

PART IV

REGIONAL AND INTERNATIONAL INITIATIVES TOWARDS CORPORATE LEGAL RESPONSIBILITY

18 A multilateral contribution to corporate standards of behaviour: the ILO's declaration on multinational enterprises

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Introduction

Concerns over the social impacts of multinational enterprises (MNEs) have had a lingering tenacity. The perceived threats to the sovereignty and welfare of host countries posed by MNEs ignited an international effort to develop a multilateral framework for corporate regulation in the 1970s. The neo-liberal paradigms of the 1980s and early 1990s effectively replaced apprehension with more accommodating stances. Since the mid-1990s, however, the social conduct of MNEs has again come under public scrutiny, albeit by different actors from those in the 1970s. In response, many enterprises have voluntarily engaged in unilateral or multi-stakeholder initiatives to improve the social impacts of their own operations as well as those of their business partners. Furthermore, a growing number of enterprises have recognised that social responsibility can contribute to the sustainability of their businesses. None the less, the voluntary nature of corporate social responsibility (CSR) activities has raised a number of credibility and verification issues, which in turn have led some actors to call for legally binding frameworks for the regulation of MNEs.

This chapter evaluates historical achievements, weighs them against recent trends, considers future prospects for the regulation of international business and raises a number of policy implications. Specifically, the chapter examines the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy and the growing number and diversity of voluntary private sector initiatives. The various legal issues which have arisen from the multilateral framework and the CSR initiatives of companies challenge the dichotomy between legally binding and voluntary means of regulating MNEs. Considering the adoption of the former to be unlikely in the near future, this chapter highlights complementarities between voluntary multilateral instruments and private sector initiatives which could informally ensure proper social conduct by MNEs.

Historical background: multilateral framework

The expansion of international trade and investment following the Second World War gave rise to the increasing number and predominance of MNEs on

the world economic scene. Against this backdrop, the regulatory mechanisms embedded at the national level were seen to be insufficient and by the early 1970s, there were increasing calls, especially by developing countries, for an international framework for the regulation of MNEs. Actions at the multilateral level to address these calls were first undertaken in 1972 when the Chilean government accused the International Telephone and Telegraph Company (ITT) of intervention in national politics at a meeting of the United Nations Economic and Social Council (ECOSOC). As a result, ECOSOC called for the appointment of:

[a] Group of Eminent Persons . . . to Study the Impact of Multinational Corporations on Development, especially that of the developing countries, and on International Relations, to formulate conclusions which may possibly be used by Governments in making their sovereign decisions regarding national policy in this respect, and to submit recommendations for appropriate international action. (UN Economic and Social Council Resolution 1721 (LIII), 1972)

These developments were taking place in the United Nations within the broader context of the need to overhaul the existing international economic order to better recognize the sovereign rights of states and redress the economic development and social gaps between developing and developed countries. Led by developing countries and newly independent states, the UN General Assembly (UNGA) in May 1974 adopted the Declaration on the Establishment of a New International Economic Order (NIEO). MNEs at the time were viewed by developing countries as playing an overall negative role in the economic and social development of host countries, and the declaration stipulated that the NIEO should be founded upon, *inter alia*, regulation of the activities of MNEs (UNGA Resolution No. 3201 (S-VI), 1974). The Programme of Action adopted with the above declaration observed that ‘all efforts should be made to formulate, adopt and implement an international code of conduct for international corporations’ (UNGA Resolution No. 3202 (S-VI), 1974).

In August 1974, soon after the adoption of the NIEO, ECOSOC considered the study undertaken by the Group of Eminent Persons, and decided to establish the UN Commission on Transnational Corporations with the UN Centre on Transnational Corporations as secretariat. This commission had as a priority the formulation of a code of conduct for MNEs. Negotiations for such a code were conducted over several decades but without success, and the commission was formally closed in 1992. One of the key differences between the negotiating parties was whether the code should be legally binding or voluntary.

During the mid-1970s, work on similar codes of conduct began to take place in other multilateral fora, in particular the Organisation for Economic

Cooperation and Development (OECD) and the International Labour Organisation (ILO). In January 1975, the OCED Council established the Committee on International Investment and Multinational Enterprises to examine measures to foster better cooperation among OECD member countries on international investment matters. Following negotiations, the OECD in June 1976 adopted the Declaration on International Investment and Multinational Enterprises, which laid a framework for facilitating investment among OECD member states. It initially contained three elements: Guidelines for Multinational Enterprises, an instrument on National Treatment and an instrument on International Investment and Disincentives.¹ These elements were to be reinforced by a consultation and review procedure. While the other instruments were backed by decisions of the OCED Council (which are legally binding upon member countries), the Guidelines for Multinational Enterprises is the only instrument that explicitly states that it is 'voluntary and not legally enforceable' (OECD Guidelines for Multinational Enterprises, Concepts and Principles, para. 1). The guidelines represent recommendations which provide 'voluntary principles and standards for responsible business conduct consistent with applicable laws' (ibid., Preface, para. 1). The guidelines, which were revised in 2000, are addressed to enterprises and contain 10 chapters covering a broad range of issues from employment and industrial relations to taxation.

The ILO's tripartite declaration of principles concerning MNEs and social policy

Created in 1919 from the Treaty of Versailles, which established the League of Nations, the International Labour Organisation is the recognised competent body to formulate and support internationally recognised labour standards. The ILO's unique tripartite structure, where workers and employers have an equal voice with governments in decision-making, provides a platform where the parties can come together to adopt labour standards in the form of conventions and recommendations. Conventions create legally binding obligations to implement their provisions through ratification by member states. Furthermore, membership of the ILO creates an obligation to comply with the principle of freedom of association whether or not the relevant ILO convention has been ratified. Moreover, in 1998 the ILO adopted the Declaration on Fundamental Principles and Rights at Work. This declaration commits ILO member countries, regardless of ratification, to promote and uphold the principles concerning the right to freedom of association and collective bargaining; the elimination of forced and compulsory labour; the abolition of child labour; and the elimination of discrimination in the workplace. The application of ILO instruments is supervised by an elaborate reporting procedure and through technical assistance.

Since labour-related and social policy issues are among the specific

concerns to which MNE activities give rise, the ILO was also drawn towards international guidelines within its sphere of competence. In October 1972, a tripartite meeting of experts on the Relationship Between Multinational Corporations and Social Policy was mandated to 'explore and submit recommendations to the Governing Body on the desirability and possible scope of ILO action in this area' (ILO, 1972). That meeting was characterised by diametrically opposed views on the role of the MNEs: industrialised country governments and employer groups viewed MNEs as a conduit for economic growth and job creation, whereas developing countries and worker groups viewed them as a threat to national sovereignty and livelihoods. Given such irreconcilable positions, the key conclusion of the meeting was for the International Labour Office to undertake a series of intensive studies concerning MNEs.

After these studies, and in the light of other actions then being undertaken at the United Nations, a second tripartite meeting of experts was held in May 1976. At this meeting the tripartite partners agreed to initiate a declaration concerning MNEs and social policy that would be non-mandatory in character; to avoid inequality of treatment between multinational and national enterprises; to cover all MNEs irrespective of their ownership pattern; to give due consideration to existing ILO instruments; to direct efforts to governments, employers/multinationals and workers; and to transmit the outcome to the United Nations for incorporation in its code of conduct then under consideration.

The code of conduct being undertaken by the UN Commission on Transnational Corporations was a key impetus to the agreement. Employers felt that the 'the chapter of the proposed United Nations' text on multinational enterprises dealing with labour and social matters was best authored within the ILO where both workers and employers had a voice, rather than in a solely governmental organization such as the UN General Assembly' (Charles H. Smith Jr in ILO, 1999: 66). The worker group, on the other hand, had favoured more legally binding measures in the form of a convention on MNEs. However, they decided to 'go along with it as a step in that direction, hoping that through the implementation of its provision, some positive results could be achieved and would eventually lay the ground for a future Convention on this important subject' (Amal Mukherjee in ILO, 1999: 44).

Following extensive negotiations, the Governing Body of the ILO in November 1977 adopted the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (the MNE Declaration). ILO conventions and recommendations reinforce the provisions of the MNE Declaration and in March 2000, the text of the MNE Declaration was revised to incorporate the ILO's Fundamental Principles and Rights at Work.

The two interdependent aims of the MNE Declaration are to encourage the

positive contributions of MNEs to economic and social progress, and to minimise and resolve the difficulties to which their operations may give rise. Addressed to governments, employers' and workers' organisations as well as MNEs, the MNE Declaration seeks to advance these aims by providing guidance on the social policy measures and actions which can be taken individually and jointly.

The MNE Declaration is divided into five sections: general policies, employment, training, conditions of work and life, and industrial relations. Under general policies, the MNE Declaration recommends compliance with national legislation, respect for international standards (including the Fundamental Principles and Rights at Work) and support for the development priorities of the countries where MNEs invest. The MNE Declaration does not seek to differentiate its treatment of multinational or domestic enterprises, and its principles reflect good practice and guidance for all types of enterprises.

In the area of employment, the MNE Declaration encourages productive employment in MNEs (either directly or through linkages with local enterprises), the employment of host-country nationals, pursuing equality of opportunity and treatment, and enhanced employment security in the establishment and restructuring of operations.

The MNE Declaration encourages cooperation in developing policies and programmes for vocational training which meet the needs of both MNEs and host countries, and additionally links skills development and vocational guidance to employment. Furthermore, MNEs are encouraged to assist the development of the domestic private sector by participating, alongside national enterprises, in local skills development programmes and by making available both resources and personnel to help conduct training.

In the area of conditions of work and life, MNEs are called upon to offer wages, benefits and conditions of work as favourable as those provided by comparable employers and to ensure the highest standards of safety and health. In order to secure the effective abolition of child labour, the MNE Declaration expects multinational and domestic enterprises to respect legislation regarding the minimum age for employment.

In the area of industrial relations, the parties are encouraged to respect freedom of association and the right to bargain collectively as well as to provide systems for consultations on matters of mutual concern.

The follow-up to the MNE Declaration is ensured through periodic surveys and an interpretation procedure. Under the survey procedure, governments, employer and worker organisations submit reports – either jointly or independently – on the effect of the MNE Declaration. Although the ILO has to date carried out eight such surveys, there are lingering doubts regarding their effectiveness. Commentators and stakeholders have noted that many governments do not collect labour statistics, information which is specific to particular

MNEs precludes a satisfactory overall picture, and that anecdotal evidence does not necessarily reflect general practice (ILO Doc GB.288/11, 2003). Notwithstanding these limitations, the resulting information has proved useful in bringing about a rapprochement of views held by different social partners and by highlighting social and economic issues which can either validate or initiate research by economists and social scientists. For example, the question whether foreign firms in developing countries pay higher wages than domestic enterprises has been a topic of extensive literature and empirical inquiry (see further, Aitken et al., 1996; Dirk and Morrissey, 2001). Many respondents to the ILO surveys indicated that wages in MNEs 'were equal to or better than those of comparable employers in the country'. However, this proposition was qualified by emphasising that higher wages were sector specific and based on worker characteristics and skills levels (ILO, 2001: para. 97).

A more tangible impact of the survey procedure is evident at the national level. Respondents are encouraged to undertake tripartite consultations in completing the questionnaire. The resulting dialogue between the national social partners can lead to the identification of policies regarding MNEs and development. For example, in the Philippines the government, employers, trade unions and the ILO guided by the MNE Declaration concluded a Memorandum of Social Understanding. This identifies appropriate courses of action for the social partners in an effort to foster a mutually beneficial relationship between the Philippines and its investors (see further, Institute for Labour Studies, 1999).

Under the interpretation procedure, the ILO Governing Body can be requested to clarify the meaning or application of one or more provisions of the MNE Declaration. The importance of this procedure lies in its availability to contribute to the harmonious development of labour relations. Recourse to it may encourage disputants to confront their difficulties and secure perspectives capable of mutual accommodation. Thus the interpretation procedure 'operates more as a preventive response in areas prone to conflict through the building of patterns of adverse consequences, rather than a mechanism for dispute settlement in specific cases' (Diller, 1999b: 21).

To date, five cases have been the subject of decisions by the ILO Governing Body. The first case, in 1984, involved a US multinational bank operating in the United Kingdom that had decided to reduce its workforce. The Governing Body interpreted, *inter alia*, the MNE Declaration to require reasonable prior notice of intended changes in operations to be given to the workers' representatives and their organisations, where such organisations were identifiable under national law and practice. It was insufficient to inform the affected workers on an individual basis where such representatives and organisations existed (ILO Doc GB.229/13/13, 1985).

The second case involved a Belgian subsidiary of a French MNE that had

informed its works council of its decision to close the plant. The interpretation procedure found, *inter alia*, that attempting to minimise the negative social repercussions alone did not fulfil the purpose of the declaration. Any such action should be consistent with the twin goal of contributing to economic and social progress and moreover must be compatible with national social and economic policy imperatives (ILO Doc GB.239/14/24, 1988). The third case involved a MNE intending to expand its investment in a country where, according to an international trade union, there was total disregard for all workers' and human rights. However, the request was considered irreceivable since there was no actual dispute between workers and management or between the enterprise and the government (ILO Doc GB.255/10/12, 1993). In the fourth case, a secretary-general of a union had been appointed to participate in a sectoral tripartite meeting. The union leader requested his employer to: (a) grant him 'union leave' (that is, paid leave, non-deductible from annual vacation) to attend the session; and (b) provide company safety and health information for use at that meeting. The employer granted 'leave without pay' but declined to provide safety information and statistics on the grounds that these 'are proprietary and for company use' only (ILO Doc GB.264/13, 1995). The members of the subcommittee entrusted with examining the case were unable to agree on an interpretation.

In the final case, a senior executive located at a multinational's headquarters in another country announced at a press conference that one of its factories would be closing down later that year. The interpretation found, *inter alia*, that management should give reasonable prior notice of any intended changes which would have major employment effects. Providing notice after the final, irrevocable decision had been made but before its implementation was considered insufficient. Prior notice was necessary to facilitate discussions and identify possible measures of mitigation to minimise the negative employment effects (ILO Doc GB.272/MNE/1, 1998).

The low number of cases received to date and the promotional nature of the interpretation procedure has not escaped scrutiny. Worker organisations have remarked that determining the receivability of a particular case is dependent upon a unanimous decision by the officers of the Subcommittee on Multinational Enterprises, and if no agreement is reached, then upon a decision by the full subcommittee. Such a procedure is 'cumbersome, tough and discouraging' (Bill Brett in ILO, 1999: 7). Furthermore, the interpretation procedure has been criticised as 'anachronistic' (Neil Kearney in ILO, 1999: 40). Whereas the global dimensions of MNEs necessitates the pursuit of industrial relations at the international level, the interpretation procedure is perceived to be anchored at the national level, with international trade unions able to submit cases on behalf of national affiliates only under certain conditions.² International trade unions correctly observe that this procedure 'ignores

the fact that some of the greatest problems occur precisely in countries where trade union activity is effectively banned' (ibid.: 40). On the other hand, given the voluntary nature of the declaration, the high thresholds for receivability have prevented the procedure from becoming a tribunal which airs allegations of violations of the MNE Declaration by individual enterprises.

The emergence of private sector initiatives

Were the multilateral frameworks for the regulation of MNEs, reflected by instruments such as the OECD Guidelines and the MNE Declaration, a 'preemptive strike by the industrialized states to avoid more stringent controls' (Hepple, 1999: 353)? Did MNEs engage with these instruments 'as a means of delaying an issue until it quietly disappear[ed]'?³ Although developments in the 1980s could well provide credibility to their validity, circumstances in the 1990s and at the beginning of the twenty-first century suggest only initial and partial success.

By the mid-1980s, the attitude towards the regulation of MNEs had changed considerably. Countries began losing interest, most clearly manifested by the lack of progress on the negotiations for a code for MNEs at the United Nations and the subsequent closure of the Commission on Transnational Corporations. Furthermore, states began to institute more accommodating regimes to attract foreign direct investment, to the point where many countries were following a policy of offering special incentives to foreign investors.

There were several reasons behind the shift in thinking. First, neo-liberal paradigms which had become prevalent from the early 1980s emphasised decreased government intervention in market activities, including in the area of trade and investment. Second, the debt crisis of the early 1980s prompted many developing countries to seek non-debt-creating sources of capital, including MNEs. Third, successful national experiences in hosting multinationals increased awareness of their benefits as a source of know-how and technology transfer which increased export markets, tax revenues and direct and indirect employment.

The de-emphasis on public sector regulation and the accentuation of corporate rights characteristic of the 1980s was followed by a period in which enterprises began to undertake a number of voluntary initiatives that acknowledged their responsibilities to the natural environment, employees, business partners and society at large. These initiatives have been broadly classified under the umbrella of corporate social responsibility. No consensus has yet emerged on a definition for CSR or on the specific social responsibilities of enterprises.⁴ Some consider CSR to be exceeding legal requirements, others as merely corporate philanthropy whereas to some 'there is one and only one social responsibility of business – to use its resources and engage in activities

designed to increase its profits so long as it stays within the rules of the game' (Friedman, 1962, p. 133).

Flurries of activity based on different perceptions of CSR have taken place since the early 1990s. Hafler (2001) identifies three major factors which have driven such initiatives: the risk of government regulation, the need to maintain or develop corporate reputation as a global asset, and the spread of knowledge among businesses concerning the benefits of voluntary action. Corporate codes of conduct have been the most proliferate means for enterprises to define their responsibilities. Increasingly these codes of conduct apply not just to a company's own operations but also to those of business partners such as suppliers. An ILO review of 258 codes of conduct which addressed labour practices found that codes were more likely to be found in sectors that dealt directly in consumer products (including textiles, clothing, leather and footwear (TCF)), commerce, food and beverages, chemicals and toys (Urminsky, 2001). There was, however, a significant level of selectivity in terms of the labour issues these codes addressed. Codes in the TCF sector focused upon child and forced labour whereas the other sectors gave special attention to the issues of health and safety. Topics such as freedom of association and collective bargaining were addressed in only a third of those codes reviewed.

In addition, most codes of conduct contain subjective definitions of desired labour practices (Diller, 1999a). References to national law are the most frequent provision and most codes do not refer to international labour standards. The text of several codes could even be interpreted as contravening international labour standards, particularly those regarding freedom of association (ILO Doc GB.286/WP/SDG/4(Rev), 2003). Reference to national law, while articulating a useful minimum standard, does not identify appropriate conduct where there is no national legal framework or institutional capacity.

The lack of comprehensiveness and subjective definitions has diminished public confidence in codes of conduct. In response, enterprises have turned to both internal and external means of managing control. An internal measure that has become particularly prominent among MNEs is corporate reporting on the social and environmental impacts of operations. Recent ILO research that examined the social reports of the world's 150 largest MNEs also reveals that reporting is highly selective. The research compared 64 indicators derived from the MNE Declaration to the labour issues reported by MNEs and found the most frequent topics addressed to be wages, non-discrimination, training, health and safety and full employment. The fundamental labour principles of child labour, forced labour, freedom of association and collective bargaining were covered in fewer than 10 per cent of those reports analysed.

External control measures include accreditation and certification programmes (commonly referred to as 'social labelling'), monitoring and

inspection initiatives. However, social labelling programmes suffer from similar shortcomings as codes of conduct. Furthermore, they apply almost exclusively to export industries, which may overlook problems in others and rely heavily on consumer purchasing behaviour that might be undermined where the market is saturated with labels lacking credibility.

As a confidence-building measure, an increasing number of enterprises have engaged in multi-stakeholder initiatives which involve entities such as civil society organisations in design, implementation and monitoring. Notably, these types of initiatives tend to contain more references to international labour standards than unilateral initiatives. In a related measure, MNEs have entered into partnerships with intergovernmental organisations. The UN Global Compact is perhaps the best-known private–public partnership (www.unglobalcompact.org). It brings companies together with UN agencies, labour and civil society to support ten principles in the areas of human rights, labour, the environment, bribery and anti-corruption. These principles are based upon universally recognised multilateral instruments. The new partnership approach in promoting CSR has been favourably received by enterprises and organisations from around the world and there are currently over 1800 participants. Although the explicit goal of the Global Compact is not to enforce the conduct of enterprises, the initiative has none the less come under criticism from various quarters for failing to ensure that companies are committed to and abiding by the principles ('Global Compact, Little Impact', *Business Week*, 14 July 2004).

Investors are also increasingly using their financial influence to promote responsible behaviour among enterprises. Although socially responsible investment (SRI) represented a negligible proportion of invested capital during the mid-1980s, it has grown rapidly in the past decade and increased the likelihood that enterprises could be excluded from several sources of capital. According to one report, 'more than one out of every nine dollars under professional management in the United States' in 2003 constituted SRI (Social Investment Forum, 2003, p. 1). That said, the labour criteria used in identifying socially responsible enterprises are also lacking in specificity and standardisation (ILO Doc GB.286/WP/SDG/4(Rev), 2003).

Legal implications of multilateral and private initiatives

The analysis of multilateral instruments for the regulation of MNEs and the private sector initiatives considered above has highlighted various inherent limitations of both frameworks. However, the aim of this chapter is not to abrogate their positive contributions. Multilateral instruments such as the MNE Declaration and the OECD Guidelines have been critical for establishing comprehensive reference points upon which to base enterprise policies and initiate dialogue between stakeholders. Private initiatives have played an

important role in leveraging market outcomes to further social goals and in promoting greater awareness that enterprise profitability and social development are not mutually exclusive outcomes.

The limitations common to both frameworks have their roots in their voluntary and legally unenforceable nature. In recognition of that fact, there have been increased calls for corporate accountability based upon legally binding measures. In particular, the World Summit on Sustainable Development of 2002 mobilised various civil society organisations to demand a binding international normative framework (Friends of the Earth, 2001; Graymore and Bunn, 2002). That said, the existing multilateral framework and the private sector initiatives are not totally devoid of legal implications. It is worthwhile to recall the deliberations of the UN Commission on Transnational Corporations:

A code of Conduct on transnational corporations, whether in legally binding or non-binding form, represents an effort to formulate expectations which Governments collectively feel justified to hold with regard to the conduct of transnational corporations. It becomes thereby a 'source' of law for national authorities as well as for the transnational enterprises themselves, since both can rely on and utilize the Code to fill gaps in relevant laws and practices. In this manner, the Code may become a springboard for legally creative action by national courts and other authorities, and even by transnational corporations themselves, to the extent that the latter may help to shape pertinent legal principles through their continuous practice. (UN Commission on Transnational Corporations, 1978)

There is a further reason why particular follow-up procedures such as reporting were insisted upon during the negotiations for these multilateral instruments. Pointing to the voluntary nature of a multilateral instrument does not 'exclude the possibility of the emergence of customary international law on any issue of MNE conduct on which there is state practice, including such practice in the context of follow-up proceedings' (Baade, 1980, p. 407).

