PERSPECTIVES ON CORPORATE SOCIAL RESPONSIBILITY

Edited by
Nina Boeger
Rachel Murray
Charlotte Villiers

Corporations, Globalisation and the Law
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CORPORATIONS, GLOBALISATION AND THE LAW

Edward Elgar
Cheltenham, UK • Northampton, MA, USA
# Contents

**List of contributors** vi  

1 Introduction Nina Boeger, Rachel Murray and Charlotte Villiers 1  

2 Corporate social responsibility in law and policy Halina Ward 8  

3 Misappropriating citizenship: the limits of corporate social responsibility Joseph Corkin 39  

4 The United Nations, human rights and transnational corporations: challenging the international legal order Sorcha MacLeod 64  

5 Corporate law, corporate power and corporate social responsibility Charlotte Villiers 85  

6 Varieties of capitalism and the learning firm: corporate governance and labour in the context of contemporary developments in European and German company law Peer Zumbansen 113  

7 Corporate social responsibility: do corporations have a responsibility to trade fairly? Can the Fairtrade movement deliver the duty? Janet Dine and Kirsteen Shields 144  

8 Reflexive governance, meta-regulation and corporate social responsibility: the ‘Heineken effect’ Colin Scott 170  

9 Locating the ‘environment’ within corporate social responsibility: continuing problems of legal definition and representation David M. Ong 186  

10 Engaging individuals Sally Wheeler 224  

*Index* 247
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1. Introduction

Nina Boeger, Rachel Murray and Charlotte Villiers

What is Corporate Social Responsibility (CSR) and what exactly does the term encompass? Is CSR necessarily a good thing? As this collection of essays illustrates, the answers to these questions are essential for a rational system to be devised in order to respond adequately or appropriately to the challenges raised in the CSR debate. Globalization adds to these definitional challenges, as a term that also has problems of definition. Is global economic growth a (politically neutral) means of wealth-creation and -distribution or a (political) good in its own right? The answers to these questions will affect our views of CSR, and how it is enforced.

Where definitions are not settled, identifying the aims and expectations also becomes difficult. Misunderstandings arise alongside contradictions and competing approaches. For example, there exists competition between the notions of sustainable development, including environmental concerns, and social policy concerns focusing on poverty reduction and decent standards of living. The fact that either can and has been pursued through CSR merely serves to highlight what a wide field the CSR debate covers, and that there is a need for clear definitions. ‘Social responsibility’ and ‘corporate responsibility’, and related terms such as ‘corporate governance’, corporate ‘stakeholder’ or ‘shareholder’ models all need to be carefully defined, to avoid talking at cross-purposes.

This collection of essays arises out of a symposium in which lawyers from different spheres were brought together to discuss CSR in the context of globalization (Bristol EC–International Law Forum: Perspectives on Corporate Social Responsibility, 22–23 January 2007, Bristol University). Underlying our discussions was the question to what extent law is relevant to CSR. Whilst it is perfectly possible for CSR to be debated in economic, business and management terms as well as in political and policy terms, this symposium highlighted the central importance of law, legal systems and the role of lawyers to this very current debate. It thus covers not only international law, including issues of international trade, but also human rights, environmental law, company law, European law and public law. Although there has been
considerable debate on CSR amongst lawyers (Wells, 1993; Ward and Smith, 2006; Hopkins, 2007; Villiers, 2007), it has tended to take place in different spheres, whether that be domestic or international, and different disciplines, such as international law (UNCTAD, 1999), human rights (Addo, 1999, de Schutter, 2006), company law, European law and environmental law (Gillespie, 2000; Robbins, 2001). Our multi-disciplinary approach serves to bridge this gap. In doing so it is clear that a number of cross-cutting themes emerge strongly from the essays published here.

Is CSR a matter for legal intervention? If so, what type of intervention should this be? A number of the contributions (for example, Dine and Shields, Villiers, Corkin, Ward) discuss the effectiveness of CSR as a form of regulation through soft-law standards, and whether a move to hard law (Chinkin, 1989; Boyle, 1999; Hillgenberg, 1999) is necessary given that, as Colin Scott points out, compliance with standards depends more on political, social and economic pressures than whether a norm is binding or not. These questions underline the evident competition between a market driven approach to CSR – that which favours a voluntary character – and a regulatory approach (Baldwin and Cave, 1999; Black, 2001) – that which favours external control of corporate activities.

Should CSR be left to corporations? Many of the chapters in the book observe the inadequacy of a purely voluntarist approach to CSR but there are different viewpoints on the level of legal intervention necessary and the type of legal regulation most appropriate (Baldwin and Cave, 1999; Black, 2001). Colin Scott, for example, suggests that a reflexive approach may be a positive way forward in which the legal system acts as a support infrastructure that assists corporations in regulating themselves or if that should fail will be able to act as an enforcement mechanism. Scott argues that law can be a reason to act but it is not the only one as competition and markets can be other factors. Indeed, the law can be a trigger for further measures to be adopted voluntarily. Vice versa, formerly informal voluntary standards may gradually gain recognition as ‘hard’ law (see, for example, in relation to international law, Boyle and Chinkin, 2007). David Ong, for example, explores the progressive legalization and integration of corporate environmental reporting into legal standards on corporate disclosure.

How far corporations will go in adopting voluntary CSR standards depends to a large degree on what company