Voluntary private initiatives have also raised a number of legal implications. The first question is whether corporate reports or public statements on their labour practices can be subject to legal challenge. This was considered when the California Supreme Court ruled that Nike's statements concerning the labour practices and working conditions within its factories amounted to 'commercial speech' (that is, was directed at consumers for the purpose of promoting sales) and was thus subject to anti-competition and false advertising laws.⁵ The court, however, was careful to point out that:

Our holding, based on decisions of the United States Supreme Court, in no way prohibits any business enterprise from speaking out on issues of public importance or from vigorously defending its own labor practices. It means only that when a business enterprise, to promote and defend its sales and profits, makes factual

representations about its own products or its own operations, it must speak truthfully. (*Kasky v Nike, Inc.*, 27 Cal. 4th 939)

Mandatory reporting on the non-financial aspects of an enterprise's operations is a further legal development. These reporting requirements are gaining ground particularly in Europe, largely as a measure to enhance corporate governance. Beginning in 2005, Directive 2003/51/EC of the European Parliament and of the Council of the European Union will require large and medium-sized companies to report on environmental and employee issues where such information is 'necessary for an understanding of the company's development, performance or position'. The UK has also undertaken a parallel initiative. The government has completed draft regulations regarding mandatory reporting on environmental and social issues and is currently undertaking a consultative process before laying them before Parliament. Under the new regulations, all quoted companies in the UK would have to submit an operating and financial review (OFR) from the fiscal year 2005. The review would present an analysis of commercial operations, and must 'consider whether it is necessary to provide information on a wide range of factors which may be relevant to an understanding of the business, such as information about employees, environmental matters and community and social issues' (Department of Trade and Industry, 2004: 7).

Mandatory reporting on social and environmental issues is not novel within Europe. Since 1977, France has required all enterprises with more than 300 employees to submit annually a *bilan social* (social report). The document contains only statistical information and is aimed at stimulating dialogue between workers and management. Belgium also requires an analogous *bilan social* (Urminsky, 2003). Another French law of 2001 (*Nouvelles régulations économiques*) requires listed companies on the French stock exchange to report on how they take into account the social and environmental consequences of their operations.⁶ Labour indicators under this law include the promotion of and respect for the ILO's fundamental conventions among subcontractors with respect to employment, working time, remuneration, equity, collective bargaining, health and safety, training and diversity.

Finally, a number of lawsuits brought before courts in Australia, Canada, the United Kingdom and the United States are considering whether courts of the home countries of these MNEs can be used to ensure that they do not violate human rights standards within host countries (International Council on Human Rights Policy, 2002). While the threat of litigation can force MNEs to take their human rights responsibilities more seriously, it does not present an effective means of ensuring corporate social responsibility.

Policy conclusions

After more than 30 years of multilateral and unilateral efforts, concern for the social impacts of MNEs has not dissipated. It is interesting to note that whereas industrialised countries and MNEs were opposed to the imposition of legal means to ensure appropriate standards of MNE behaviour during the 1970s, these actors are now more willing to entertain such measures. Various legal initiatives in several industrialised countries were discussed above. Furthermore, one survey of leading corporations has concluded that more than half of the respondents favoured strong laws on CSR and strong enforcement thereof (Berman and Webb, 2003). Such laws provide a level playing field for all enterprises and would obviate free-riders. On the other hand, it is unclear whether developing countries would now support legally binding measures. Obligations on the part of MNEs to be socially responsible, which extend to ensuring that suppliers and business partners in developing countries conduct themselves in an identical manner, could be perceived as protectionist. Furthermore, the costs for monitoring compliance could simply be passed down the global commodity chain. To counteract protectionist tendencies, groups in industrialised countries responsible for driving the CSR agenda need to ensure that their honest efforts to protect workers in developing countries do not override the realities and hopes within those states. Further dialogue with and the participation of developing countries within this agenda are therefore imperative.

It is unlikely that a compromise on legally binding measures to hold MNEs accountable will be achieved in the near future at the multilateral level. This makes it all the more important to leverage the existing platforms and ensure that multinational instruments and voluntary initiatives complement each other. Greater coordination is all the more important since socio-economic development is not a single-sided challenge for only one actor but requires multifaceted partnerships with predefined individual responsibilities. Mandatory reporting at the national level is an important step in this direction since it provides governments and other social partners with more information with which to assess the social conduct of MNEs and design appropriate social policies. Mandatory reporting also serves the practical purpose of augmenting reporting requirements under the follow-up procedures of multilateral instruments. The provisions found in multilateral instruments such as the MNE Declaration should provide useful indicators for this purpose. It would also address the shortcomings with respect to the selective and self-defined nature of voluntary initiatives, thereby bringing greater convergence and firmer public trust.

Notes

1. An instrument on Conflicting Requirements was added in 1991.
2. In order for an international organisation of workers or employers to submit a request for interpretation, it must do so on behalf of a representative national affiliate and only if (a) the government concerned has declined to submit the request and (b) three months have

elapsed since the organisation addressed the government without a statement of the government's intention. See Procedure for the Examination of Disputes concerning the Application of the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy by means of Interpretation of its Provisions, ILO (1986), *Official Bulletin*, Vol. LXIX, Series A, No. 3: 196–7.

3. International Federation of Chemical, Energy and General Workers' Unions (ICEF), quoted by Dan Gallin in ILO (1999: 20).
4. The European Commission, for example, has defined CSR as a 'concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis' (Commission of the European Communities, 2002: 5). The Prince of Wales International Business Leaders forum defines CSR as 'open and transparent business practices that are based on ethical values and respect for employees, communities and the environment . . . designed to deliver sustainable value to society at large, as well as to shareholders.' Available at www.pwblf.org/csr/csrwebassist.nsf/content/a1.html (visited 10 April 2004).
5. Nike subsequently appealed to the US Supreme Court, which refused to rule on the 'commercial speech' judgment. Nike eventually settled out of court.
6. Law No. 2001-420 of 15 May 2001, available at www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=ECOX0000021L (visited 26 October 2004).

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19 Corporate environmental liability within the European Union

Catherine Wijnants

Introduction

The Sixth Environment Action Programme defines the priorities and objectives of the European Union's environmental policy up to 2010 (European Community, 2002). It recognises that legislation remains central to meeting environmental challenges. A few weeks later, the *Prestige* oil tanker disaster, which, in November 2002, caused serious pollution along the Spanish and French Atlantic coast, confirmed that environmental liability is an issue of utmost importance. The Sixth Environment Action Programme also aims at promoting collaboration and partnership with enterprises with a view to improving the environmental performance of enterprises. In Europe, the debate is currently growing over how corporate accountability to various stakeholders (as well as shareholders) can be increased. The next section examines the substantive grounds for environmental corporate liability in Europe with the directive on environmental liability discussed in some detail.¹ Contemporary initiatives regarding criminal liability will be reviewed in the subsequent section. The penultimate section considers the implications of these developments for corporate social responsibility within the EU. The final section concludes.

Substantive grounds for environmental liability at the EU level

The environmental liability directive²

Background and justification for an EC environmental liability regime On 23 January 2002, the European Commission adopted a proposal for a directive on environmental liability addressing both prevention and restoration of environmental damage.³ The Commission then submitted this proposal to the European Parliament and to the Council of the European Union with a view to the adoption of a comprehensive Community scheme.

The purpose of this proposal, which is the first Community legislative instrument based on 'the polluter-pays' principle, is to establish, at EU level, a harmonised system of environmental liability that would ensure that environmental damage is either prevented by taking appropriate measures or effectively

remedied if the damage has already been done. Subject to certain exceptions, the operator of the potentially or actually damaging activity is held financially liable and has to bear the cost of the necessary preventive or remedial measures. The idea is to induce operators to adopt measures and develop practices to minimise the risks of environmental damage.

The directive was published in the *Official Journal* on 30 April 2004 and entered into force on that day (OJL 143, 56). Member states have until 30 April 2007 to implement the directive in national law.

This directive relies on a number of previous initiatives which go back more than a decade and which gave rise to wide debates involving several interested parties. In 1993, the Commission published a 'Green Paper'⁴ on remedying environmental damage, which presented the concepts for a potential Community liability regime (European Commission, 1993). In February 2000, the Commission adopted a 'White Paper'⁵ on environmental liability, the objective of which was to explore how the 'polluter-pays' principle, one of the key environmental principles in the EC Treaty, can best be applied to serve the aims of Community environmental policy (European Commission, 2000). The Commission considered a range of instruments and options in the course of developing an approach to environmental liability. This included Community accession to the Council of Europe's Lugano Convention of 1993 (Council of Europe, 1993) but the idea was subsequently abandoned. The White Paper concluded that the most appropriate option is a Community framework directive on environmental liability. In July 2001, the Environment Directorate-General of the Commission released a working paper which set out the principles upon which the future regime could be based (European Commission, 2001a).

The directive proposal comprises an Explanatory Memorandum in which the Commission gives several reasons as to why there is a need for Community intervention, notwithstanding that almost all member states already have national legislation which directly or indirectly addresses liability issues. In the Commission's view, the key issue is not whether liability rules are desirable but whether it is desirable to enact rules at Community level rather than at the national one. The Commission relies upon a distinction between site contamination and biodiversity damage. As far as site contamination is concerned, the Commission considers that community action is needed because:

1. liability is necessary to prevent further soil pollution;
2. not all member states have adopted soil sanitation legislation;
3. most member states' legislation does not tackle orphan sites; and
4. without a harmonised framework, operators could take advantage of the differences in member state's approaches and try to avoid liability.

In the case of biodiversity, the Commission states that the loss of biodiversity in the Community has accelerated in recent years. Community action to protect and restore biodiversity is based upon two main grounds: ensuring that socially efficient means are used to finance remediation and encouraging efficient prevention (European Commission, 2001b).

The Commission has to justify Community action by explaining how the principles of subsidiarity and proportionality have been met.⁶ With respect to the proposed environmental liability directive:

[T]he objective of the proposed action, namely to establish a common framework for the prevention and remedying of environmental damage at a low cost to society, cannot be sufficiently achieved by the member states and can therefore be better achieved at Community level by reason of the scale of the proposed action and the implementation in respect of other Community legislation. (Directive, Recital 3)

However, such a justification for the subsidiarity principle is completely circular and justifies EC intervention because members states cannot take EC action (Bergkamp, 2002b: 296). Moreover, the proposed directive fails to meet the proportionality principle since, among other things it imposes a strict liability regime, as will be considered further below (see also *ibid.*: 297).

Main Features of the EC Environmental Liability Regime

THE SCOPE OF THE DIRECTIVE AND DEFINITION OF KEY TERMS As mentioned before, the purpose of the directive is to establish a framework for environmental liability based on the polluter-pays principle to prevent and remedy environmental damage.

Article 3 of the directive defines the scope of the directive:

Art. 3. This Directive shall apply to:

- (a) environmental damage caused by any of the occupational activities listed in Annex III and to any imminent threat of such damage occurring by reason of any of those activities;
- (b) damage to protected species and natural habitats caused by any occupational activities other than those listed in Annex III and to any imminent threat of such damage occurring by reason of any of those activities, whenever the operator has been at fault or negligent.

This provision thus defines what kind of damage and what kind of activities are covered by the directive. 'Environmental damage' is defined under Article 2(1) of the directive as damage to protected species and natural habitats, water and land. As far as the covered activities are concerned, the directive makes a distinction between environmental damage caused by the

'occupational activities' listed in Annex III and to damage to protected species and habitat caused by any 'occupational activities' other than those listed in Annex III. 'Occupational activity' under Article 2(7) of the directive means any activity carried out in the course of the economic activity, a business or an undertaking, irrespective of its private or public, profit or non-profit character. The occupational activities mentioned in Annex III include for instance waste management operations subject to permit or registration in pursuance of Directive 75/442/EEC of 15 July 1975 on waste. To be considered further below, the distinction between occupational activities listed in Annex III and other occupational activities implies different liability rules.

Article 4 of the directive provides for several exceptions. First, the directive does not cover environmental damage or an imminent threat of such damage caused by act of armed conflict, hostilities, civil war or insurrection, or a natural phenomenon of exceptional, inevitable and irresistible character.

Second, the directive does not apply to environmental damage or to any imminent threat of such damage arising from an incident in respect of which liability or compensation falls within the scope of any of the international conventions listed in Annex IV in force for the member state concerned. The listed international conventions deal with the issue of civil liability in relation to specific fields such as oil pollution (art. 4(2) of the directive). Similarly, the directive does not apply to nuclear risks (art. 4(4)).

Third, under Article 4(5) the directive does not apply to environmental damage caused by pollution of a widespread, diffuse character, where it is impossible to establish a causal link between the damage and the activities of individual operators. Recital (13) of the directive observes:

[N]ot all forms of environmental damage can be remedied by means of the liability mechanism. For the latter to be effective, there need to be one (or more) identifiable actors (polluters), the damage needs to be concrete and quantifiable, and a causal link should be established between the damage and the identified polluter(s). Liability is therefore not a suitable instrument for dealing with pollution of a widespread, diffuse character, where it is impossible to link the negative environmental effects with the acts or failures of certain individual actors.

The relevance of this exception is questionable: pursuant to general principles of tort law, if the causal link cannot be established, there will not be any liability. Such an exception violates the equality principle: if all operators responsible for pollution other than diffuse pollution have to pay restoration costs when the causal link is established, one does not see why operators responsible for diffuse pollution should not have to bear these cost in (the exceptional) case the causal link is established (Betlem, 2002: 30). Fourth, and without offering justification, under Article 4(6) the directive does not apply to military activities. Fifth, the directive under Recital 14 does not apply to

cases of personal injury, to damage to private property or to any economic loss and does not affect any right regarding these types of damage.

LIABILITY RULES Liability rests on the operator of the activity that caused the environmental damage or the imminent threat of such damage.

[An operator is] any natural or legal, private or public person who operates or controls the occupational activity or, where this is provided for in national legislation, to whom decisive economic power over the technical functioning of such an activity has been delegated, including the holder of a permit or authorisation for such an activity or the person registering or notifying such an activity. (Article 2(6))

Hence, both individuals and corporations can be operators and thus liable. The directive provides for two distinct liability regimes: a strict liability regime and a fault liability regime, depending upon the kind of damage. Under Article 3(1)(a), the strict liability regime applies to environmental damage caused by those occupational activities listed in Annex III. The fault liability regime applies only to damage to protected species and natural habitat caused by those occupational activities outside Annex III. This means that operators of activities outside Annex III may also be liable under the directive for the costs of preventing or restoring biodiversity damage but only where they have been at fault or negligent (art. 3(1)(b)). The burden of proof regarding the operator's negligence lies with the government.

Operators declared liable will either have to (i) directly finance either the preventive measures (where the environmental damage has not yet occurred but there is an imminent threat) or the remedial measures⁷ (where the environmental damage has occurred) or (ii) reimburse these costs where the government took the necessary measures. The insolvency of operators is one factor that may hinder cost recovery consistent with the polluter-pays principle by competent authorities. However, the impact of this may be limited by adequate financial insurance for potential damage. Under the directive, member states are free to implement adequate financial security arrangements.

DEFENCES Subject to certain exceptions, the operator that has caused the environmental damage or an imminent threat of such damage occurring has to bear the cost of the necessary preventive or remedial measures (the polluter-pays principle).

Article 8(3) and (4) of the directive foresees some defences which are justified by the need to ensure legal certainty and safeguard innovation. Pursuant to Article 8(3), an operator will not be required to bear the cost of preventive or remedial actions taken pursuant to the directive when he/she can prove that the environmental damage or imminent threat of such damage:

- (a) was caused by a third party and occurred despite the fact that appropriate safety measures were in place; or
- (b) resulted from compliance with a compulsory order or instruction emanating from a public authority other than an order or instruction consequent upon an emission or incident caused by the operator's own activities.

Pursuant to Article 8(4), member states may allow the operator not to bear the cost of remedial actions taken pursuant to the directive where he/she can prove that he/she was not at fault or negligent and that the environmental damage was caused by:

- (a) an emission or event allowed under applicable laws or in the permit issued to the operator;
- (b) emissions or activities which were not considered likely to cause environmental damage according to the state of scientific and technical knowledge at the time when the emission was released or the event took place [i.e., the state-of-the-art exception].

The Article 8(4) exceptions are likely to be controversial. However, it seems that there are strong reasons for their inclusion as they are critical elements of a well-balanced liability regime. These defences will provide companies with a degree of predictability as to costs and liabilities, provide a strong incentive to operate strictly within their permit limits and encourage them to identify and follow the state of the art. The Article 8(4) exceptions will not apply if the operator was at fault or negligent. This caveat is troubling. How can a company negligently comply with a permit or the state-of-the-art exception? With respect to Article 8(4)(a), an operator is either in compliance or not in compliance. With respect to Article 8(4)(b), the state of the art identifies the level of care needed to be satisfied in order to benefit from the exemption. How can an operator satisfy the state of the art yet still be negligent?

NATURE OF THE REGIME AND TEMPORAL APPLICATION The directive does not establish a civil liability regime but an administrative one. The proposed regime is 'government-centric'. 'The regime centers on the state's obligation to issue prevention and remediation orders (or take measures itself) with respect to covered environmental harm and recover the cost of prevention and remediation in case the operator does not act' (Bergkamp, 2002b: 295, 329; see also Betlem, 2002: 29). The directive seeks to offer a minimum level of protection and member states are free to maintain or adopt more stringent provisions under Article 16(1). Pursuant to Article 17, the directive has no retrospective effect. Moreover, the directive does not apply to damage if more than 30 years has passed since the emission, event or incident, resulting in the damage, occurred.

Environmental criminal liability

The concept of corporate liability is particularly interesting in the area of criminal law. Environmental crimes are committed within the framework of a legal person whereas practice reveals serious difficulties in prosecuting natural persons who are acting on their behalf. For example, in view of the size of corporations and the complexity of their decision-making structures, it becomes increasingly difficult to identify a natural person who may be held responsible for the offence. Moreover, if an agent of management is convicted, the sanction can easily be compensated for by the legal person. The contemporary international trend supports the general recognition of corporate criminal liability even in countries which only a few years ago formally adopted the principle whereby corporations cannot commit criminal offences.

In the field of environmental criminal law, there are three important developments at the European level: (i) the Convention of the Council of Europe on the protection of the environment through criminal law; (ii) the European Commission proposal for a directive on the Protection of the Environment through Criminal law; and (iii) the Council Framework Decision of 2003. This section will examine each of these initiatives and identify the implications of the new regime on the liability of corporations.

Convention of the Council of Europe on the Protection of the Environment through Criminal Law

General features On 4 November 1998, the Council of Europe adopted the Convention on the Protection of the Environment through Criminal Law. Although important for criminal law, the convention has not yet entered into force.⁸ As stated in its explanatory report, the purpose of the convention is to improve environmental protection at European level by using the solution of last resort – criminal law – in order to deter and prevent conduct which is most harmful to the environment. It also seeks to harmonise national legislation in this field. Contracting states are obliged to introduce specific provisions into their criminal law or to modify existing provisions in order to establish as criminal offences certain acts committed intentionally or through negligence where they cause or are likely to cause lasting damage to the quality of air, soil, water, animals or plants, or result in the death or serious injury of any person. The convention thus makes a distinction between intentional and negligent offences.

Article 2 covers the most serious environmental offences which are committed intentionally. It states the following:

Art. 2 Intentional offences

1. Each Party shall adopt such appropriate measures as may be necessary to establish as criminal offences under its domestic law:

- (a) the discharge, emission or introduction of a quantity of substances or ionising radiation into air, soil or water which:
 - (i) causes death or serious injury to any person, or
 - (ii) creates a significant risk of causing death or serious injury to any person;
 - (b) the unlawful discharge, emission or introduction of a quantity of substances or ionising radiation into air, soil or water which causes or is likely to cause their lasting deterioration or death or serious injury to any person or substantial damage to protected monuments, other protected objects, property, animals or plants;
 - (c) the unlawful disposal, treatment, storage, transport, export or import of hazardous waste which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants;
 - (d) the unlawful operation of a plant in which a dangerous activity is carried out and which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants;
 - (e) the unlawful manufacture, treatment, storage, use, transport, export or import of nuclear materials or other hazardous radioactive substances which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants, when committed intentionally.
2. Each Party shall adopt such appropriate measures as may be necessary to establish as criminal offences under its domestic law aiding or abetting the commission of any of the offences established in accordance with paragraph 1 of this article.

This provision comprises two parts: (a) which protects only humans and which does not require an unlawful discharge and (b) to (e) which are not restricted to pollution endangering persons but are also applicable to pollution causing substantial damage to animals, plants or protected monuments. The latter do require infringing legal provisions (unlawfulness). Pursuant to Article 2(a), anyone who intentionally discharges a hazardous product into the environment is criminally liable even if he/she holds a permit for the discharge. This is justified by the fact that a permit does not give the right to cause damage to third parties (Roef, 2001: 128). Also noteworthy is that Article 2(a)(ii) refers to 'significant risk of causing death or serious injury to any person' whereas Article 2(b) uses the expression 'is likely to cause death or injury to any person'. Article 2(a) thus requires a higher degree of risk than the other subsections.

Article 3 extends the scope of Article 2 to those cases where the offence is committed 'with negligence'. Article 3 also allows states to restrict the application of that article to offences committed with gross negligence. The concept of gross violation implies a serious violation of duties of care. Article 4 extends the scope of the convention to a wide range of environment-related

illegal behaviour (for example, unlawfully causing noise). It is thus a catch-all provision comprising abstract endangerment offences. The contracting states can choose to impose criminal sanctions and/or administrative measures for these offences. The relevant sanctions must include imprisonment and pecuniary sanctions. However, reinstatement of the environment is only an optional provision in the convention (arts 6 and 8).

Corporate liability Noteworthy for present purposes is Article 9 of the convention which refers to the liability of legal persons. Article 9(1) obliges contracting states to adopt the necessary measures enabling them to impose sanctions on legal persons on whose behalf an offence referred to in Articles 2 and 3 has been committed by their organs, members or representatives. Clarification of the three conditions to Article 9 is in order. First, an environmental criminal offence must have been committed as specified in Article 2 (intentionally) or Article 3 (by negligence). Second, the offence must have been committed 'on behalf of' the legal person. This condition is an application of the organ theory: the legal person will be criminally liable only where the offences are committed by an organ. The criminal liability of legal person is thus derived from the liability of specific natural persons.⁹ Third, the 'organ, a member of its organs or other representatives' of the corporation must participate in the criminal offence, assuming that these physical persons are in law or in fact in a position to engage the liability of a legal person. It is also worth noting that Article 9(1) does not require that the sanctions have to be criminal in nature. Contracting states are therefore free to impose criminal and/or administrative sanctions on legal persons.

Article 9(2) provides that corporate liability does not exclude individual liability. In a concrete case, different spheres of liability may be established simultaneously, for example, the responsibility of an organ distinct from the liability of the legal person as a whole. Individual liability may arise within any of these liability categories. Finally, pursuant to Article 9(3), each party may declare that it reserves the right not to apply section 1 of this article. One possible reason for such a reservation is that several states still address these problems through administrative or civil law.

European Commission proposal for a directive on the protection of the environment through criminal law

General features On 13 March 2001, the European Commission adopted a proposal for a directive on the protection of the environment through criminal law (European Commission, 2001b). The Commission justified its proposal as follows:

Experience has shown that the sanctions currently established by the member states are not always sufficient to achieve full compliance with Community law. Not all member states provide for criminal sanctions against the most serious breaches of Community law protecting the environment. There are still many cases of severe non-observance of Community law on the protection of the environment which are not subject to sufficiently dissuasive and effective penalties.

Moreover, the Commission argued:

In many cases, only criminal penalties will provide a sufficiently dissuasive effect. First, the imposition of criminal sanctions demonstrates a social disapproval of a qualitatively different nature compared to administrative sanctions or a compensation mechanism under civil law. It sends a strong signal, with a much greater dissuasive effect, to offenders. For instance, administrative or other financial sanctions may not be dissuasive in cases where the offenders are impecunious or, on the contrary, financially very strong. Second, the means of criminal prosecution and investigation (and assistance between member states) are more powerful than tools of administrative or civil law and can enhance effectiveness of investigations. Furthermore, there is an additional guarantee of impartiality of investigating authorities, because other authorities than those administrative authorities that have granted exploitation licences or authorisations to pollute will be involved in a criminal investigation. (European Commission, 2001b)

The most controversial feature of this proposal is that it compels member states to use criminal law when certain activities breach Community law with respect to environmental protection as specified in the Annex. Legal scholars consider that the use of criminal penalties is incompatible with the character of a directive (Faure, 2004: 19; see also Roef, 2001: 145; Faure, 2003: 228). Pursuant to Article 249 of the EC Treaty, a directive is binding as to the result to be achieved but not as far as the choice of methods or instruments. The EU traditionally identifies the norms of European environmental law and member states are free to choose the preferred implementation technique.

The central provision of the proposed directive is Article 3, which requires member states to ensure that the following activities are criminal offences when committed intentionally or with serious negligence in so far as they also breach EC environmental protection law and/or the rules adopted by member states in order to comply with EC law:

- (a) the discharge of hydrocarbons, waste oils or sewage sludge into water;
- (b) the discharge, emission or introduction of a quantity of materials into air, soil or water and the treatment, disposal, storage, transport, export or import of hazardous waste;
- (c) the discharge of waste on land or into water, including the operation of a landfill;

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- (d) the possession, taking, damaging, killing or trading in protected wild fauna and flora species or parts thereof;
- (e) the significant deterioration of a protected habitat;
- (f) trade in ozone-depleting substances;
- (g) the operation of a plant in which a dangerous activity is carried out or in which dangerous substances or preparations are stored or used.

For the purposes of legal certainty, the Annex to the proposed directive contains an exhaustive list of 51 directives and regulations which prohibit those activities described in Article 3 (for example, Council Directive of 15 July 1975 on waste).

Sanctions and corporate liability Article 4 of the proposed directive states:

Art. 4. Member States shall ensure that the offences referred to in Article 3, and the participation in or instigation of such offences are punishable by effective, proportionate and dissuasive sanctions.

- (a) As concerns natural persons, member states shall provide for criminal penalties, involving in serious cases deprivation of liberty.
- (b) As concerns natural and legal persons, where appropriate, member states shall provide for fines, exclusion from entitlement to public benefits or aid, temporary or permanent disqualification from the practise of commercial activities, placing under judicial supervision or judicial winding up orders.

The proposed directive has interestingly taken into account the fact that in some member states the concept of criminal liability for legal persons does not exist. Article 4(b) therefore allows those member states to impose sanctions other than criminal penalties as long as they are effective, proportionate and dissuasive. It is questionable, however, whether this is not a striking contradiction with the overall goal of the proposed directive: resort to criminal law as a deterrent to corporate misbehaviour.

Council Framework Decision on the Protection of Environmental Law through Criminal Law

General features The final initiative of particular note is the Framework Decision adopted by the Council on 27 January 2003 (European Council, 2003). In 1999, the 1998 Convention of the Council of Europe considered above had not been ratified by any of the EU member states. To break the inertia, Denmark submitted a proposal for joint action (recast as a draft framework decision following the entry into force of the Amsterdam Treaty) that repeated several proposals made in the 1998 Convention. The Framework Decision of 27 January 2003 refers explicitly to the 1998 Council of Europe Convention in

its preamble and approximately replicates its most important provisions. Hence, the Council Framework Decision also distinguishes between intentional offences (art. 2) and negligence offences (art. 3). Article 6 of the Framework Decision also provides that each member state shall take the necessary measures to ensure that the conduct referred to in Articles 2 and 3 are punishable by criminal penalties. The Framework Decision took effect on 5 February 2003, the day of its publication in the *Official Journal* of the European Union. Pursuant to Article 10 of the Framework Decision, member states have to implement it before 27 January 2005.

Corporate liability Article 6 of the Framework Decision provides that each member state shall take the necessary measures to ensure that legal persons can be held criminally liable. This provision notably differs from the proposed Commission directive considered above which rejected the obligation to introduce corporate criminal liability.

Institutional conflict on the protection of the environment through criminal law

The proposed Commission directive has not yet been adopted and is still pending in the legislative process. However, the publication of the Council Framework Decision of 27 January 2003 led to an interesting institutional conflict. There are presently two texts on the same subject but possessing a different legal basis. The Treaty of the European Union (TEU), signed in Maastricht on 7 February 1992, is divided into three pillars: the original pillar of Community law (the 'first pillar') and two new pillars: common foreign and security policy (the 'second pillar') and police and judicial cooperation in criminal matters (the 'third pillar'). The Council Framework Decision has been adopted under the third pillar, whereas the Commission has presented its draft directive under the first pillar. The TEU specifies several rules to prevent conflict between the respective competencies as defined under the three pillars. Nevertheless, a serious conflict emerged between the Commission and the Council concerning environmental protection through resort to criminal law. On 31 March 2003, the European Commission challenged the Framework Decision before the European Court of Justice with a view to having it declared invalid.¹⁰ The case is still pending as of January 2005.¹¹

Corporate social responsibility within the EU

In the light of these legal developments, this section will conclude the chapter by briefly reviewing the concept of corporate social responsibility as it has evolved within the EU. Environmental policies over the last three decades have generally been based on an 'adversarial or confrontational approach' whereby governments imposed new regulations upon polluters and limited

operators to severe operating conditions. Environmental policy was thus dominated by law. Meeting the challenges of today's environmental problems contemplates looking beyond a strictly legalistic approach and adopting a more strategic approach which employs a variety of measures and instruments to influence decision-making by corporations, consumers, policy planners and citizens. The contemporary approach to environmentalism is thus based on cooperation: it involves the industry in the process of setting rules and objectives (Bergkamp, 2002a: 136).

One of the most significant illustrations of the cooperative approach within the EU is corporate social responsibility. On 18 July 2001, the European Commission adopted a Green Paper promoting a European Framework for Corporate Social Responsibility (European Commission, 2001c). The Commission intends to launch a wide debate on how the EU can promote corporate social responsibility at both the European and international levels, exploit existing experiences, encourage innovative practices, introduce greater transparency and increase the reliability of evaluation and validation. The Green Paper suggests an approach based upon deepening of partnerships in which all actors have an active role (*ibid.*: 3).

The Green Paper defines corporate social responsibility as 'the concept whereby companies decide voluntarily to contribute to a better society and a cleaner environment'. More specifically it is a 'concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis'. It follows that 'being socially responsible means not only fulfilling legal expectations, but also going beyond compliance and investing more into human capital, the environment and the relations with stakeholders' (*ibid.*: 4, 6). The overall idea is to render corporations responsible for environmental problems beyond strict legal compliance.¹²

However, the Green Paper clearly states that corporate social responsibility should not be seen as a substitute to regulation or legislation concerning environmental standards, including developing new legislation as appropriate. According to the Commission, corporate social responsibility extends beyond the doors of the company into the local community and involves a greater range of stakeholders in addition to employees and shareholders: business partners, suppliers, customers, public authorities, NGOs and the environment. The Green Paper asserts that stakeholders can play a decisive role in prompting corporations to adopt socially responsible practices (*ibid.*: 15). It also suggests a series of management tools to implement corporate social responsibility, such as best practices, codes of conduct (European Parliament, 1999), training, auditing, reporting and eco-labels. By these means, corporate social responsibility can be a positive contribution to the strategic goal identified at the European Council in Lisbon in 2000 'to become the most competitive and dynamic knowledge-based

economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion.’ (Council resolution on the follow up to the Green Paper on corporate social responsibility, 2002/C 86/03).

The Green Paper states that the European approach to corporate social responsibility has to reflect and be integrated within various other international initiatives such as the UN Global Compact (2000), the ILO’s Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (1997/2000) and the OECD Guidelines for Multinational Enterprises (2000). A European approach would complement and add value to these existing activities by:

- (i) providing an overall European framework, aimed at promoting quality and coherence to corporate social responsibility practices;
- (ii) supporting best practice approaches to cost-effective evaluation and independent verification of corporate social responsibility, thereby ensuring their effectiveness and credibility (European Commission, 2001c: 6).

Conclusions

The EU directive on environmental liability deservingly introduces the concept of environmental damage into the national legal orders of member states. However, it will certainly raise several serious questions (for example, with respect to the defence provisions) in respect of its concrete application. In the field of criminal environmental liability, three developments are of interest at the European level and a legal action is currently pending before the European Court of Justice. Consequently, administrative and criminal liability grounds will both have important implications for corporations operating within the EU in the near future. With respect to corporate social responsibility the role of the EU is appreciably embryonic at this stage (see further, Bergkamp, 2002a: 139).

Notes

1. This chapter considers the law as at January 2005 and does not take into account the potential legislative changes that may have occurred after 6 January 2005.
2. See <http://europa.eu.int/comm/environment/liability/>.
3. Proposal for a directive of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage, COM (2002) 17 Final, 23 January 2002.
4. Green Papers are ‘discussion papers . . . addressed to interested parties – organisations and individuals – who are invited to participate in a process of consultation and debate. In some cases they provide an impetus for subsequent legislation’, http://europa.eu.int/documents/comm/index_en.htm.
5. White Papers ‘contain an official set of proposals in specific policy areas and are used as vehicles for their development’, http://europa.eu.int/documents/comm/index_en.htm.
6. The principle of subsidiarity provides that the objectives of the proposed action cannot be sufficiently achieved by member states and can therefore be better achieved by action on the part of the Community. The proportionality principle requires EC action not to go beyond what is necessary to achieve the objectives of the treaty. See Protocol on the application of the principles of subsidiarity and proportionality, which is annexed to the Amsterdam Treaty, *Official Journal, Communications* (OJC), 340, 10 November 1997.

7. The remedial objectives are detailed in Annex II of the directive.
8. The entry into force of the convention requires three ratifications. On 6 January 2005, there was only 1 ratification (Estonia). For the text of the convention and the ratification status, see <http://conventions.coe.int/Treaty/en/Treaties/Html/172.htm>.
9. For a critical assessment of the organ theory, see Roef (2001: 130). In Belgium the law of 4 May 1999 introducing corporate liability into the Criminal Code is not based upon the organ theory: corporate liability is an independent liability.
10. Case C-176/03: Action for annulment of Council Framework Decision 2003/80 *Justice and Home Affairs* (JHA) of 27 January 2003 on the protection of the environment through criminal law.
11. For a justification of the European Commission's position, see Comte (2003: 148).
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20 Corporate responsibility: the UNEP experience

Monique Barbut and Cornis van der Lugt

Introduction

Since its creation in the 1970s, the United Nations Environment Programme (UNEP) has been working with the private sector in various ways to advance greater environmental awareness and responsibility. In the early days more energy was invested in putting out fires, focusing on end-of-pipe solutions and policy approaches based on dilution and treatment downstream. Over the years we have been learning with business and industry, going upstream with a focus on cleaner production and – in more recent years – a focus on sustainable consumption and life-cycle approaches. Following more holistic approaches also meant increasingly dealing with social challenges, based on the integration that sustainable development requires. This also implied taking on the growing debate on what some preferred to call ‘corporate social responsibility’ (CSR). The CSR debate was driven by new questions being asked about the societal role of big companies in the aftermath of the Cold War and unease about raising inequalities accompanying the process of globalisation.

This chapter will focus on corporate environmental responsibility and the related activities of UNEP. A few words about legalistic approaches and the legal profession are also called for. In the CSR debate some critics have questioned the role of the legal profession and company lawyers for forcing company decision-makers to focus more on ‘liability’ than ‘responsibility’, causing many companies to follow a minimalist approach that leaves little room for proactive leadership. At UNEP’s 20th Annual Consultative Meeting with Industry Associations, held in Paris in October 2003, one participant from the USA referred to recent litigation in that country and argued ‘if you want real change go to the law schools, not the business schools’.¹ One could of course argue that ‘liability’ and ‘responsibility’ are two sides of the same coin. Being liable for something implies not having acted responsibly in a particular case. So let us start then by asking what ‘environmental responsibility’ requires from a company, before going into a more general discussion of corporate environmental and social responsibility (CESR) as called for in the 2002 Johannesburg Plan of Implementation.

Corporate environmental responsibility: sustainable production and consumption as foundation

The UN Global Compact challenges business to promote greater environmental responsibility. Chapter 30 of Agenda 21, agreed to by governments at the 1992 UN Conference on Environment and Development (UNCED), described 'environmental responsibility' as requiring from business the following:

responsible and ethical management of products and processes from the point of view of health, safety and environmental aspects. Towards this end, business and industry should increase self-regulation, guided by appropriate codes, charters and initiatives integrated into all elements of business planning and decision-making, and fostering openness and dialogue with employees and the public.

What steps should the company take today if it wishes to display environmental responsibility? Within UNEP those key steps should involve the following:

1. *redefine company vision, policies and strategies to include the 'triple bottom line' (Elkington, 1997, 2004) of sustainable development – economic prosperity, environmental quality and social equity;*
2. *develop sustainability targets and indicators – economic, environmental, social;*
3. *establish a sustainable production and consumption programme with clear performance objectives to take the organisation beyond compliance in the long term;*
4. *work with suppliers to improve environmental performance, extending responsibility up the product chain and down the supply chain;*
5. *adopt voluntary charters, codes of conduct, codes of practice in global and sectoral initiatives to confirm acceptable behaviour and performance;*
6. *measure, track and communicate progress in incorporating sustainability principles into business practices, including reporting against global operating standards; and*
7. *ensure transparency and unbiased dialogue with stakeholders.*

In doing the above, the existence of appropriate management systems is crucial in helping the company to meet the organisational challenge. Key tools for the company are:

1. assessment/audit tools:
 - (i) environmental impact assessment, environmental risk assessment;
 - (ii) echnology assessment;
 - (iii) life-cycle assessment.

2. management tools:
 - (i) environmental management systems;²
 - (ii) technology management;
 - (iii) ecodesign.
3. reporting and communication tools:
 - (i) corporate environmental reporting and sustainability reporting;
 - (ii) stakeholder dialogue.

A central action in the above is the formulation of a sustainable production and consumption programme. Let us start with production. When formulating its policy and strategy, a company can find key principles in a policy tool that UNEP launched in 1998. The International Declaration on Cleaner Production outlines a set of principles that can lead to increased awareness, understanding and ultimately, greater implementation of what came to be known in the 1990s as 'cleaner production', similar to the concept of eco-efficiency as advanced by WBCSD (2000). For companies in particular, the declaration serves as a practical tool to facilitate the adoption of a cleaner production strategy.

Cleaner production is a strategy for increasing the efficiency of natural resource use and minimising wastes. Pollution and risks to human health and safety are reduced at the source, rather than the end of the production process, that is, the 'end-of-pipe' stage. The adoption of cleaner production by companies typically involves improving maintenance practices, upgrading or introducing new technology, or changing production process. It results in meeting consumers' needs with more environmentally compatible, quality products and services. As well as reducing pollution, this strategy also generates tangible economic savings for a business enterprise by improving the overall efficiency of production. The potential benefits of implementing the strategy with its principles are listed in Table 20.1.

Of particular relevance in a discussion on corporate responsibility and liability is also the fact that cleaner production implies a precautionary approach as set out by the Rio Declaration of 1992. Precaution is included as one of the principles of the UN Global Compact. A key element of a precautionary approach is the idea of *prevention* rather than *cure*. In other words, it is more cost-effective to take early action to ensure that irreversible environmental damage does not occur. Companies should consider the following:

1. While it is true that preventing environmental damage entails both opportunity and implementation costs, remediation of environmental harm after it has occurred can cost much more.
2. Investing in production methods that are not sustainable, that is, that deplete resources and degrade the environment, has a lower, long-term return than investing in sustainable operations. In turn, improving environmental

Table 20.1 *The benefits of implementing cleaner production*

Principle	Potential benefits
Leadership	<ol style="list-style-type: none"> 1. Improved dialogue along the supply chain 2. Increased confidence from consumers, suppliers, users
Awareness, education and training	<ol style="list-style-type: none"> 1. Increased confidence from consumers, suppliers, users 2. Long-term culture change: greater industry motivation 3. Strengthen internal capacity
Integration	<ol style="list-style-type: none"> 1. Integration of a cost-effective environmental strategy 2. Linkages with international conventions
Research and development	<ol style="list-style-type: none"> 1. Innovation spurred 2. Potential for new markets
Communication	<ol style="list-style-type: none"> 1. Improved public perception 2. Potential for new partnerships
Implementation	<ol style="list-style-type: none"> 1. Due diligence 2. Reduce risk and liability 3. Realise economic saving 4. Improve state of local, regional, global environment

Source: See www.uneptie.org/pc/cp/declaration/home.htm.

performance means less financial risk, an important consideration for insurers.

3. Research and development related to more environmentally friendly technology and products could have significant long-term benefits.

What then do we mean by 'sustainable consumption'? The concept refers to different and more efficient consumption, sharing more resources between rich and poor peoples, protecting the environment and not threatening the basic needs of future generations. During the 1992 Rio Earth Summit (UNCED) the issue of 'consumption patterns' was identified as a key factor in sustainable development and the future of our planet (Agenda 21, Chapter 4). A decade later, during the 2002 Johannesburg Summit (World Summit on

Sustainable Development: WSSD), governments highlighted the need to develop awareness programmes dealing with the importance of both sustainable production and consumption patterns (Johannesburg Plan of Implementation: JPoI).

After years of working on cleaner production and more recently sustainable consumption, the WSSD in 2002 challenged its participants to revisit the debate by specifically looking at the interrelation of production and consumption. This new approach is encapsulated in the new heading 'Sustainable Consumption and Production', for which a ten-year framework of programmes is being developed with the close involvement of UNEP.³ Behind the new approach lies some important trends of the preceding ten years that became clear. First of all, it became evident that the gains made in productivity or eco-efficiency are overtaken by the overall increase in production. Second, while the environmental problems during the production process are better understood and controlled, problems during the use of the products are far from being addressed. Third, newly emerging or quickly developing sectors of 'the new economy' are posing increasing threats that are yet to be effectively addressed. Fourth, it is clear that environmental concerns are often not integrated into programmes for economic and social progress and vice versa. The call for a new approach from the conception of a product to the end of its life following consumption is also a call for better integration across all pillars of sustainable development.

What does this require from business? Action is needed to re-orientate social and economic development to remain within the carrying capacity of the earth by:

1. continuing improvements in production *processes*;
2. accelerating improvements in the *design* of goods and services; and
3. re-orientating *consumer choices* – of individuals, industry and public institutions – towards more sustainable lifestyles and purchasing decisions.

In addition to continuing and expanding cleaner production programmes, sustainable consumption policies need to be developed and integrated into mainstream decision-making. Consumption decisions have to be re-orientated. This poses new challenges for companies in communicating with their consumers and developing appropriate marketing and communications strategies. Faced with consumers who do not always behave consistently and expected costs resulting from the introduction of sustainability into their marketing mix, pioneer companies are managing to overcome the traditional barriers with a view to creating or anticipating new business opportunities. This also requires changes in core management areas. If sustainability is to go

mainstream, a revised definition of reputation risk needs to be at the heart of corporate policies and strategies. In a context where reputation and brand value are viewed as key 'assets', more and more companies are beginning to consider whether sustainable development may become the decisive 'value' driver. Responding to consumer citizens and public opinion on the emerging CESR agenda, the question is how innovative companies can meet the challenge in the area of sustainable consumption.

As is clear from the above, the advancement of sustainable consumption and production lies at the core of displaying corporate environmental responsibility. The call for corporate environmental responsibility was addressed by environment ministers at UNEP's first Global Ministerial Environment Forum, held in Malmö in May 2000, when they discussed the private sector and the environment. The Malmö Declaration⁴ asked for a greater commitment by the private sector 'to endanger a new culture of environmental accountability'. Questions raised in the Malmö Declaration echoed in debates at the WSSD on corporate responsibility and accountability, with some NGOs campaigning for the creation of a new international convention on this topic. It was therefore no surprise that the Johannesburg Declaration called for private sector corporations 'to enforce corporate accountability'. Addressing CESR, paragraph 18 of the JPoI called for actions to:

[e]ncourage industry to improve social and environmental performance through voluntary initiatives, including environmental management systems, codes of conduct, certification and public reporting on environmental and social issues, taking into account such initiatives as the International Organisation for Standardisation (ISO) standards and Global Reporting Initiative guidelines on sustainability reporting . . .

Ongoing discussion on the societal role of business reflects a growing awareness that the distinction between what happens within and outside the factory gate is no longer clear-cut. What is viewed as a social cause or external event today may easily turn out to be a business question related to internal operations tomorrow. This awareness of shifting boundaries in rights and responsibilities applies not only to business but to all societal actors, governmental and non-governmental, as we develop a better comprehension of the complexity of environmental and social problems that are systemic, transnational and occurring globally. The bottom line is that proactivism is expected from all. In this respect the role of business and industry as part of the solution is critical. It is unlikely that the private sector will be engaged by threats and doomsday theories. The way to attract the business mind and to spur innovation is to present these global problems as challenges. This was the approach followed, for example, in a state of the world publication by UNEP, WBCSD and WRI (2002) which was aimed at the business community and appeared

under the title *Tomorrow's Markets: Global Trends and Their Implications for Business*. In the section 'Innovation', the chapter on consumption reminded readers that '[r]ising consumption creates environmental risks and business opportunities for innovation'. As regards the engagement of business in the developing world, there is a growing business case that highlights gains in emerging markets such as cost reductions and higher sales (as opposed to reputational gains and brand value that apply more typically in the developed world; SustainAbility, IFC, Ethos, 2002: 52).

Corporate citizenship and the UN Global Compact

The promotion of core values and principles in the global market is the driving force behind the UN Global Compact. The initiative serves as a reminder to companies that they, like citizens, have both rights and duties. The UN Secretary-General is reminding companies that while they benefit much from liberalisation in international trade, the increased freedom to operate globally brings with it an accompanying duty to meet some internationally agreed minimum standards. It is this awareness of the two elements 'rights and duties' encapsulated in the concept 'citizen' that has led the Global Compact to advance the concept of 'corporate citizenship'. Some prefer to use the term 'CSR', which is linked with ethical business responsibility and stakeholder theory, claiming that a corporation has a responsibility to all those groups who are harmed by, or benefit from, the operations of a company (Matten et al., 2003: 110). It is important to note is that these responsibilities include environmental responsibility, which is often underplayed in CSR debates and which is why the WSSD texts used the term 'CESR'. The company displaying corporate citizenship is aware of its rightful place in society, next to other 'citizens', with whom it forms a community.

The birth of the UN Global Compact dates back to a speech by UN Secretary-General Kofi Annan at the World Economic Forum in January 1999. Months before Seattle, he warned of a backlash against globalisation since (i) its benefits are distributed highly unequally, (ii) it is characterised by an imbalance in rule-making, and (iii) it enhances a global identity crisis (people want to know 'who' is in control) (Ruggie, 2001: 3–4). As global wealth is rising but the income gap grows wider, his warning remains as valid as ever. World business leaders have been challenged to enhance shared values for the global market and promote corporate citizenship globally. The Global Compact challenges companies to integrate into their operations a set of core values in the areas of human rights, labour standards, environment protection and anti-corruption. These values are embodied in ten principles that have been taken from existing intergovernmental agreements. The first four years since the launch of the Global Compact in mid-2000 focused on human rights, labour and the environment. A tenth principle on corruption was

added at the Global Compact Leaders Summit, hosted by Kofi Annan in New York on 24 June 2004. Following an extensive consultation and survey among participants in the Global Compact, it was clear that a principle against corruption reinforces the other nine principles. Examples of this range from the site level (for example, bribes offered to an environmental inspector), to the board level (for example, misrepresentation of facts in emissions trading).

The three environmental principles advanced under the Global Compact have been taken from the 1992 Rio Declaration. They require business to:

1. support a precautionary approach to environmental challenges;
2. undertake initiatives to promote greater environmental responsibility; and
3. encourage the development and diffusion of environmentally friendly technologies.

The three environmental principles are fundamental in the sense that certain minimum requirements must be met, yet aspirational in the sense that there is always room for improvement. We all know that a principle such as precaution is complex, which is why it is all the more valuable for participants in the Global Compact to share their experiences in its implementation. The application of these principles is at stake in all activities undertaken by UNEP in its work with companies and associations in different industry sectors.⁵ The role of four of the core UN agencies involved in the Global Compact is to act as guardians of the ten principles, to ensure that their interpretation and implementation follows current consensus on what constitutes acceptable or best practice. These four core agencies are the Office of the High Commissioner for Human Rights (OHCHR), the International Labour Organisation (ILO), UNEP and the United Nations Office on Drugs and Crime.⁶

Today the Global Compact has a solid participants' base. It has become the world's largest voluntary corporate citizenship network, with over 1700 companies participating. More than half of the participants are headquartered outside the OECD. There are 43 local Global Compact networks at the country and regional level. The participation of all companies starts with a letter from the chief executive to the UN Secretary-General, committing to work towards implementation of the ten principles and supporting the initiative. This reflects the need to engage top management in bringing about change for sustainability within large companies. That commitment needs to be followed up by middle management and employees. With this in mind the Compact has offered opportunities for dialogue and learning, developing a data base with case studies of company good practices and developing – through the core UN agencies and business organisations – training materials and guides for companies. For example, UNEP has been closely involved in the development of the Global Compact Resource Package (UN Global Compact, 2003) and

Performance Model (Fussler et al., 2004) with its listing of management tools that companies can employ.

Global voluntary initiatives by industry sector

The Compact has built upon the existing experience of agencies such as UNEP who have been involved in setting up voluntary initiatives with different industry sectors since the early 1990s. While it presents the cross-sectoral umbrella, UNEP's sectoral voluntary initiatives look more specifically at the application of the environmental principles in individual sectors. Among the various activities that UNEP undertakes with companies and associations in different industry sectors, five sectoral initiatives are the best established.⁷ These engage participant companies on an ongoing basis to develop environmentally sound practices along the lines of the Rio principles.

A Tour Operators' Initiative for Sustainable Development has been developed in cooperation with the World Tourism Organisation and the United Nations Educational, Scientific and Cultural Organisation since March 2000. It has been signed by 25 tour operators which together handle over 20 million tourists a year. Founding members have agreed that, to ensure the profitable future of tourism, they have to work towards sustainability and maintain the quality of the environment. The initiative is currently developing tools for the integration of environmental and social questions in contracting and supply chain management.

The Global e-Sustainability Initiative (GeSI) was created by representatives of major telecommunications operators and suppliers in conjunction with UNEP, the International Telecommunication Union (ITU) and the European Telecommunication Network Operators Association and launched in June 2001. GeSI currently has 12 members who are involved in working groups to address issues such as corporate responsibility in supply chain management and the role of information and communications technology in combating climate change through processes such as dematerialisation, efficient management of public buildings and computerised traffic regulation.

UNEP's Advertising and Communication Forum originated from the recommendation by governments at the Rio +5 Conference of 1997 that business, the media, advertising and marketing sectors need to be encouraged to help shape sustainable consumption patterns. As a result the Advertising and Communication Forum was set up in partnership with the European Association of Advertising Agencies in 1999. Current activities under this forum include follow-up to the 2004 Global Compact Policy Dialogue on Sustainable Consumption: Marketing and Communications. Issues addressed include responsible advertising and ways of communicating to consumers in a manner that enables them to make informed choices.

In 2002, in cooperation with various automotive manufacturers, UNEP

created the Mobility Forum. Involving all major car manufacturers, the Forum aims to protect the environment while maintaining healthy and profitable business operations within the framework of sustainable development. Participant companies have, among others, worked with non-industry experts to develop a sector supplement to the Global Reporting Initiative (GRI) Guidelines for sustainability reporting by the automotive sector.

The UNEP Finance Initiative (UNEP FI) resulted from the merger of two initiatives started after the Rio 1992 Summit involving banks and insurance companies. These were the UNEP Statement by Financial Institutions on the Environment and Sustainable Development and the UNEP Statement of Environmental Commitment by the Insurance Industry. Currently involving over 270 companies, UNEP FI conducts activities through working groups dealing with issues such as asset management, climate change, environmental management and reporting. UNEP FI is also responsible for follow-up to reports issued in June 2004 by major brokerage firms at the Global Compact Leaders Summit on corporate responsibility and sustainability (considered further below).

An important consideration in these initiatives is the credibility of the UN agency in providing a multi-stakeholder platform with global reach (see Nelson, 2002: Ch. IV). The role of UN agencies is supported by the fact that public institutions are key actors when externalities and harmonisation need to be addressed at the global level. These international voluntary initiatives complement intergovernmental processes, help to implement international agreements and fill gaps in global governance. The same argument for engaging non-state actors in voluntarism applies at the national level. As John Ruggie, adviser to Kofi Annan, wrote in the *Financial Times* of 25 October 2002, p. 13: '[s]ociety, therefore, has come to demand help from the corporate sector in coping with adversities that stem from governance gaps and governance failures, ranging from securing investments in community development to preventing conflicts and diseases'.

Voluntary initiatives have been used increasingly by industry and governments since the 1992 Rio Summit as an approach to improve environmental performance. Recognising its responsibilities, business and industry has increasingly been involved in the development of voluntary initiatives at the national and international levels. These have taken various forms, including voluntary codes of conduct and standards adopted by industrial sector associations, or agreements on performance targets between a government and a company, a group of companies or an industry sector. Voluntary initiatives are non-legislatively required commitments or obligations agreed to by one or more organisations, or by companies making commitments to improve their environmental performance beyond legal requirements. These initiatives often take the form of negotiated agreements between industry and

public authorities (see UNEP, 1998; OECD, 1999). While voluntary, such initiatives may nevertheless be:

1. *Legally binding*, in the case of a signed, contractual agreement, and thus enforceable if broken;
2. *Mandatory*, if it becomes a condition for membership in an industry association;
3. *Compulsory*, if it becomes a de facto marketing requirement (for example, ISO 14000), or when, as in countries with an established consensus-based approach, it has the same weight as traditional regulations; and
4. *Used to encourage compliance* with existing laws.

At the international level, various industry associations have been involved in the creation of international voluntary codes and guidelines in the environmental field. These include the International Chamber of Commerce, the International Council of Chemicals Associations, the World Coal Institute, the International Federation of Consulting Engineers, the International Iron and Steel Institute, the International Council of Metals and Mining, the International Petroleum Industry Environmental Conservation Association and the World Travel and Tourism Council (UNEP, 2002a, 2002b). Some would refer to the growing prominence of international voluntary initiatives as the 'partial privatisation' of global governance, as the institutional loci shifts away from state institutions and intra-institutional systems of self-regulation begin to assume greater importance. This suggests a growing 'public role for the private sector', built on the expectation that private actors have superior information regarding production processes, are more flexible in responding to technological and market trends, and can best ensure that standards are actually implemented. The important point here is not to fall into the trap of thinking in 'either/or' terms, but to advance the complementarity between regulatory and voluntary approaches in different policy mixes (see Gunningham and Grabosky, 1998).

Measuring and communicating progress: sustainability reporting

Voluntary initiatives inevitably encounter scepticism from others who argue that they are full of idealistic goals yet weak on implementation and monitoring. First, voluntary initiatives are the product of considerable preparation and negotiation. The more stakeholders involved, the more complicated conception becomes. Often its mere establishment is an accomplishment not to be underestimated. That said, praiseworthy statements and goals need to be followed up with praiseworthy action and the transparent communication of results. This highlights the importance of reporting, not simply as a monitoring mechanism but also as a vehicle to maximise learning and enable continuous improvement.

After four years of campaigning and recruiting greater numbers of participants from all regions, the Global Compact has been confronted with the same challenge. The value of sustainability reporting was recognised at an early stage and underlined by UNEP as one of its core agencies. On 28 November 2001, the Global Compact Office and the GRI announced a 'cooperative framework' under which company sustainability reporting along the GRI Guidelines can be considered to qualify as submissions fulfilling the participation requirements of the Global Compact. At the inauguration of the GRI in New York on 4 April 2002, Kofi Annan referred to the GRI as an 'important complement' to the Compact. Consistent with that position, UNEP has been advancing the development of sector specific indicators for sustainability reporting and benchmarking through sectoral voluntary initiatives established in conjunction with business and industry.

Case studies are also valuable in communicating progress and demonstrating the dilemmas confronting companies when implementing environmental principles. During the first two years of the Global Compact, companies were encouraged to submit annually examples that evidenced how they were implementing some or all of the nine principles. Several key themes emerged from a review of initial submissions. First, it was clear that implementation of the principles requires a substantial degree of organisational change. Important organisational and managerial factors included training, change management and leadership. The submissions also demonstrated that many businesses faced difficulties assessing the priority of corporate citizenship responsibilities relative to other profit-seeking business activities (see McIntosh and Thomas, 2004).

The original intent was that these case studies would form the basis of a learning bank on the Compact website where, through transparent public commentary and analysis, best practices would be identified. This approach also identified several shortcomings, including the lack of an analytical framework, lack of capacity, language barriers and lack of resources on the part of participants to comment and analyse. Consequently, the Global Compact Advisory Council agreed in January 2003 that companies would no longer be required to submit annual examples as a precondition for participation. Rather, companies will be asked to indicate in their annual financial and sustainability reports what steps they have taken to implement the ten principles. This new approach of 'Communications on Progress'⁸ encouraged companies to use indicators such as those included in the sustainability reporting guidelines of the GRI but left the door open for other non-report forms of communication by smaller companies who may, for example, highlight their actions in company newsletters, brochures and websites. Particularly noteworthy in the light of the fact that the Compact follows a learning as opposed to a policing approach is the idea of encouraging the measurement, tracking and communication of progress through reporting (Van der Lugt, 2004: 141–3).

The growth in corporate sustainability reports that cover environmental, economic and social performance of companies has been facilitated by the GRI, an internationally recognised framework produced through an ambitious multi-stakeholder process.⁹ The GRI process was launched in 1997 by UNEP and the Coalition of Environmentally Responsible Economies. The mission of the GRI is to develop and disseminate globally applicable sustainability reporting guidelines. The aim is to elevate the quality of reporting to a higher level of comparability, consistency and utility. The guidelines can be used by any organisation – corporate, governmental or non-governmental. They are subject to continuous revision and refinement in a multi-stakeholder process involving participants from all regions of the world. The GRI is now a permanent institution in the form of a UNEP Collaborating Centre located in Amsterdam with a multi-stakeholder board and 60-member Stakeholder Council. Close to 600 companies worldwide are presently producing GRI-based sustainability reports.

In addition to realising its managerial value, the growth in reporting by companies over the last ten years has also been the result of increased pressure from investors, rating agencies, other companies, authorities, campaigners, customers, NGOs and the media. Reporting has been supported by the emergence of legislated corporate governance disclosure, with a number of countries extending disclosure requirements to embrace social and environmental risk management issues. The Asian financial crisis of the 1990s was an early reminder of the importance of transparency in financial governance which helped to identify risks, improve efficiency and stabilise markets in uncertain times.

The GRI process is concerned with sustainability (covering the triple bottom line), transparency, accountability and stakeholder engagement. Participants in the process have also agreed on 11 principles which are essential to producing a balanced and reasonable report on an organisation's economic, environmental and social performance. They relate to the framework of the report as well as its content, quality, reliability and accessibility. The 11 reporting principles are: (i) transparency, (ii) inclusiveness, (iii) auditability, (iv) completeness, (v) relevance, (vi) sustainability context, (vii) accuracy, (viii) neutrality, (ix) comparability, (x) clarity, and (xi) timeliness.

The GRI Guidelines indicate that these principles define a compact between the reporting organisation and the report user, ensuring that both parties share a common understanding of those matters underpinning the report (GRI, 2002: 22). They were designed with the conviction that new knowledge and learning will continue to advance performance measurement over the long term. An international review process is currently under way to develop the third revised version of the GRI Guidelines for 2006.

The business case: from risk avoidance to leadership

When the corporate sustainability manager says ‘responsibility’, the corporate lawyer responds by warning ‘liability’. Is it as simple as that? Why are more companies introducing sustainability and CSR to their strategic planning and joining voluntary efforts in support of corporate citizenship and sustainable development? We are currently observing an ongoing trend that departs from the traditional reductionist approach of saying ‘the business of business is business’. Support for corporate citizenship is based on a new vision of the social contract between the company and the society within which it operates. Many companies become involved because of trigger events such as negative experiences or adverse criticism of their practices. We often learn by burning our fingers. But increasingly companies are also becoming involved as a result of positive inducements, taking note of the growing business case for sustainable development. Many companies today view proactive corporate citizenship as good business, helping to advance their overall performance, profitability and corporate image (see SustainAbility/UNEP, 2001).¹⁰

Greater pressure from consumer-citizens moves more businesses to take moral or ethical positions and acknowledge social responsibilities. In addition, investors and shareholders also support the emerging business case for sustainable development. In particular, global companies increasingly face questions from ethical or socially responsible investment funds. Indexes such as the Dow Jones Sustainability Group Index and the FTSE4Good Index motivate global companies to follow a more integrated sustainability approach. This is where the social responsibility of business becomes a ‘near rational’ economic choice (UNGA, 2001b: 11). Corporate citizenship as advanced under the Global Compact and the sectoral voluntary initiatives under UNEP auspices are therefore very different from traditional conceptions of corporate philanthropy (see UNCTAD, 1999: 3).

The increasing body of research on the business case encourages efforts to standardise sustainability indicators, improve our ability to measure and meaningfully communicate progress, benchmark company performance across different sectors and develop more elaborate sustainability reports. If business generally and individual champions within companies wish to answer these critical questions directly, they need to meet three central challenges: (i) develop and disclose clear boundaries, (ii) make the link with financial accounting, and (iii) engage local development actors in building new business models.

Clarify the boundaries

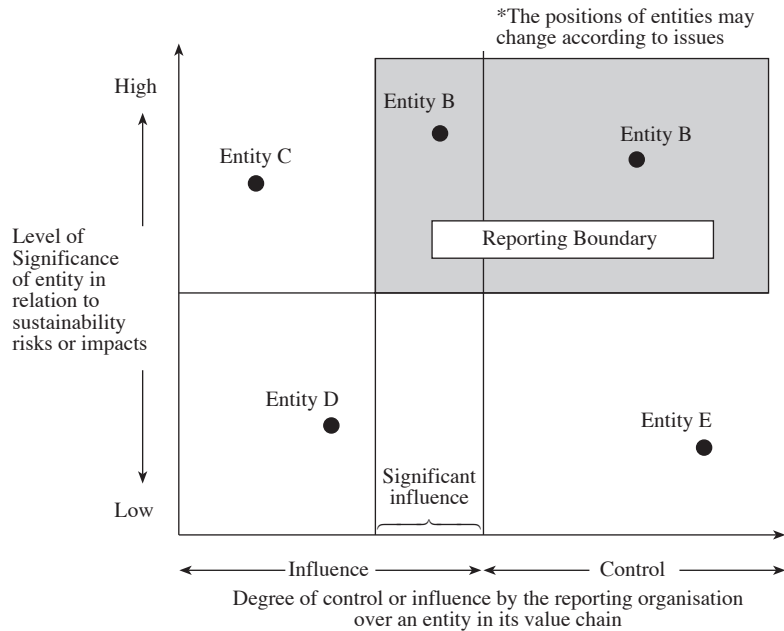
Liability, for example in the form of accountability for environmental harm done to society, requires a sense of responsibility from companies. It compels them to consider the consequences of their actions, to identify the boundaries

of their responsibilities and – in the case of liability – what they can be held accountable for. Boundary issues are often complex and unclear. CSR appears to be elastic: the more the company does the more is expected of it. Inevitably this raises the questions faced by sustainability managers and corporate lawyers. How much is expected from the firm, from corporate headquarters or local sites in the field? How far are we willing (or can afford) to go? If we are expected to apply life-cycle approaches, how far upstream and downstream should we go? Do we take responsibility for our first-, second- or third-tier suppliers? Do we take responsibility for the way our consumers consume? Essentially, what are the parameters of our responsibilities?

Any effort to quantify the costs and benefits of following the triple bottom line approach needs to be based on clear parameters in terms of temporal scope (short- or long-term profits and losses?) and organisational scope (do we include the costs of pollution caused by our supplier, subsidiary or consumer?). The challenge of ‘setting boundaries’ is also reflected within sustainability reporting. One of the most difficult and immediate decisions for companies is to decide from which entities to gather data. Presumably that which you include in your report is that for which you are willing to assume accountability. During the early years, most organisations measured and reported impacts based on the boundary criteria used in financial reporting, that is, legal ownership and direct control. We have increasingly seen the need for clearer methodology since significant dimensions of an organisation’s economic, environmental, and social footprint may fall outside traditional financial boundaries.

In this context the GRI has mandated a Boundaries Working Group to draft the pilot version of a GRI Boundaries Protocol to enable companies to identify the sustainability ‘footprint’ of their organisation and activities. The draft protocol developed by this multi-stakeholder working group was made available for public comment in late 2004. Figure 20.1 usefully sets out the issues a company has to consider when determining its reporting boundaries and defining the building blocks upon which the business case can be quantified.

The figure confirms that the boundary is determined using the intersection of two concepts – ‘significance’ and ‘control/influence’. A sustainability report should cover the entities that generate significant risks or impacts over which the reporting organisation has control and/or significant influence. This enables the reporting organisation to determine which entities are within its reporting boundary. All entities falling in the top right (high risk/impact and high control) clearly belong within it. Typical examples of where a company has significant control or influence would be a subsidiary where the reporting organisation owns, directly or indirectly, more than 50 per cent of the voting power, or a contractual relationship where the reporting organisation has purchasing agreements accounting for a substantial portion of sales by the



Source: GRI Draft Boundaries Protocol, October 2004.

Figure 20.1 Visual tool to define a reporting boundary

supplier. While the definition of ‘control and influence’ may be a fairly technical exercise in terms of legal and financial accounting rules, the determination of ‘significant impact’ may involve political considerations such as the perception of public needs.

Connect sustainability performance and financial performance

The challenge for the sustainability manager is to communicate integrated costs and benefits to senior management, shareholders and financial analysts. It is of course easier to quantify material resource efficiency. More progress has therefore been made in defining the business case as far as cleaner production processes are concerned. Such savings are often measurable and go directly to the financial bottom line. There is also strong empirical evidence that superior environmental performance reduces costs over time (SustainAbility/UNEP, 2001: 19). Yet social issues are increasingly prominent in building the business case. First, a persuasive body of evidence exists as far as workplace conditions are concerned. Employee-friendly work practices

contribute to increased revenue since motivated employees are more productive. The quantification of cause and effect in monetary terms for more complex issues such as climate change, sustainable consumption and external stakeholder engagement becomes more complicated. The frustration in defining 'the elusive business case' is largely due to different timeframes (short, medium or long term?), the framework conditions under which companies operate (is there a level playing field and at what level?) and different approaches to and degrees of internalising 'externalities' (where lies the boundary?). Companies who wish to 'make profit while doing good' are also desperate to get recognition from financial markets which has been slow to materialise.

The financial services community accordingly has a central role in the unfolding business case. In one of 22 sector reports prepared for the WSSD in a process facilitated by UNEP (2002a), the finance sector frankly admitted its lethargy in linking financing with sustainability. Credit, insurance and investment portfolios incorporated environmental risks and opportunities only to a limited extent. However, a more holistic and integrated approach to fiduciary responsibility has also been emerging. Increasingly, financiers are paying close attention to the 'upside' or revenue potential for those firms who proactively manage sustainability issues in a manner that minimises risk but also generates increased sales and market share. This new approach has now reached a critical threshold with the position assumed by mainstream investment brokers during the June 2004 Global Compact Leaders Summit. Through the Materiality Report (UNEP FI, 2004) the UNEP Finance Initiative and 12 fund managers called upon investors, government and business leaders to embed environmental, social and governance best practices at the core of their markets. UNEP Executive Director Klaus Töpfer observed that '[t]his new report is a crucial recognition from major financial institutions that the environmental and social components of sustainable development, as well as the economic considerations, should sit at the heart of investment and capital market considerations'.¹¹ The financial analysts who undertook the research were clearly convinced that sustainability issues impact long-term shareholder value. Its first key finding was that 'environmental, social and corporate governance criteria affect shareholder value both in the short and long term'. They accordingly argued that research to determine the financial materiality of these criteria should use longer time spans than is currently the norm. Just as the obsession with short-term profit is being questioned, so too is the meaning of 'risk' taking on a new dimension. One of the brokerage house reports noted that

while the 'holy grail' of empirically linking CSR performance to financial or stock price performance is something we believe is most likely never to be found . . . we

believe good CSR practices minimises business risks . . . understanding CSR risks gives a deeper understanding of the company and the business threats it faces. (Ibid.: 14–15)

In addition, 18 major investment companies developed and endorsed a report entitled *Who Cares Wins* in which they discussed how the industry should address environmental, social and corporate governance issues (UN GC, 2004). They recommended that analysts better integrate sustainability factors into their research, that financial institutions commit to integrating sustainability factors in a more systemic way and that stock exchanges include environmental, social and corporate governance criteria in their listing considerations for companies. With respect to investment, the report noted that ‘many studies confirm that the way a company manages environmental, social and corporate governance issues is often a good indicator of overall risk levels and general management quality’ (ibid.: 9). From both these reports it is therefore evident that innovative techniques to financially analyse environmental, social and corporate governance criteria are being developed in response to growing investor demand.

Engage local development actors in building new business models

For the innovative company, building a strong business case based on long-term vision will depend upon its ability to work with local communities and engage local entrepreneurs. Prahalad and Hart (2001) highlighted the business opportunities of commercial engagement with the world’s four billion poorest people as consumers, employees or entrepreneurs. However, the company expecting to enter these emerging markets by management ‘at arm’s length’ or driven by headquarters is in for a surprise. Large companies have to earn their ‘licence to operate’ in a spirit of *co-entrepreneurship*. This implies following a business model that is flexibly orientated towards the local: company activities within the community, local employees, the extent to which the company is involved in local relationships and its ability to work with local social and business entrepreneurs. Ambitious commitments by large corporations to help alleviate poverty and meet millennium development goals will have limited success if other courses are pursued.

High-impact sectors such as oil and gas have observed over recent years how emerging corporate citizenship issues have moved beyond traditional hot topics such as oil spills and CO₂ emissions to bigger picture questions such as socio-economic impacts and revenue sharing (UN GC, 2004: 29, quoting a study by Arthur D. Little and Business in the Community). In the construction sector, transnational companies have been drawn into local governance issues when new infrastructure stimulates economic development and population growth. Mining companies have dealt with HIV/Aids, introduced high-quality

health care for employees and encountered complicated relationships with the rest of society and local authorities. At times the division of accountability between states and large companies is unclear, resulting in an accountability vacuum in which neither takes responsibility (see Ward, 2003). The proactive company is one that tackles these social issues through partnership with local development actors. One example of risk management is the community approach of the Awareness and Preparedness for Emergencies at the Local Level (APELL) programme of UNEP (see Box 20.1). It can also take the form of developing new business ventures with local entrepreneurs, jointly developing new innovations (for example, in micro-financing, energy and water services provision) or local manufacturing. To bridge the gap between the 'corporate economy' and the 'livelihoods economy', The RING Alliance (2003: 8) highlighted that 'a business agenda for poverty reduction needs to reflect better understanding of the development significance of small and medium-sized enterprises, the informal sector, co-operatives, and other forms of business organisation operating at the level of the human economy'. One of its key recommendations to the UN Global Compact was 'building understanding of the business relevance of civic entrepreneurship'.

BOX 20.1 AWARENESS AND PREPAREDNESS FOR EMERGENCIES AT LOCAL LEVEL (APELL) PROGRAMME OF UNEP

Think of recent industrial accident headlines: 'Ammonium Nitrate Explosion in Toulouse – France, 21 September 2001'; 'Prestige Tanker – Oil Spill Accident in Spain, 14 November 2002', 'Gas Well Blowout in Gao Qiao, Chongqing, China, 23 December 2003, 243 people died, 9,000 injured, and 64,000 evacuated'; 'Ammonium Nitrate Explosion in Ryongchon Train Station, North Korea, 22 April 2004, 161 people killed and 1,300 people injured'. It is part of a long list, going back many years. In late 1986, following various chemical accidents, UNEP suggested a series of measures to help governments, particularly in developing countries, to reduce the occurrence and harmful effects of technological accidents and emergencies.

A key outcome of this has been the development of the APPEL Programme (Awareness and Preparedness for Emergencies at Local Level). This has been undertaken with the International Council of Chemical Associations and other industry associations, governments and local communities. The aim has been to minimise the occurrence and harmful effects of technological

accidents and emergencies by raising awareness within local communities and by improving communication between the parties. APELL provides a well-structured, detailed process for developing a coordinated, integrated and well-functioning emergency response plan for local communities. It is a tool for bringing people together to allow effective communication concerning risks and emergency responses. This process should help to:

- reduce risk;
- improve effectiveness of response to accidents;
- allow people to react appropriately during emergencies.

It is clear under APPEL that industries have a responsibility both to minimise risks and to ensure effective planning for response, even though it is normally government agencies that have the statutory responsibility to address emergencies outside industrial facilities. The APELL concept has been successfully introduced in more than 30 countries and in over 80 industrialised communities world wide. APELL was also featured at the World Conference on Disaster Reduction, held in Kobe (Japan) in January 2005, where international priorities and mandates in disaster prevention for the following 10 years have been established. See further, www.uneptie.org/pc/apell/home.html.

A growing part of UNEP's programme of work involves SMEs and supporting local entrepreneurs. UNEP is helping to catalyse SME development and finance through its Rural Energy Enterprise Development programmes in Brazil, China and five African countries.¹² These programmes provide enterprise development support and seed capital for innovative new companies who offer cleaner energy products or services to customers currently without access to clean and secure energy supplies. The key to success is the ability to connect local entrepreneurs with NGOs, companies and financial institutions who can help the local business to start up or to scale up. Having said this, one should have no illusions about large companies partnering overnight with local entrepreneurs to set up new businesses which benefit local communities. It takes long and hard work by committed individuals. Preparing the ground for the business case at the local level also requires sufficient investment in human capital through capacity building. Working with partner organisations to this end, UNEP provides various types of training materials to SMEs. For example, the Efficient Entrepreneur calendar for SMEs is a month-by-month action programme that introduces the small

company to environmental management and reporting. UNEP is also supporting local entrepreneurs in partnership development with the UNDP and the World Conservation Union through the Seed Initiative, launched simultaneously at the World Economic Forum and World Social Forum in January 2004.¹³

Conclusions

This chapter has provided an overview of how UNEP interprets ‘corporate environmental responsibility’, a key principle it advances as a UN agency under the UN Global Compact. It has also described how companies can be engaged to assume that responsibility in a more proactive manner through voluntary initiatives, partnerships and sustainability reporting, inspired by the emerging business case for sustainable development. We commenced by questioning the role of the legal profession. One analyst remarked:

Where the CSR agenda focuses on responsibility, legal risk management focuses on liability. Whereas the CSR agenda focuses on transparency, legal risk management focuses on confidentiality, and where the CSR agenda focuses on bridge-building and partnerships, the legal risk management approach is typically one of cautious defensiveness. (Ward, 2003: 27)

The contemporary challenge is to build a body of evidence that moves company management to address the sustainability agenda not in terms of a risk avoidance strategy but in terms of a window of opportunity. This puts the onus upon us all to move the business case argument beyond a collection of selected best-practice case studies to the definition of a convincing business model in which the word ‘liability’ becomes associated with ‘lack of taking action’ or ‘failure to act’.

Notes

1. See meeting report at www.uneptie.org/outreach/business/ind_meeting.htm.
2. Companies have become more concerned about their corporate image. This, coupled with the emergence of stringent environmental legislation with liability implications in a number of countries over the last ten years, has reinforced the case for a certifiable environmental management systems. Since its publication in 1996 as a mandatory compliance standard, the growth in ISO14001 certification has been significant.
3. On the series of regional and international consultations on this Framework organised by UNEP and the UN Department of Economic and Social Affairs, see www.uneptie.org/pc/sustain/10year/home.htm.
4. See the full declaration at: www.unep.org/malmo/malmo_ministerial.htm.
5. UNEP advances work in the area of environmentally friendly technologies through its International Environmental Technology Centre in Japan and web-based services such as MaESTro (www.unep.or.jp/maestro2/) and the Sustainable Alternatives Network (SANet, www.sustainablealternatives.net).
6. Furthermore, the United Nations Development Programme (UNDP) is helping to support Global Compact outreach at the national level and the UN Industrial Development Organisation (UNIDO) is focusing on the promotion of the Compact among small and

medium sized enterprises (SMEs). Around a quarter of current company participants are SMEs.

7. See www.uneptie.org/outreach/vi_home.htm.
8. See further, www.unglobalcompact.org.
9. See www.globalreporting.org.
10. The proactive and leadership role of individual businesses contrasts to the preference of laggards to hide behind lowest common denominators as defined collectively in their industry associations (see SustainAbility/GPC, 2001). UNEP hosts an annual consultative meeting in Paris with industry associations to focus on constructive contributions and challenges. Associations can be crucial allies in involving smaller companies, particularly those from the developing world (see UNGA, 2001a: 38).
11. See UNEP FI press release at <http://unepfi.net/stocks>.
12. See www.areed.org.
13. See www.seedinit.org.

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21 Corporate accountability: an NGO perspective

Craig Bennett and Helen Burley

Introduction

Environmental organisations like Friends of the Earth have campaigned against the socially and environmentally destructive practices of companies for as long as they have been in existence. Over the years, groups have won campaigns against companies on a range of issues but how much has really changed in the corporate world?

We argue that the corporate sector's response to campaigns by civil society (ethical consumerism and corporate social responsibility: CSR) fails to address the unprecedented social and environmental challenges faced by humanity in the twenty-first century. In particular, it fails to challenge the growth of unaccountable corporate power. As a result, we now see the development of a 'corporate accountability movement'.

Corporate accountability can be defined as the ability of those affected by a corporation to control that corporation's operations. It is a concept that demands fundamental changes to the legal framework in which companies operate. These include social and environmental duties being placed on directors to counterbalance their existing duties on financial matters and legal rights for local communities to seek compensation when they have suffered as a result of directors failing to uphold those duties.

In this chapter, we briefly review how the concept of corporate accountability has come about and how it is fundamentally different to voluntary CSR. We outline some of the mechanisms that could help deliver corporate accountability at an international and EU level, but we also explore in some depth how the principles and components of these mechanisms would be transposed and made to work within one jurisdiction in particular: the UK.

From corporate campaigning to campaigning for corporate accountability

Friends of the Earth's first campaign action in the UK, shortly after it was established in 1971, was a mass 'bottle-drop' outside the London offices of Schweppes in protest against their plans to start selling drinks in non-returnable plastic bottles.

Over the years, Friends of the Earth and other non-governmental organisations (NGOs) have fought countless campaigns against companies over specific issues. They have forced companies to abandon plans to build roads, ports, mines, dams and pipelines in protected areas both here and abroad; bullied some high street banks into begrudgingly developing some limited expertise in environmental matters after it was exposed how investors had been unwittingly financing rainforest clearance, human rights abuses and polluting industries; and cajoled certain oil and gas companies to withdraw from lobby groups set up specifically to stop governments from taking action on climate change.

Their consumer campaigns have persuaded hundreds of thousands of shoppers to buy recycled paper, peat-free compost, fair trade and organic coffee, tea, chocolate and bananas, genetically-modified (GM)-free food, timber that has been certified as sustainable by the Forest Stewardship Council (FSC), and more.

With other campaign groups, Friends of the Earth have been able to expose some of the worst examples of corporate behaviour and indicate what kind of behaviour might be better. Green consumerism has shown that it is possible to make and sell products in an ethical way.

The Confederation of British Industry (CBI) recently said (emphasis added):

Commercial opportunities have arisen for businesses to meet customer expectation of higher environmental standards, either as a core part of their brand or through *discrete* parts of their product range. *For some*, the beneficial effects on image and reputation of being environmentally pro-active is also an important driver of behaviour. (CBI, 2004: 8)

The argument put forward by the CBI, among others, is that the corporate sector's response to social and environmental campaigns (ethical consumerism and CSR) has been so successful that a more regulatory approach is not necessary; the solution to social and environmental problems is the free market. Some, including UK government ministers, are clearly so content with this neo-liberal *modus operandi* that they have thanked NGOs for driving these developments by acting as the 'whistleblowers and enforcers'¹ and urged Friends of the Earth to continue with their fine work.

While some may seek to perpetuate the view that ethical consumerism and CSR are somehow going to deliver in an adequate manner, there are very few campaigning organisations that share this perspective.

A proper assessment of the social and environmental challenges facing us in the twenty-first century, an examination of the limits of ethical consumerism, the limits and failings of CSR and the scale and nature of corporate power suggests that a new way forward is required.

The challenge

The social and environmental challenges facing the world in the twenty-first century are unprecedented in human history.

Global biodiversity is being lost at a rate many times higher than that of natural extinction. Although insufficient information is available to determine precisely how many species have become extinct in the past three decades, about 24 per cent (1130) of mammals and 12 per cent (1183) of bird species are currently regarded as globally threatened. The net loss in global forest area during the 1990s was about 94 million hectares (equivalent to 2.4 per cent of total forests). Deforestation of tropical forests is almost one per cent annually. About one-third of the world's population live in countries suffering from moderate-to-high water stress – where water consumption is more than 10 per cent of renewable freshwater resources. Some 80 countries, constituting 40 per cent of the world's population, suffered from serious water shortages by the mid-1990s (UNEP, 2002a).

Meanwhile, social and economic development is proceeding too slowly. For many countries the 1990s was a decade of despair. Some 54 countries are poorer now than in 1990. In 21, a larger proportion of people are going hungry. In 14, more children are dying before age five. In 12, primary school enrolments are shrinking. In 34, life expectancy has fallen. The income of the richest one per cent of the world's population, about 60 million people, is equal to the income of the poorest 57 per cent, some 3.4 billion people. Twenty per cent of the world's people, 1.2 billion of them, exist on less than one US dollar a day (UNDP, 2003).

Poverty, particularly within societies, can often be linked to human rights abuses and injustice, with communities losing rights to access natural resources such as land, water and forests, which they may have relied on for generations, as corporations and national governments see the potential to exploit and 'develop' these resources. Information about such 'development' projects is often inadequate or non-existent and those people affected are all too often excluded from the relevant decision-making processes. Evidence from parts of the developing world show that where governments and corporations take control of such resources, individuals and even whole communities can face eviction, loss of livelihood and even violence and intimidation. All too often the natural environment also pays a price (FOEI, 2002a, 2004).

The environment and the world's poor are also at risk from the impacts of climate change, which looks set to exacerbate the problems of uneven development and environmental injustice. Globally, average temperatures have increased by 0.6°C since 1860 and the Intergovernmental Panel on Climate Change (IPCC) projects that global temperatures could rise by between 1.4 and 5.8°C by the end of this century (IPCC, 2001).

The impacts of these changes in temperature are likely to be felt most

harshly in developing countries. In Africa, increases in droughts, floods and other extreme weather events will add to the current stress on water resources, food production and human health. In Asia, tens of millions of people will be displaced from their land as sea levels rise. Forest fires, flooding and droughts are likely to become more frequent. The consequences could be particularly devastating for the poorest countries – which are least able to take measures to adapt to the changing climate (Simms et al., 2004).

The challenges are immense and demand urgent action from world leaders. But in today's global economy, it is not just the politicians that hold the power. The role played by corporations in shaping our world, makes it clear that any solutions must also include the corporate world. Of the 100 largest economic entities in the world, 51 are now corporations and 49 are countries. The top 500 corporations now control almost two-thirds of world trade (Anderson and Cavanagh, 2000). One-third of world trade occurs within transnational corporations (TNCs) (Simms et al., 2000).

It could be argued that corporate globalisation has led to a situation where companies face little choice but to put profits above such considerations as environmental protection. The 'need' for companies to remain 'competitive' in the global economy is regularly cited in support of the deregulatory agenda.

Take for example the energy sector, the driving force within the modern global economy. At a time when the majority of scientists are agreed on the urgent need to tackle the level of emissions from fossil fuels which contribute to climate change, oil and gas companies are putting unprecedented levels of investment into finding yet more fossil fuels to extract from the ground – while investing a tiny proportion of their profits in the development of cleaner energy supplies (Simms et al., 2004).

Take the food industry, for example, where commodities such as coffee, sugar, cocoa and palm oil are transported around the world to satisfy our endless appetites for cheap food, regardless of the impacts on the communities where these products are grown. In Indonesia and Papua New Guinea, rain-forest is being felled to make room for palm oil plantations – so that this cheap vegetable oil can find its way into one in three products on our supermarket shelves (Friends of the Earth, 2004).

Take the growing market for cheap flights and holidays: regardless of the impact of the increasing number of flights on our climate, the impact of aircraft noise on individuals, or the impact of tourism on the communities around the world whose villages are displaced to make way for hotel chains and restaurants, in exchange for jobs serving, feeding and cleaning up after their visitors.

Many argue that the corporate sector is part of the solution by generating the wealth that will eventually 'trickle down' to poorer communities and so provide higher social and environmental standards in the 'global south'. But

the evidence suggests that billions of people are still waiting for this ‘trickle down’ while seeing their human rights, communities, livelihoods and local environments impinged upon while, across an incredibly diverse range of sectors, companies make money to satisfy unsustainable consumption in the ‘global north’.

Sustainable development, and social and environmental justice will not be realised unless the corporate sector is part of the solution. The question is, how can our leaders ensure that it is in the interest of the world’s most powerful companies to contribute to that solution? Will companies embrace the need for sustainable development voluntarily, do they need financial incentives, or do we need to see fundamental changes to legal frameworks and power dynamics in which corporations operate before real change will occur?

Ethical consumerism

One suggested way forward is through the development of an ethical business sector, offering consumers the chance to choose between products that are produced in an environmentally and socially responsible way, and those that are not. There is a market-based logic to such a solution. If consumers want to buy ethical products, then companies will respond to their demand and so the environmental impacts of corporations, and of consumption, will be reduced.

Such a market-based solution has indeed developed over recent years. The international fair-trade mark, *Fairtrade* has become part of mainstream culture, with *Fairtrade* products available alongside the ‘unfair’ varieties in most major supermarkets in the UK. Similarly organic food – less damaging to the environment because it relies on far fewer chemicals – is labelled as such and is widely available, albeit often at a higher price. Shoppers who want to buy responsibly have the option to do so – at least when it comes to buying certain products. And a growing number seem to be opting for the ethical choice. The Co-operative Bank’s *Ethical Consumerism Report* (2003) estimated the value of ethical consumption at £19.9 billion – an increase of 44 per cent in the period from 1999 to 2002. This sounds impressive, until it is considered that, overall, ethical goods and services account for just 1–2 per cent of the total market share.

Indeed, the limits to green consumerism should be obvious. Greener products are often more expensive and often represent a niche market compared to those products that are merely produced as cheaply as possible. A more fundamental limit is that even the most ardent, the most caring, the most affluent green consumer, will never possess enough knowledge to buy ethically all the time. *Fairtrade* marks, certification schemes and clear labels exist for some products, but they account for only a small proportion of the range of goods that the average consumer buys.

The average supermarket contains tens of thousands of product lines.

Social and environmental issues are ever more complex and dynamic. How can we possibly expect consumers to keep abreast of all the latest developments and then have the time to work out for themselves what this means for their shopping basket – in a world where people are increasingly time poor? How is an ethical consumer supposed to boycott a company – such as a mining company – which may be involved in the supply chain of thousands of products but their brand is on none? What if there is no ethical version of the product I need to buy?

Even where ‘green labelling schemes’ do exist, they have limitations. Although the UK government has noted that ‘[b]y making sure manufacturers and retailers provide useful and honest information about their products, consumers will be able to make an informed choice when buying green’ (DTI, 2004: 19), NGO experience of labelling schemes is mixed.

In 1993, Friends of the Earth, Greenpeace, the World Wide Fund for Nature, some retailers and forest companies came together to form the Forest Stewardship Council, which aimed to provide a credible guarantee to consumers that wood products came from well-managed forests. The FSC has surely benefited from more coordinated promotion than any other eco-labelling scheme. The NGOs have promoted it to their members, retailers have promoted it via point-of-sale advertising, it has enjoyed celebrity endorsements (most notably from James Bond actor Pierce Brosnan) and been the subject of mainstream advertising campaigns. Greenpeace has used high-visibility direct action events to expose prestigious restoration projects that failed to use FSC timber (such as at the Cabinet Office in London). In many respects, the FSC has set a standard for other eco-labelling schemes to follow.

And yet, ten years on, the vast majority of western consumers continue to buy timber without considering where it has come from. One of the FSC’s greatest successes has been in the Netherlands, where unprompted recognition of the FSC label rose to 33 per cent among consumers in 2004 following the third annual awareness-raising campaign which involved some 30 companies, including major ‘do-it-yourself’ (DIY) retailers, timber importers, and several NGOs (FSC, 2004). In other words, two-thirds of Dutch consumers did not recognise the logo. The FSC has not been helped by the less scrupulous parts of the timber industry setting up rival certification schemes with lower standards that many suspect were established specifically to undermine the FSC.

More recently, the Marine Stewardship Council, a similar certification scheme for sustainably sourced fish, has struggled to gain any significant recognition from consumers (Gribben, 2003).

The point here is not to criticise the efforts of those involved in the FSC or other eco-labelling schemes. They have provided ethical consumers with a clear choice and have shown that ethical trading is technically possible. Indeed, there certainly appears to be a role for schemes that satisfy those

consumers who demand higher standards than those required by legislation. But surely eco-labels cannot be developed and promoted for every one of the 30,000 product lines in the average supermarket? And even if one could, is a shopper's choice between the ethical and non-ethical brand really the way to protect the planet?

The experience of the FSC tells us that eco-labels are not the answer to the world's drastic social and environmental problems. In the case of timber, there will always be a large number of companies that are happy to sell unsustainably sourced timber products and a large number of consumers that are prepared to buy them. And yet, the problems that result from global forest loss affect us all. The real injustice is that the communities who suffer the most have almost certainly never been inside a western DIY store or furniture shop.

Ethical consumerism has a role to play, but those who rely on it as the primary driver of change do so because they would be content for social and environmental concerns to remain peripheral to mainstream business concerns.

CSR and voluntary initiatives

Another possible way forward, embraced by many within the corporate sector, is the adoption of corporate social responsibility. This involves companies voluntarily choosing to improve their social and environmental standards and so reduce their negative impacts on the environment. After all,

[The UK government sees] CSR as *the* business contribution to sustainable development. There are many definitions but we are all talking about how business takes account of its economic, social and environmental impacts in the way it operates – maximising the benefits and minimising the downsides. (Timms, 2004, p. 3, emphasis added)

The argument has been made, time and again, that there is a strong business case for CSR that goes beyond image and public relations. Weiser and Zadek (2000) have observed that proactive programmes to improve a company's social and environmental performance can improve sales and marketing; employee recruitment, retention and motivation; operational regularity; product service, progress or brand innovation; and risk and reputation management.

Business leaders give an impression that the whole corporate sector is fully engaged in CSR. Digby Jones, Director General of the Confederation of British Industry has commented that 'business today understands fully that its responsibilities extend beyond maximising profitability to include addressing the needs of its wider stakeholders' (Jones, 2001, p. 7).

Political leaders trumpet the 'huge uptake' in CSR. Nigel Griffiths MP, the UK's minister for CSR, has recently noted that '2000 international companies

regularly report on their environmental and social impacts' (Griffiths, 2004). Kofi Annan, UN Secretary-General, has boasted how nearly 1500 firms, from 70 countries are participating in the Global Compact, a UN voluntary initiative (Annan, 2004). The initiative is based on ten principles in the areas of human rights, core labour standards, environmental protection and anti-corruption but it promises not to 'police, enforce or measure the behaviour or actions of companies', relying instead on companies 'enlightened self-interest'.

But there are not just 2000 companies in the world, but an estimated 61,000 TNCs and over 900,000 foreign affiliates (UNCTAD, 2004) implying that only 3.2 per cent are reporting on their social and environmental impacts and only 2.5 per cent have signed up to the Global Compact. Leaving aside questions about the poor standard of most CSR reports and the serious concerns that many NGOs have with the Global Compact (for example, see Bruno and Karlinger, 2002), these figures still beg the question: in what realm of life other than the strange world of CSR would a 2–3 per cent take-up rate be considered to be a success? The truth could not be much starker: the vast majority of the corporate world is failing to volunteer to be part of the voluntary approach.

This quantitative assessment is supported by the more rigorous qualitative assessment undertaken by UNEP, published in May 2002, which reviewed the performance of 22 industry sectors on sustainability issues since the 1992 Rio Earth Summit. UNEP concluded that:

There is a growing gap between the efforts of business and industry to reduce their impact on the environment and the worsening state of the planet . . . due to the fact that in most industry sectors, only a small number of companies are actively striving for sustainability, that is, actively integrating social and environmental factors into business decisions . . . the majority of companies are still doing business as usual. (UNEP, 2002b)

Those companies that are engaged in CSR are primarily those that have previously been on the receiving end of boycotts, campaigns by civil society groups, media exposés and/or are operating in particularly controversial industry sectors, such as BP, Shell, British American Tobacco, Rio Tinto and BAE Systems.

The argument is put that as long as NGOs continue in their 'enforcer' role, the uptake of CSR will continue. But, there will never be enough NGO capacity to police the corporate world and run effective, inspiring campaigns to counter every type of corporate wrongdoing. The public, let alone the media, will never have the time or appetite for that number of campaigns. And what about those countless companies that are not brand sensitive, either because they are too specialist, or because they sell their products and services to other

businesses, rather than to the public? What about those companies that see CSR as just another type of public relations?²

An alternative suggestion is that NGOs like Friends of the Earth should put less effort into confrontational campaigns and instead engage in constructive dialogue with corporations and participate in relevant multi-stakeholder voluntary initiatives. But to do this would require them to focus exclusively on a fraction of companies at the expense of monitoring the corporate sector as a whole.

Furthermore, many NGOs have become increasingly frustrated at the failure of many corporations to deliver on the promises that they make when joining voluntary initiatives. In 1995, for example, the British supermarket Tesco joined the WWF 95+ Group and in so doing promised to ensure its timber products were certified as sustainable by the FSC. In 2003, Friends of the Earth found Tesco selling garden furniture made from illegally felled tropical hardwood. The broken promise meant that the precious resources injected into the initiative by several NGOs were wasted.

Although voluntary initiatives are held up by politicians and business alike as the preferred method of CSR delivery, the evidence of their effectiveness is not good. In 2003, the Organisation for Economic Cooperation and Development (OECD) reviewed the performance of a range of voluntary initiatives across a range of industry sectors. Given the NGO, governmental and commercial resources that have been put into such initiatives, the report's conclusions were damning: 'there are only a few cases where [voluntary initiatives] have contributed to environmental improvements significantly different from what would have happened anyway' (OECD, 2003: 14).

As with ethical consumerism, CSR and voluntary initiatives have a role to play but it is a fallacy to believe that they will bring about the kind of widespread change in the corporate sector that is needed.

The rise of corporate power

But the real limits of ethical consumerism, CSR and voluntary initiatives go far beyond their practical inadequacies. Such initiatives fundamentally fail to challenge the spectre that is causing growing unease in several sections of society: the rise of corporate power. This rise has been the subject of a succession of best-selling books over the last decade, most notably Korten (1995), Klein (2000), Monbiot (2000) and Bakan (2004) – the last also related to a general-release film documentary about corporate power. Protests in Seattle in 1999 and later in Genoa were important for the fact that the world's mainstream corporate media – 40 per cent of the world's media is controlled by five TNCs (Simms et al., 2000) – gave them extensive coverage and branded them as 'anti-corporate' (Bendell, 2004).

Hornblow (2004) has noted how Hollywood is now tapping into this unease by making the corporation its new 'bad guy':

In films from Jonathan Demme's remake of *The Manchurian Candidate* to *I, Robot*, *The Bourne Supremacy*, *Spider-Man 2*, and even *Catwoman*, the movie industry's new villain is, to varying degrees, the corporation. . . . Whether narrative or documentary, the celluloid portrait of the corporation is uniformly unflattering. Corporations are depicted as outsized, profit-driven, unprincipled and potentially murderous, all of which makes Big Business the perfect Public Enemy No. 1. . . . Creating a list of films in which corporations are viewed in a more flattering light is nearly impossible. This points to two things: The first is that the corporation is easily demonized. But the second is more telling: The steady rise in the number of superheroes and Average Joes doing battle with Big Business on the big screen suggests the American population is angry with corporate malfeasance and executive skulduggery. . . . Hollywood has always functioned as a Dream Factory, and right now Americans seem to be dreaming that corporate hegemony can be brought to its knees.

Corporations have gained their power for two principle reasons that have evolved out of the process of 'incorporation' or the establishment of a separate legal identity. First, the corporate 'legal person' has gained some civil and legal rights, such as freedom of speech, which – in turn – has allowed them to influence political processes. Second, it can limit liability (that is, protect those who run it from some of the responsibilities of their actions). As noted by Bendell (2004, p. 8), '[t]hese two aspects of corporations mean that they could acquire significant power, which they could exercise with limited accountability'.

Part of the growing frustration among NGOs, activists and communities with ethical consumerism, CSR and voluntary initiatives is that they fail to challenge this power dynamic. No matter how much a sizeable minority of consumers may ask for more ethically sourced products, the majority of companies will only stop producing damaging products or start producing ethical products if it suits their business interests. No matter how much 'stakeholder dialogue' a corporation may undertake with a local community over their plans for a major construction project in their neighbourhood, the company is still driven by its business interests and that is what will determine the final decision. No matter how much effort NGOs and government may put into a voluntary initiative, there are no penalties if a company pulls out or blatantly disregards the commitments it has made. And it should be remembered that for the NGOs, the only reason for being involved in such a process is if it is going to make a real difference in the way a company behaves.

Even worse, rather than challenging corporate power, CSR has been used to reinforce it. Despite the questionable efficacy of voluntary initiatives and partnerships, these have been adopted by governments as a justification for inaction and by corporate lobby groups as 'proof' that regulatory frameworks are not needed.

Nowhere was this clearer than at the 2002 World Summit on Sustainable

Development (WSSD) in Johannesburg where over 200 agreements were announced as official 'Type 2' outcomes of the 'Earth Summit'. This was the first time that agreements between non-state actors had been endorsed at an intergovernmental conference and the development was used by some western countries and lobby groups such as Business Action for Sustainable Development and the International Chamber of Commerce as evidence that legally-binding measures on business need not be agreed. As Bendell has put it: '[a]s partnerships and voluntary corporate responsibility morphed from a methodology to an ideology, it became clear that some participants in and commentators on partnerships were using them to pursue a neo-liberal political agenda' (Bendell, 2004: 31).

But leaving the market to decide on social and environmental standards means that they will become a minority pursuit, leaving the majority of companies to ignore such standards and continue with business as normal.

For all the talk by politicians and business leaders about corporate responsibility and ways in which to promote it, there is a deafening silence when it comes to corporate irresponsibility. What happens to the companies who do not voluntarily chose to adopt responsible environmental and social standards? Few governments have yet put forward any means of addressing this.

The emergence of a corporate accountability movement

Bendell (2004) has provided a thorough analysis of the emergence of what he terms a 'corporate accountability movement'. He defines corporate accountability as 'the ability of those affected by a corporation to regulate the activities of that corporation' and the corporate accountability movement as 'those who work toward this outcome, knowingly or not, in specific circumstances or in general' (ibid.: 19).

The concept of corporate accountability raises questions about the desired relative role of corporations, governments and society. It highlights that society has provided corporations with a licence to operate and asks whether they should have to operate in the public interest if they are to maintain that licence.

From a corporate accountability perspective, ethical consumerism and voluntary CSR places a focus on the consumer and on the individual company (all too often located in the global north) and ignores the real issues of social and environmental justice for communities (often located in the global south).

Is it right for workers on banana plantations to suffer if, actually, the majority of western consumers decide that having a cheap banana is more important to them than have a fairly traded banana? Is it right for western governments to sit back and do nothing when indigenous communities get pushed off their land and rainforests cleared to produce cheap palm oil for British supermarkets? Is it right for social and environmental concerns to be ignored in circumstances where addressing them does not make short-term business sense? Is it

right for governments to surrender their responsibilities to govern, and rely instead on NGOs and the free market?

When our society decided that it was time to mainstream common standards on health and safety, employee or consumer protection, it was done through changes to the legal framework in which companies operate. Company directors were given new legal duties, and employees and consumers were given rights that would allow them to hold companies and directors to account if they failed to uphold those duties.

If we, as a society, are serious about sustainable development, social and environmental justice, the time has surely come to mainstream common standards on social and environmental performance. The way to do it is through equivalent changes to the legal framework that would allow people to hold corporations to account for social and environmental wrongdoing; in short, corporate accountability.

These changes are already being called for at international, EU and UK levels. These campaigns differ in one crucial respect from those that have preceded them. Whereas, in the past, the corporations were the target of the campaigners' strategies, the targets now are politicians and governments. This is because only politicians and governments can bring about the kind of legal changes required.

International frameworks for corporate accountability and liability

There has been a stream of proposals for mechanisms to deliver corporate accountability over the last five years, recently summarised by the United Nations Research Institute for Social Development (UNRISD, 2004):

The emerging corporate accountability agenda includes proposals to establish institutional mechanisms that hold corporations to account, rather than simply urging companies to improve standards or to report voluntarily. Corporate accountability initiatives promote complaints procedures, independent monitoring, compliance with national and international law and other agreed standards, mandatory reporting and redress for malpractice . . . The corporate accountability movement has put the spotlight on certain issues that have not figured prominently, if at all, in the mainstream CSR agenda but which are fundamental to the role of TNCs in governance and development: corporate power; perverse fiscal, financial and pricing practices; and corporate lobbying for macroeconomic policies that can have negative developmental impacts.

Some of these focus on specific sectors, such as the Framework Convention on Tobacco Control. Others focus on specific aspects of corporate accountability, such as the International Right to Know Campaign's call for disclosure and transparency. While sector-specific mechanisms will undoubtedly play a crucial role in delivering corporate accountability, there is a danger that they will be developed for only a handful of sectors.

In the run-up the 2002 WSSD (frequently referred to as the 'Johannesburg

Earth Summit'), Friends of the Earth International (FOEI) published proposals for a new international legally binding convention on corporate accountability and liability that sought to address problems common to the corporate sector as a whole (FOEI, 2002b). FOEI is the world's largest grassroots environmental organisation, with member groups in 71 countries around the world. The proposal, developed with the involvement of groups based in the global north, south, east and west, stipulates the following requirements for signatory governments:

- (i) *Duties*: Impose duties on publicly traded companies, their directors and board level officers to:
 - (a) report fully on their social and environmental impacts, on significant risks and on breaches of relevant standards (with such reports to be independently verified);
 - (b) ensure effective prior consultations with affected communities, including the preparation of environmental impact assessments (EIAs) for significant activities and full public access to all relevant documentation; and
 - (c) take the negative social and environmental impacts of their activities fully into account in their corporate decision-making.
- (ii) *Liability*: Extend legal liability to directors for corporate breaches of national social and environmental laws, and to directors and corporations of corporate breaches of international law or agreements.
- (iii) *Rights of redress*: Guarantee legal rights of redress for citizens and communities adversely affected by corporate activities, including:
 - (a) access for affected people anywhere in the world to pursue litigation where parent corporations claim a 'home', are domiciled, or listed;
 - (b) provision for legal challenge to company decisions by those with an interest;
 - (c) a legal aid mechanism to provide public funds to support such challenges.
- (iv) *Rights to resources*: Establish human and community rights of access to and control over the resources needed to enjoy a healthy and sustainable life, including rights:
 - (a) over common property resources and global commons such as forests, water, fisheries, genetic resources and minerals for indigenous peoples and local communities;
 - (b) to prior consultation and veto over corporate projects with a view to preventing displacement;
 - (c) to compensation or reparation for resources expropriated by or for corporations.

- (v) *Standards*: Establish (and enforce) high minimum social, environmental, labour and human rights standards for corporate activities based, for example, on existing international agreements and reflecting the desirability of special and differential treatment for developing countries.
- (vi) *Introduce sanctions*: Establish national legal provision for suitable sanctions for companies in breach of these new duties, rights and liabilities (wherever breaches occur) such as:
 - (a) suspending national stock exchange listing;
 - (b) withholding access for such companies to public subsidies, guarantees, loans or procurement contracts; and
 - (c) in extreme cases the withdrawal of limited liability status.
- (vii) *Extend the role of the International Criminal Court* to try directors and corporations for social, environmental and human rights crimes, perhaps involving a special tribunal for environmental abuses.
- (viii) *Improve international monopoly controls* over mergers and monopolistic behaviour by corporations.
- (ix) *Implementation mechanism*: Establish a continuing structure and process to monitor and review the implementation and effectiveness of the convention (FOEI 2002b).

FOEI did not expect the Johannesburg Summit to result in a clear agreement to develop an international convention, let alone agree on its content. While the position paper contained some detail on how such a proposal would work in practice, it was not a draft convention.

The purpose of the proposal was to provoke debate around the possible solutions to corporate wrongdoing, to promote a southern agenda around community rights, as opposed to a northern corporate agenda on voluntary codes of conduct, and to reverse the pendulum swing away from corporate voluntarism towards corporate accountability.

The call for corporate accountability became a rallying call for environmental, human rights, development and labour organisations in the run-up to Johannesburg. Governments took note and a clear commitment was made at the meeting to develop new frameworks and mechanisms. This was summarised in the Final Plan of Implementation document which noted that 'urgent action' was required 'at all levels' to:

Actively promote corporate responsibility and accountability, based on the Rio Principles, including through the full development and effective implementation of intergovernmental agreements and measures, international initiatives and public-private partnerships, and appropriate national regulations, and support continuous improvement in corporate practices in all countries. (WSSD, 2002)

Inevitably, different governments have differing opinions as to the meaning of this text. Governments from the G77 group of developing countries have consistently expressed their view that it calls for the development of new international frameworks. In contrast, the closing session of the Johannesburg Summit saw the United States declaring a formal 'reservation' with respect to the paragraph in which they noted their belief that it only referred to the development of 'existing agreements', even though the word 'existing' was specifically dropped from the draft text during the negotiations.

The realisation of an International Convention on Corporate Accountability and Liability is still some way off, but a long and slow process towards that eventuality may have begun. An international framework represents the ultimate solution for many in the corporate accountability movement and one that many campaign groups continue to work towards.

EU legislation for corporate accountability and liability

The European Union is the world's largest single market and home to many of the world's largest corporations. If economic union is the *raison d'être* for the EU, then surely this needs to be paralleled with the development of mechanisms that ensure that the economic benefits are also to the benefit of people and the environment, allowing stakeholders to hold EU-based corporations to account?

Over the last couple of years the Green 8 group of NGOs (the coalition of leading environmental groups engaged in the EU policy process³) participated in a two-year multi-stakeholder process on CSR, facilitated by the European Commission, which concluded in June 2004. At the end of this process, the Green 8 issued a dissenting statement noting that the bias in the final report towards voluntary CSR was the result of a process which had been dominated by business interests.

They called on the European Commission, the Council and the Parliament to work together to develop a regulatory framework that ensures:

- (i) Mandatory corporate transparency on environmental and social performance and impacts;
- (ii) Enforceable stakeholder rights to information, participation and accountability;
- (iii) Public procurement and investment rules that discriminate in favour of companies whose responsible performance can be independently verified;
- (iv) Clear standards and practices for the independent verification of corporate performance;
- (v) Tax reforms to internalise the environmental and social costs.

Such legislation could be introduced into EU legislation through an EU Corporate Accountability and Liability Directive.

UK legislation for corporate accountability and liability

International conventions and EU directives would have to be transposed into the domestic legislation of signatory/member states to come into force. To examine how such frameworks might work in a practical sense, it is necessary to explore in greater detail the technical and legal mechanisms that would facilitate their translation into national law.

In the UK, a coalition of NGOs, trade unions and think tanks known as the Corporate Responsibility Coalition (CORE)⁴ has been developing proposals on how company law could be changed to hold UK companies to account. These proposals can be grouped under three headings.

Mandatory reporting and access to information

Legal requirements on companies to report annually on their financial performance form the basis of company law in most jurisdictions. A similar requirement on UK companies to report annually on their social and environmental performance is needed to form the basis of UK legislation for corporate accountability.

CORE wants to see a new legal duty placed on companies (or their directors) requiring them to report annually on the *significant* (see Box 21.1) negative social and environmental impacts of their business operations, products, policies and procedures. There should be a requirement for these reports to be independently audited and for a range of key performance indicators (KPIs) to be developed to facilitate comparisons between companies and sectors.

New legal duties on company directors

UK company law relies on legal duties on directors to ensure certain aspects of their behaviour. The fiduciary duty was defined in the classic quotation of Lord Cranworth in *Aberdeen Railway Co v Vaikie Bros* (1854) 1 Macq 461:

The Directors are a body to whom is delegated the duty of managing the general affairs of the Company . . . Such agents have duties . . . of a fiduciary nature . . . And it is a rule of universal application, that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which may possibly conflict, with the interests of those whom he is bound to protect. (Quoted in Macintyre, 2005: 515)

There are considered to be two separate aspects of the fiduciary duty owed by directors: (i) the directors must exercise their powers *bona fide* for the benefit of the company as a whole and (ii) there must be no conflict between the directors' interests and the interests of the company.

Over time, the common law fiduciary duty has been added to and counterbalanced by a number of non-fiduciary duties defined in statute. For example, Section 309 of the Companies Act 1985 provides that directors should have regard to the interests of the company's employees as well as to the interests of the members (shareholders). Section 2(1) of the Health and Safety at Work Act 1974 states that it shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all their employees and sets out five matters to which the duty particularly extends (for example, providing information, instruction and training, and providing an overall safe working environment for employees). The law does not prescribe exactly how to do this and the duties are not absolute; the employer only has a duty to comply with them so far as it is reasonably practicable. If it is practicable, however, and he or she fails to carry it out then they will be liable (Macintyre, 2005).

The fiduciary duty should be counterbalanced with new statutory duties requiring directors to take *reasonable* steps to reduce the *significant* (see Box 21.1) negative social and environmental impacts of their business operations, products, policies and procedures, which have been identified through the mandatory reporting requirements. This new duty could be referred to as a 'duty of care' to people and the environment.

New provisions for liability, including foreign direct liability

Individuals or communities who suffer significant negative impacts because of the failure of UK companies (and directors) to have proper regard to these new duties, should be given the legal right to seek redress in a UK court, with legal aid. This would include negative impacts such as human rights and environmental abuses resulting directly from the operations, policies, products and procurement practices of UK companies or their overseas subsidiaries.

Under the approach adopted, it would be left for an aggrieved party or a prosecuting body to make a case in court that a company had failed to report on the 'significant' negative impact of its business policies, products, operations and procedures, or had failed to take 'reasonable' steps to reduce their negative impacts. The claimant would most likely point to evidence such as: more progressive behaviour being practised by a company's competitors; established and effective voluntary initiatives that the company had failed to participate in; expert witnesses; widely distributed research and materials meaning the company should have been aware of a particular issue and impact; correspondence between interested, expert or affected parties; and so on.

The legal issues around foreign direct liability are complex and outside the scope of this chapter, but a fuller description has been offered by Ward (2002, 2003). It is worth noting that a major review by the Royal Institute of

International Affairs of options for action by governments on how to follow up the WSSD commitments on CSR recommended that 'enabling communities to get redress when business flout norms' should be an area of priority (Calder, 2005, p. 10).

BOX 21.1 SO WHAT IS 'REASONABLE' AND WHAT IS 'SIGNIFICANT'?

Corporate accountability legislation in the UK would be able to utilise the flexibility that is inherent in the British system of common law whereby it can be left to courts to interpret, on a case-by-case basis, the meaning of legislative words such as 'significant' and 'reasonable'.

It is an approach that is used effectively in a number of torts, such as the tort of negligence. The duty which an occupier owes to his lawful visitors, for example, is defined by the Occupiers' Liability Act 1957, 2(2) as 'a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purpose for which he is invited or permitted by the occupier to be there'.

In deciding whether or not an occupier's duty has been breached, a court will consider all the circumstances of the case and will assess the reasonableness or otherwise of a defendant's conduct by assessing how 'the man in the street', 'the man of ordinary prudence' and, most famously, 'the man on the Clapham omnibus' would have behaved in the same circumstances and how these mythical bodies would have defined words such as 'safe' or 'significant'.

Negligence is then defined as 'the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do' (Alderson B in *Blyth v Birmingham Waterworks Co* 1856).

Legislation to deliver corporate accountability could take a similar approach whereby the concept of the 'reasonable man' would be used to define what social and environmental impacts were 'significant' enough to be subject to reporting requirements and what remedial steps would be considered 'reasonable' enough that a company would be expected to undertake them when having regard to their new duty of care to society and the environment.

Why not define more precisely?

An alternative approach would be to try and codify (perhaps through lists or legal guidance) precisely what social and environmental impacts the legislation pertains to and exactly what remedial steps a company would be expected to take. Such an approach is rightly adopted for environmental regulations pertaining to very specific areas of commercial performance (for example, emissions of dangerous chemicals, where regulations may specify the exact parts per million limit that is considered reasonable).

Such an approach would be inappropriate for broad framework legislation designed to improve the social and environmental performance of the corporate sector as a whole because:

- It would not be possible to foresee and list every possible form of negative social and environmental impact that could possibly be carried out by any company at any time (now and in the future), let alone then specify the precise nature of the remedial action necessary;
- It is reasonable to expect that a particular 'impact' may vary in its significance according to commercial sector, company size, geographical location and so on;
- It would be over-prescriptive and might place a bureaucratic burden on business, one that would also create a 'tick-a-box' culture of compliance rather than one of innovation and striving for constant improvement;
- It would miss the point of broad corporate accountability legislation, which is not to 'catch' well performing companies for making small errors when trying to improve their social and environmental performance – or even those merely acting 'reasonably' – but rather to 'catch' those companies that are failing to take even the most basic steps to reduce their negative social and environmental impacts.

Of course, there will always be a role for regulations that prescribe specific levels of performance for particular sectors. It would also be appropriate for legislative guidance to set common approaches for mandatory social and environmental reporting (for example determining certain KPIs).

But the foundation for corporate accountability legislation must be as broad as possible if it is really going to change the behaviour of the corporate sector as a whole. Broad duties requiring *reasonable* actions would represent such a broad foundation.

What difference would this make?

Business lobby groups argue that regulating CSR would create a culture of compliance rather than innovation and tie business up in red tape. But logically, this seems to represent the standard knee-jerk reaction of big business to anything resembling regulation.

The reality is that corporate accountability is not about ‘red tape’; it is about fundamentally changing the legal framework in which companies operate to enable the people affected by their operations to ensure they are operating in the interests of people and the environment. It does not prescribe exactly how a company should go about improving its social and environmental performance, merely that it should. Corporate accountability would also provide a means of redress for affected communities in the most extreme cases where companies fail to consider and mitigate their negative impacts.

In the vast majority of circumstances, the way in which a company would show that it has ‘had regard’ to the circumstances is through genuine CSR programme (including stakeholder dialogue), joining the relevant voluntary initiatives (and taking them seriously) and having regard to agreed and well-established norms of corporate behaviour.

In some circumstances, governments may consider it appropriate to specify, through guidance, what these norms are or what voluntary initiatives would help companies to meet them. In 2002, the Johannesburg Stock Exchange, for example, became the first stock exchange in the world to require publicly listed companies to report to the standards set by the Voluntary Global Reporting Initiative.

In other circumstances, it might be that a court would conclude that it was reasonable to expect that a company should have had regard to well-established and defined norms, such as the OECD Guidelines, or the UN Human Rights Norms for business (see further, Amnesty International, 2004).

Either way, this interaction between legal expectations and codes of conduct would provide a much-needed ‘statutory foundation’ and degree of enforcement to voluntary initiatives – without losing the benefits associated with the voluntary approach (that is, being able to evolve and amend codes without recourse to government).

Over time, it could be expected that common and ‘reasonable’ standards of corporate behaviour would go through a continual cycle of improvement bringing benefits to all stakeholders and allowing best-of-sector companies to define future norms of behaviour.

Conclusion

Calls for mechanisms to deliver corporate accountability will continue to grow as the evidence mounts that voluntary CSR is failing to deliver the changes

that are needed to deliver sustainable development as well as social and environmental justice.

The corporate accountability movement does not claim to have all the answers, but it has come a long way in a short time. Over the next few years, the debate and the campaigns will intensify. It is time for political parties, politicians and governments to join this debate and help develop the policies and mechanisms that will make corporations fit for the twenty-first century.

What is clear is that we urgently need to shift our priorities in recognition of the social and environmental damage that is being done. Despite years of civilisation, as we move into the twenty-first century, our world is divided and damaged, our future uncertain. It is time that corporations recognised that they should be the servants of society, rather than the masters, and to join the calls for corporate accountability. As such, they might start to become part of the solution rather than the problem.

Notes

1. Stephen Timms, the-then UK Government Minister for Corporate Social Responsibility, in a speech to a World Wide Fund for Nature 'fringe' meeting during the 2002 Labour Party Conference.
2. A recent job advert for a CSR post at Virgin Group specified that knowledge and experience of marketing and public relations was 'essential'. In contrast, knowledge of social and environmental issues was not even mentioned (advertisement issued March 2004).
3. The Green 8 consists of: Birdlife International, Climate Action Network Europe, European Environment Bureau, Friends of the Earth Europe, Friends of Nature, Greenpeace European Unit, Transport and Environment, and WWF European Policy Office.
4. CORE is a broad grouping of over 100 UK-based environment, human rights and development organisations, think-tanks and trade unions including Action Aid, Amicus, Amnesty International (UK), CAFOD, Christian Aid, Friends of the Earth, Save the Children, New Economics Foundation (NEF), T&G Union, Traidcraft, Unison and Unity Trust Bank.

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22 International aspects of corporate liability and corruption

Gemma Aiolfi and Mark Pieth

Introduction

In September 2003 the shares of Statoil, the Norwegian oil company, took a beating: over a three-week period the value of the shares fell by 11 per cent, whereas the crude oil price had declined by only 2 per cent in the same time span. The cause of this unexpected price drop was the revelation that the company was possibly implicated in bribery in its international business dealings. The news reports allege that Statoil had signed a contract for advisory services with an Iranian intermediary, named M.H. Rafsanjani, the son of the former Iranian president. The contract provided for a \$15 million fee to be paid over an 11-year period. The Norwegian financial crime police announced that a payment of \$5.2 million of Statoil money had wound up in an account in the Turks and Caicos Islands belonging to a consulting company registered in the UK (Horton Investment) and which appears to have been used in the transaction. The services that the Iranian consultant was supposed to render included supplying information on social developments in Iran, but the whistle was blown by internal audit staff at Statoil, with the resulting furor in the world press. Within two weeks the chief executive officer of Statoil, the chairman, and the head of exploration, all resigned from their posts. It would appear that once this had happened, the share price began to recover, although it took until mid-December 2003 for the price to regain its September level. During that same period oil prices had gained 11.6 per cent.¹ At the time of writing in November 2004, the Norwegian and US stockmarket authorities (Securities and Exchange Commission) are still investigating, and no charges against the company or any of its personnel have been brought.

The Statoil story serves to illustrate some of the issues associated with corporate liability and corruption. Perhaps most striking were the immediate financial repercussions felt by the company: the share price slid until the resignations took effect, indicating that a company's reputation really is its most valuable and fragile asset. The facts also illustrate the importance of protection for whistleblowers and the dilemmas faced by staff as to who to turn to when confronted with a serious problem (the question of whistleblower protection is an important and relevant aspect of this subject but will not be

addressed here). The question also arises what might constitute suitable sanctions for a company found liable for bribe payments. We shall return to the issue of sanctions and their corollary of preventive measures later on.

Although Statoil has not been indicted, the facts do provide a useful example that highlights where ‘corporate liability’ might attach in connection with acts of bribery. First, with respect to the consulting company mentioned above – a small company in a major financial centre with an account located offshore to facilitate the collection of funds for later disbursement. The risk of corporate vehicles, such as international business corporations, foundations, and trusts and so on, being misused for illegal purposes is well known (OECD, 2001). Second, corporate liability might attach to the intermediaries executing the transactions involved in paying the bribes, such as banks or other financial intermediaries which may act as conduits, enabling illicit funds to flow.² In the Statoil case, investigations are also being conducted by Swiss authorities into the role played by certain banks, according to media reports.³ Under some circumstances, these financial intermediaries may be accused of complicity in these transactions, rendering them liable to charges of money laundering.⁴ Third, companies engaged in international trade which may engage in illicit payments to foreign public officials in order to obtain or retain business. This last group is the subject matter of this chapter. The following questions will be addressed are. When may a legal entity be held liable for bribery of a foreign public official when the offence is committed by its officers or employees? What sanctions should be imposed and what preventive measures might be appropriate for multinational enterprises competing for business globally? Before considering these issues, the legal and historical context of the development of international anti-corruption law will be briefly outlined, followed by an overview of the main relevant international instruments.

From Watergate to the world

All of the industrialised countries and many in the developing world passed laws in the nineteenth and early twentieth centuries that made the bribery of public officials illegal. For example, England enacted the Corrupt Practices Act in 1883 and the Public Bodies Corrupt Act in 1889, and current laws date back to 1906. Countries like Canada, Denmark, France (as early as 1810), Germany, Italy, the Netherlands, Spain and Switzerland similarly adopted provisions in their criminal codes to address this issue. The USA passed the Federal Practices Act in 1910 (repealed in 1972 and replaced by the Federal Election Campaign Act). All these laws were restricted to the bribery of domestic (that is national) officials (Timothy Martin, 1999). It was not until the Watergate scandal in the 1970s revealed the widespread practice of US companies paying bribes when engaging in contracts abroad that the extra-territorial leap was made by the USA. The payment of bribes to foreign public

officials by natural and legal persons was subsequently criminalised. The Foreign Corrupt Practices Act⁵ was later to become the catalyst for change at the international level, although not before early attempts to address the question at the UN failed (Brademas and Heimann, 1999). The motivation for American companies to push for an international approach was the recognition that they were at a competitive disadvantage compared to their foreign competitors, who not only could pay with impunity but could also invariably deduct these payments for tax purposes (Hines, 1995; US Department of Commerce, 1995).

Renewed efforts for a multilateral approach were made by the USA in 1993 under the Clinton administration. The conclusion of the Cold War prompted the USA to focus its attention on global economics, and the problem of the so-called 'supply side' of bribery by corporate entities was given high priority. The organisation chosen to pursue this multilateral approach was the Organisation for Economic Cooperation and Development (OECD), which had been working on the topic since 1989. Other organisations had also been tackling this problem for quite some time. The Rules of Conduct on Extortion and Bribery in International Business Transaction of the International Chamber of Commerce (ICC) were first published in 1977 and updated in 1996. These rules prohibit extortion and bribery as such, and are not just confined to bribery to obtain or retain business (the scope of the OECD Convention).⁶ The anti-corruption non-governmental organisation (NGO) Transparency International, founded in 1993, has attained a high profile and developed a worldwide network of chapters. It seeks to prevent and eradicate corruption through dialogue and partnerships with business and governments.⁷ International financial institutions such as the World Bank also began to take up the issue by acknowledging that corruption was not solely a political problem but also an economic one that had to be tackled through a multi-pronged approach (World Bank, 1997). It introduced a policy that permits investigating complaints of corruption and where sufficient grounds exist, companies and governments risk being blacklisted. Evidence of corruption could mean that the World Bank would cancel financing and/or prevent a company from taking part in contracts financed by the bank.⁸ The confluence of these political and civil society developments indicate the extent to which the climate had changed, and provide the backdrop for what had been brewing at the OECD since 1989.

The OECD deliberations resulted in a recommendation in May 1994, a 'soft law' document that outlined the issues for the future.⁹ The next few years saw the participants address the issues in more detail and the outcome was a further 'soft law' instrument with more prescriptive language. This revised recommendation of May 1997 provided for monitoring the implementation of the recommendation by member states. It was soon followed by the

Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (hereafter the OECD Convention).¹⁰ As at June 2004, 35 countries had signed and ratified the convention, almost all had undergone a first phase of monitoring their implementing legislation, and 13 have been submitted to the second phase to assess the efficacy of their legislation in practice. The rapidity with which the OECD Convention was ratified and implemented is unprecedented in international law.

The EU and the Council of Europe have developed regional instruments which include provisions for dealing with the question of corporate legal liability for corrupt practices. The UN Convention Against Corruption, signed in December 2003 and entering into force after ratification by 30 states, also includes an article on the liability of legal persons.¹¹

An overview of the provisions of the international instruments

The aforementioned regional and international instruments establish the liability of legal persons engaging in corrupt practices. This liability may be criminal, administrative and/or civil in nature. The European instruments are relatively more detailed on the standard of liability and also identify the range of entities covered. The relevant provisions are:

1. *OECD Convention*: Article 2 on the liability of legal persons and Article 3 concerning sanctions.
2. The *European Union Second Protocol* of 19 June 1997 is drawn up on the basis of article K.3(2)(c) of the Treaty on European Union on the Fight Against Corruption Involving Officials of the European Communities or Officials of member states of the European Union (26 July 1995) to the Convention on the Protection of European Communities' Financial Interests (26 May 1997). This convention does not itself provide for the liability of legal persons but provides for criminal liability for heads of businesses. The relevant provisions of the EU 2nd Protocol are Article 1 on the definition of legal persons, Article 3 on their liability and Article 4 on sanctions (*Official Journal* C 221, 19 July 1997).
3. The *Council of Europe Criminal Law Convention on Corruption* (hereinafter CoE Convention) of 27 June 1999: Article 1 concerns the definition of legal persons, Article 18 their liability and Article 19 on sanctions.
4. The *UN Convention Against Corruption*: Article 26 defines the liability of legal persons.

The definition of legal persons

The UN Convention, the main text of the OECD Convention and its commentaries¹² do not include a definition of 'legal persons'. The EU 2nd Protocol and

the CoE Convention provide for the same definition and put the onus upon domestic legislation to clarify the point: ‘“Legal person” shall mean any entity having such status under the applicable national law, except for States or other public bodies in the exercise of State authority and for public international organizations’.

Private entities Parties to the OECD Convention¹³ as well as EU countries include private incorporated companies as legal persons liable for bribery.

Public entities The exclusion of public entities in the EU and CoE instruments is clarified in the latter’s explanatory report.¹⁴ ‘State or other public bodies exercising State authority, such as ministries or local government bodies as well as public international organizations such as the Council of Europe’ are expressly excluded from the scope of the definition of legal persons potentially liable for bribery. Furthermore, ‘the exception refers to the different levels of government: State, Regional or local entities exercising public powers’. This exemption is included in the legislation of most EU and other OECD countries (for example: Belgium, Greece, Italy, Mexico – which excludes all public authorities – and the USA. In France the liability is not applicable to the state but can be applied to local authorities).

The report states the rationale in the following terms:

The reason is that the responsibilities of public entities are subject to specific regulations or agreements/treaties, and in the case of public international organization, are usually embodied in administrative law. . . . A contracting State may, however, go further as to allow the imposition of criminal law or administrative law sanctions on public bodies as well.

In relation to the question of how to treat state-owned and state-controlled enterprises, the report states that the exclusion of public entities ‘is not aimed at excluding responsibility of public enterprises’. It does not, however, define a public enterprise.

Standard of liability

The OECD and UN Conventions are similar in their approaches. Article 26 of the UN Convention provides that:

1. Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in the offences established in accordance with this Convention.

Article 2 of the OECD Convention provides that:

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Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.

The European provisions develop a more comprehensive approach to the required standard, and there is no significant difference between Article 18 of the CoE Convention and Article 3 of the EU 2nd Protocol, which reads as follows:

1. Each member state shall take the necessary measures to ensure that legal persons can be held liable for fraud, active corruption and money laundering committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on
 - a power of representation of the legal person, or
 - an authority to take decisions on behalf of the legal person, or
 - an authority to exercise control within the legal person,as well as for involvement as accessories or instigators in such fraud, active corruption or money laundering or the attempted commission of such fraud.
2. Apart from the cases already provided for in paragraph 1, each Member State shall take the necessary measures to ensure that a legal person can be held liable where the lack of supervision or control by a person referred to in paragraph 1 has made the commission of a fraud or an act of active corruption or money laundering for the benefit of that legal person by a person under its authority.
3. Liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, instigators or accessories in the fraud, active corruption or money laundering.

The 'for the benefit of the legal person' criterion According to the EU and CoE provisions, and in contrast to the OECD Convention, there are certain criteria to be met in order for a legal person to be held liable for bribery offences. There are three interpretations of these criteria at the national level. The first refers to the objective of the act: committed for the benefit of, or on behalf of the legal person. The second criterion is either used cumulatively with the first, or alternatively, requires that the act be 'in connection/relative to the business' of the legal person. Third, in some jurisdictions the narrower criterion of the infringement of duties by the perpetrator is used. Each of these interpretations will be examined below.

1. *Of benefit to the legal person:* This is a common requirement in many jurisdictions (such as the USA, Iceland, Italy and Canada where the phrase has been interpreted to mean 'by design, or result partly for the benefit of'). German law states that the 'legal entity . . . has gained, or was supposed to have gained, a profit'. Other countries like Belgium, France, Norway and Poland use the term 'on behalf of', drawing on the language

of the CoE explanatory report. Under French law, criminal responsibility will be incurred if the acts have been committed on behalf of the company in the broadest sense, namely in the course of activities intended to advance the organisation, operation or objectives of the legal person, even where there is no resultant benefit or advantage. Greece, on the other hand, requires clear proof that the benefit is actually realised. Several States (Belgium, France, Italy, Norway and the USA) justify this causal link to differentiate the situation where the natural person is acting purely in his/her own interest or even against the interest of the legal person.

2. *In connection/relation to the business of the legal person* This requirement is found in some national laws either as an alternative (in Japan, Korea and the UK) or in addition (Canada, USA) to the benefit to the legal person mentioned above. In the UK, the criterion finds expression in case law that states that the offence be committed 'in connection with the business of the legal person and 'within the scope of the authority of the representative'. Mexico adds the requirement that the offence must have been committed in the name or on behalf of the legal entity using means provided by the entity itself.

The distinction between (1) and (2) above is not always clear. For example, Finnish law provides that the offence has to be committed 'in [the legal person's] operations', referring to the sphere in which the crime has to occur. This is further defined such that the 'offence shall be deemed to have been committed in the operation of a corporation if the offender has acted on behalf of, or for the benefit of the corporation': in other words, back to the aim of the offence.

3. *Infringement of duties* An additional criterion in some countries (Germany, Italy, Sweden) is the requirement of infringement of duties. German law states, as an alternative to acts committed on behalf of the legal person, that 'legal entities can be liable for fines, if a "person" has committed a crime or an administrative offence by means of which duties incumbent upon the legal entity or association have been violated'. Italy refers to 'duties connected with the functions of the responsible person'. Finally, Swedish law provides that the illegal act committed when carrying out business activities 'entailed gross disregard for the special obligations associated with the business activities or to be otherwise of a serious kind'.

The 'leading person' criterion The 'identification' doctrine underwent most of its development within the Anglo-Saxon tradition in a series of cases reported in 1944 (*D.P.P. v. Kent & Sussex Contractors, Ltd* (1944); *R. v I.C.R.*

Haulage Co Ltd (1944); *Moore v I. Bresler Ltd* (1944)). The process was first set in motion by a civil liability decision of the House of Lords in 1915 in *Lennard's Carrying Co. Ltd v Asiatic Petroleum Co.* (1915). The law in the UK up until the 1940s dealt with the criminal responsibility of corporations on the basis of vicarious liability. In contrast to strict liability offences (where the company was liable for the conduct of its employees without proof of any criminal state of mind) the courts began to extend vicarious liability to cover offences where some mental element was required. The culmination of the doctrine in *Tesco Supermarkets Ltd v Natrass* (1972) established that the principle of identification applied to all offences not based on vicarious liability. The House of Lords held that a corporation could be convicted of a non-regulatory offence requiring proof of *mens rea* if the natural person who had committed the *actus reus* of the offence could be identified with the company.

This criterion has been picked up in both civil and common law systems (for example, by France and Canada). The triggering of corporate liability requires that a relationship exist between the natural and the legal person. This can include the natural person him/herself or a person under his/her authority. Where the latter case arises, the acts of the subordinate must have been made possible by 'the lack of supervision or control by a person having a leading position'. Some national laws provide a standard of liability that is based on both the EU and CoE instruments and draws together the acts committed or condoned by management and personalised management failure, originally an approach of French law (for example, Australia, Finland, France, Germany, Greece, Italy and Poland). Canada and the UK confine themselves to the 'directing mind' definition, although the Canadian approach is relatively broader since it includes the board of directors, the superintendent, the manager, or anyone else to whom the board has delegated the governing executive authority of the corporation. Canada is reportedly also considering the case where these senior company officers were aware of or wilfully blind to criminal behaviour by their subordinates.¹⁵

Many countries accept that the misdeeds of any employee can trigger corporate liability. In some instances, agents or other parties are explicitly included (for example, Denmark, Iceland, Korea, Switzerland and the USA). Whereas the USA employs a strict liability approach such that participation, acquiescence, knowledge or authorisation by higher-level employees or officers is relevant to determining the sanction, other states such as Finland, Korea, Japan, Switzerland and Sweden require that a standard of objective corporate liability be met. In Japan and Korea, this has resulted in the burden of proof for the absence of negligence being put onto the corporation. Thus in Japan the principle is based on the premise that the company did not exercise due care in the supervision or selection of an officer or employee to prevent the criminal act.

The identification concepts within corporate liability have been criticised for being overly focused on the behaviour of senior officials (Fisse, 1983a; Wells, 2001). Given the complexity of corporate structures and different modes of organisation in today's multinational enterprises, the rather simplistic 'chain of command' model based on anatomical analogy is no longer a realistic metaphor. Decision-making may be more diffuse both geographically and/or functionally, making it more realistic to use an aggregation model that looks at combined and cumulative behaviour for the purposes of corporate criminal liability (Ferguson, 1998: 14).

The critique of the identification doctrine may be particularly apposite for acts of bribery by a company. The collective and cumulative behaviour of a range of employees may provide the corporate climate in which the payment of bribes may occur. Dispersing managerial responsibilities (such as authorising purchases and payments, opening bank accounts, advising on tax arrangements, selecting and employing intermediaries as well as using under-regulated financial centres to effect payments to third parties) may make it difficult to pin the blame on a single directing mind.¹⁶ For complex industries such as defence, it is not unusual to find that the buyer of the weapons system (usually a government) has insisted upon a wholly separate set of terms and conditions that are unrelated to the subject matter of the main contract. These so-called 'offset agreements' may require specialised brokers to facilitate the performance of these secondary agreements since their subject matter is outside the core business of the defence company. This scenario, with its reliance on external parties for a contract that is a *sine qua non* to the main sales agreement, creates a risk situation vulnerable to bribery. For example, a major European manufacturer of military equipment related to the authors how a (government) customer insisted upon an offset agreement involving the purchase of a large number of pork bellies. This agreement required the services of a specialised broker since it was a business area in which the company had neither knowledge nor interest, other than being a condition for an agreement being made alongside the main contract (the purchase of military equipment). In executing the offset agreement the defence company had only limited control over the specialised broker and the variety of third parties involved in this agreement. Although there were no indications of any wrongdoing by any of the parties in that particular instance, this type of agreement is neither uncommon nor unusual and may be open to misuse.

In contrast to the 'alter ego' concepts, some jurisdictions have moved towards an objective focus on the fault of the corporation itself. Under the 1995 Australian Criminal Code, a corporation can be held responsible for the acts of an agent, employee or officer, where, for crimes requiring a mental element, the 'fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the

offence'. Authorisation or permission can be fulfilled in three ways: (a) the traditional identification liability; (b) by extending the imputation to acts and omissions of 'high managerial agents'; or (c) a 'corporate culture . . . that directed, encouraged, tolerated or led to non-compliance with the relevant provisions'. Swiss law also provides a clear example of an objective approach in its law of 1 October 2003, which states that the crime has to be as a result of 'the lack of reasonable organisational measures'.¹⁷

The link between proceedings against natural and legal persons The UN Convention as well as the EU and CoE instruments address the link between legal proceedings against the natural person and the legal entity. The UN Convention under Article 26 provides that: 'Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences'. On this point the CoE is similar to the EU 2nd Protocol and states that:

3. Liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, instigators of, or accessories to, the criminal offence mentioned in paragraph 1.

Both the EU and CoE explanatory reports examine only one side of this equation (the consequences of the prosecution of the legal person on the prosecution of the natural person) but not vice versa. According to the EU explanatory report, measures taken against an entity for whose benefit a fraud has been committed by a manager, shall not exclude criminal prosecution of that manager. The CoE explanatory report provides that:

In a concrete case, different spheres of liability may be established at the same time, for example the responsibility of an organ etc. separately from the liability of the legal person as a whole. Individual liability may be combined with any of these categories of liability.

The OECD Convention is silent on this issue. However, if corporate liability is meant to be 'effective, proportionate and dissuasive' it would be hard to see how national laws could permit anything less than the UN or European instruments. In fact most of the OECD Convention members do not require the conviction of the natural person in order to prosecute or convict the legal person (Canada, Denmark, Finland, France, Greece, Germany, Iceland, Italy, Japan, Korea, the Netherlands, Sweden and the UK). The OECD has criticised two countries that require the conviction of an individual before proceedings against a corporation can commence.¹⁸ The conviction of a natural person is a requirement to establish the liability of a legal person in Mexico, and in Poland a final judgment against a natural person is a prerequisite to start proceedings against the legal person.

In several countries the culpability of the legal person does not preclude the individual responsibility of the natural person who intended to commit the bribery (Denmark, France (explicitly), and Greece, Japan and Mexico (implicitly)). Under Finnish law, the prosecution of the legal person may be waived if the offender is a member of the management of the legal person and has already been sentenced (subject to the size of the corporation and the share held by the offender). A similar provision exists in Norway where the proximity between the natural and legal person is such that it may not be necessary to fine the company.

Sanctions

The debate about whether civil or criminal liability is appropriate for corporate misdeeds has provoked large amounts of academic literature, particularly on the subject of the range, appropriateness and effectiveness of sanctions (Coffee, 1991). The controversy relates back to philosophical notions of the aims of criminal law, the nature of criminal punishment generally, the specific sanctions available for companies, and whether blurring the distinctions between offences in torts (civil law) and criminal law somehow diminishes either field of law. In the USA, corporations themselves have engaged in efforts to influence the development of laws that would hold them accountable.¹⁹

Criminal liability is but one means of regulating corporations. Civil law, self-regulation or a combination thereof offers a panoply of possible sanctions. Traditionally, a fine is the most common sentence imposed on companies, but probation, restitution, forfeiture, confiscation and dissolution are all sentencing options that are currently available in many jurisdictions. Civil sanctions may take the form of a declaration, injunction, community service order, compensation order or a pecuniary penalty. Administrative sanctions may include infringement notices, financial penalties, publicity orders, restricting rights and revoking licences. It is also conceivable for sanctions to involve some form of arbitration or conciliation process.

The advantage of criminal sanctions most often cited is that it expresses social condemnation of the behaviour in question. Such censure may result in the loss of corporate reputation which in turn causes financial damage which is arguably the most powerful sanction that can be imposed on a corporation (Fisse, 1983b). It is of course usually the case that criminal penalties are more severe than civil penalties and fines tend to be higher. The loss of reputation for the company, and the deprivation of liberty for corporate management means that criminal penalties are perceived as harsher.

Several commentators have identified the disadvantages of criminal sanctions for corporations: companies cannot be incarcerated and fines are 'water off a duck's back' with few consequences for management (Coffee, 1981).

The ‘deterrence trap’ means that the fine is limited by the wealth of the corporate offender: if a corporation is made bankrupt or is already so then fines are meaningless (ibid.: 407). Members of the OECD Convention who have employed this approach have been criticised. Poland, for example, makes sentencing dependent on the last year’s tax return, which immediately benefits poor earners and newcomers.²⁰ Denmark and Portugal have adopted the ‘day fine system’ which may be a more effective way of fining a company.

Moral condemnation cannot attach to an inanimate object like a company. The rehabilitative effect of criminal sanctions is also lost – sending management to prison may not necessarily contribute to changes in corporate structure to prevent future repetition of the illegal behaviour. Criminal sanctions which focus on punishment rather than cooperation promotes disharmony that deters self-regulation and puts enforcement agencies and businesses on an adversarial footing.

The EU instrument provision on sanctions is set out in Article 4 and in relation to legal entities states:

1. Each member state shall take the necessary measures to ensure that a legal person held liable pursuant to Article 3(1) is punishable by effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions such as:
 - (a) exclusion from entitlement to public benefits or aid;
 - (b) temporary or permanent disqualification from the practice of commercial activities;
 - (c) placing under judicial supervision;
 - (d) a judicial winding-up order.

The CoE instrument and the UN Convention do not identify the alternative sanctions listed above but in identical language mandate for ‘effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions’.

The OECD Convention has also adopted this phrase. However, Article 3(1) applicable to both natural and legal persons envisages criminal penalties whereas Article 3(2) allows for the possible substitution of non-criminal sanctions against corporations. Confiscation and seizure are foreseen for both legal and natural persons in Article 3(3). Finally, Article 3(4) considers the ‘imposition of additional civil or administrative sanctions’ for both natural and legal persons. The OECD Commentary refers to the list of EU sanctions listed above as examples of sanctions beyond fines.

Countries have taken a mix of approaches in applying these standards at the national level. France, Italy (in para-criminal form) and Portugal served as models for the European instruments²¹ and therefore have similar sanctions. Many others have followed suit with respect to exclusion from public procurement (the aforementioned countries as well as Austria, Belgium, Brazil,

France, Germany (partially), Hungary, Poland, Spain, Switzerland and the USA). Several countries have attempted to address the issue of restitution (for example, the Netherlands), although the USA has taken the position that fines act as a stronger deterrent than seizure and that the former should take precedence. Italy's law has a built-in incentive with the possibility of substantially reduced fines if credible rehabilitative efforts are made within the company.

The notion of rewarding conduct is an approach promulgated by the US Sentencing Guidelines. The guidelines envisage a three-stage process by which courts set fines for convicted corporate offenders. The basis of the fine reflects the gravity of the offence. Seriousness is assessed against the pecuniary gain to the offender; the pecuniary loss to the victim (and whether it was caused intentionally, knowingly or recklessly); and the intrinsic wrongfulness of the offence according to a statutory table. The court will then multiply the fine by a numerical factor that reflects culpability. This gives a recommended fine range from which the court will determine the amount due unless departure therefrom is justifiable. In calculating 'culpability' the court will have regard to factors that affect the position negatively and positively. The most important mitigating factor is establishing a generally effective compliance programme to prevent and detect violations and reporting possible offences to appropriate authorities before they learn of it from another source. Developing internal codes of compliance to address anti-corruption issues are gaining currency, and not only in the USA. Once this initial step has been taken, companies may develop the courage to address the issue more widely with their competitors.

Alternative measures

Corporations are an omnipresent feature of society, several wield more power than states (Jorgensen, 2000: 174), and the continuing technological revolution keeps them globally active. It is not unreasonable to 'impute to corporations social duties including the duty not to offend all relevant parts of the criminal law'.²² Notions of corporate responsibility continue to develop. The UN Global Compact,²³ originally conceived as a means for global businesses to address human rights, labour and environmental issues, has recently added a new tenth principle stating that 'business should work against corruption in all its forms, including extortion and bribery'. The UN noted the importance of 'developing sectoral initiatives' in its report on the consultation process. Certain industry groups have already embarked upon this course in recognition that this could be a useful way to 'level the playing field' when competing for international business.

Developing industry standards

The Engineering and Construction Industry Anti-Bribery Principles²⁴ were concluded under the auspices of the World Economic Forum with the Basel

Institute on Governance and Transparency International acting as joint facilitators. This is an example of what can be achieved by rival companies who want to take a proactive approach in tackling transnational bribery. The methodology used to develop these principles built upon that developed by 12 major private banks known as the Wolfsberg Group. Their Principles on Anti-Money Laundering²⁵ stand out as an example of what can be achieved by major players who are normally rivals in a highly competitive market. They were developed by the banks together with civil society over a relatively short period of time. Continually refined and added to, their website contains a range of statements and guidance documents that this group has agreed to implement on a global basis. Interestingly, the principles have been adopted by other banks that are not formally members of the Wolfsberg Group and used for compliance training purposes. Unlike the engineering and construction industry principles, the Wolfsberg Principles do not deal with the issues of bribery and corruption directly. The integrity standards developed by the International Federation of Consulting Engineers (FIDIC)²⁶ directed at reducing corruption in aid-funded public procurement from the private sector are a similarly dynamic set of principles that commit the industry to a standard of behaviour from which it is difficult to deviate.

Industry standards are gradually gaining ground with new efforts discernible in various sectors, such as oil and gas and its supply chain, power, mining and defence. All are either contemplating the idea of collaboration or in the process of discussing the consequences of revealing their innermost secrets regarding the issue of bribery in international business transactions. Developing a common solution to commercially sensitive issues such as agents' contracts might prevent the use of agents as a conduit for bribery. Their motivation is the changing international legal framework, the costs of competitive advantage obtained through corruption and the attendant risks to corporate reputation in the event of exposure. Self-regulation through industry standards will be increasingly deployed in a variety of industries in the future.

Methodology of industry standards

The obstacles to bringing together rival companies to address these issues are significant. The whole process is very delicate if subsisting bribery exists within the particular industry. It is essential that the composition of the group is of the right balance – this means major companies in the sector in question that have a significant world market share, are active internationally and for whom the importance of a level playing field and preserving reputations are of economic significance. Timing is also of the essence: recognising and seizing the moment when an individual company has taken – or is well on the way to taking – the decision to confront the problem of corruption directly.

The way forward is a frank and forthright approach. The optimal size of the

group is in the region of 10–12 companies represented by the top echelons of management, thereby maximising their decision-making capacity. This lends momentum and weight to the whole process and is of crucial importance to the procedure. Since this process is undoubtedly a novel experience for most of the participants and may be outside their usual business experience, the use of external facilitators nurturing the process can be invaluable. How to control and monitor the implementation of the resulting standards needs to be considered for the longer term, either by adapting the peer review principle or through external agencies. After having formulated an industry standard the participants might either want to keep it ‘secret’ and monitor each other or they may want to make their document public, promote its implementation and encourage the participation of others. The latter may involve other companies directly (by ‘subscription’ as the Wolfsberg process was in the initial phase) or indirectly via regulators (its current state). When and how other companies within industry can join the ‘club’ must also be considered.

The advantages of industry standards are the speed and flexibility with which they can be created and their adaptation to specific aspects of corruption facing any given sector of industry. The acknowledgement by major companies that they are confronting issues related to bribery will, in turn, bolster government efforts to tackle the issues, making it harder for anyone to avoid their judicial, legislative or legal responsibilities. The disadvantage of industry standards relates to monitoring and how best to achieve it. Deferring this question affects the credibility of the process. This question falls to regulators for the Wolfsberg Group and remains unresolved for the engineering and construction group as a self-regulatory tool industry standards act as a dynamic spur to policy-makers and can achieve a complementary status to existing legislation.

Conclusion

The behaviour of corporations affects all our lives. The degree of economic and political influence they wield varies according to several factors, not least size and whether they engage in international activities. Those companies that operate on a transnational basis may have been less easily held to account for corruption in the past. This position has changed over the last two decades, and not only in legal terms. Corporations can no longer regard bribery as a legitimate, tax deductible means to oil the wheels of business. Corruption carries a risk that is explicit in legal provisions and implicit in economic terms through potential damage to reputation (adverse publicity, boycotting and blacklisting) as well as criminal and civil sanctions. These developments have occurred at voluntary and regulatory levels – through compliance codes which aim to moderate corporate behaviour both internally and more broadly through industry-wide initiatives and international and domestic legal changes which affect

the operating landscape. Both of these approaches put pressures on business, but is one route preferable or can they be reconciled?

Although companies may currently be wrestling with the question as to where the boundaries of, for example, their human rights obligations should be set,²⁷ there seems to be a steady momentum to ensure that corporate social responsibility will continue to expand. This has been clearly demonstrated in relation to corruption with the UN Global Compact. Self-regulatory approaches are traditionally regarded as being business orientated, risk based, flexible and adaptable to the complexities of the organisational structures of modern transnational corporations. On the other hand, the legal implications of voluntary initiatives can be problematic in some jurisdictions, most notably the USA.

On the regulatory side, the Phase Two country reviews of the implementation of anti-bribery laws under the OECD Convention are currently being conducted by the OECD Working Group on Bribery. The effectiveness of policies and procedures with respect to the prosecution of corporations suspected of paying bribes to obtain or retain business in their international transactions are being carefully assessed. The adequacy of sanctions, the degree of prosecutorial discretion and the vigour of preventive measures are taken into account before the country assessment is published on the internet. An international standard is emerging which may prompt the OECD Working Group to revisit the issue of 'effective, proportionate and dissuasive' sanctions. The working group will continue to use 'peer pressure' to raise the standards of corporate behaviour to ensure a more level playing field for all companies competing in the global market. These developments will continue to gain momentum with the entry into force of the UN Convention, which will subsequently harmonise laws and bring new challenges for legal entities with respect to asset recovery.

Can the regulatory and voluntary approaches be reconciled when considering corporate liability for corruption? A cumulative approach is called for if the aim of making corporations liable for corruption is to deter and reduce bribery within a larger effort to tackle the pernicious effects of corruption in 'southern' countries' governments, international organisations, civil society and business need to act in a concerted manner. In practice this means not just waving the stick of criminal law sanctions but also producing the carrots to bring about real changes in corporate behaviour on a voluntary basis. Hence codes of practice constitute a valuable output. Business is calling for a credible and effective form of international 'helpline' to which they can turn for guidance on how to proceed when confronted with extortive demands. Although this idea was initially mooted by the ICC several years ago, it has gained new currency and would be a welcome addition to the array of approaches that are needed to make inroads into the problem of corruption.

Notes

1. Press reports on Statoil by Kambiz Foroohar on www.Bloomberg.com. The authors thank him and Karina A. Litvack of ISIS Asset Management for information and interpretation of the Statoil share price.
2. For the 'red flags' that alert a company to risks when engaging an agent, see Davies (2003).
3. See Iranian news reports from Shargh quoted on www.Bloomberg.com, 8 April 2004, by Kambiz Foroohar and Marc Wolfensberger.
4. For the initiatives of financial intermediaries, see the statements and principles issued by the Wolfsberg Group of private banks: www.Wolfsberg-Principles.com, and Chaim Even-Zohar, *Diamond Industry Strategies to Combat Money Laundering and the Financing of Terrorism* (ABN-Amro, The Hague, 2004).
5. Foreign Corrupt Practices Act 1977 (US) amended 1988, USC Title 15, chap. 2B.
6. See www.iccwbo.org.
7. See www.transparency.org.
8. See, for example, the current case of the Canadian company Acres International found guilty by a national court in 2002 of paying bribes to a public official in relation to the Lesotho Highland Water Project.
9. Recommendation of the Council on Bribery in International Business Transactions, 27 May 1994.
10. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 17 December 1997 (signed December 1997 and entered into force 15 February 1999), http://www.oecd.org/document/21/0,2340,en_2649_37447_2017813_1_1_1_37447,00.html.
11. Over 100 countries have signed the UN Convention, and at May 2004, two countries had deposited their ratification documents (Kenya and Sri Lanka).
12. See further the Commentaries on the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.
13. Membership of the OECD Convention includes non-OECD countries: Argentina, Brazil, Bulgaria, Chile, Estonia and Slovenia.
14. The Explanatory Report is located at *Official Journal C* 091, 31 March 1999.
15. See the Phase 1 and Phase 2 Reports on Canada conducted by the OECD Working Group on Bribery, www.oecd.org/dataoecd/20/51/31643074.pdf.
16. See OECD Working Group on Bribery Phase 2 Review of Bulgaria at p. 26, www.oecd.org/dataoecd/8/19/2790505.pdf.
17. Pieth (2003). See also Phase 1 examination of Switzerland by the OECD Working Group on Bribery, www.oecd.org/dataoecd/16/45/2390117.pdf.
18. See OECD Working Group on Bribery Phase 1 reports, www.oecd.org/dataoecd/15/30/2388858.pdf and www.oecd.org/dataoecd/39/45/2020928.pdf. The critique was upheld by the Working Group in the Phase 2 evaluation in June 2004.
19. See Dobbin (1998: 43) for an account of the steps taken by General Electric to 'derail' the US corporate Sentencing Guidelines.
20. OECD Working Group on Bribery Phase 1 Review of Poland, www.oecd.org/dataoecd/39/45/2020928.pdf.
21. Council of Europe Committee of Ministers Recd. (88) 18 adopted 20 October 1988.
22. Per Turner J. in *P&O European Ferries (Dover) Ltd* (1991) 72, 83, quoted in Pinto and Evans (2003: 5).
23. See further, www.unglobalcompact.org/.
24. Business Principles for Countering Bribery in the Engineering & Construction Industry, www.skanska.com/files/EC%20Principles%2012.23.03.pdf. See also Aiolfi (2004).
25. See www.wolfsberg-principles.com/.
26. See www.fidic.org.
27. See www.novartisfoundation.com/en/articles/human/symposium_human_rights/speeches/speech_vasella.htm.

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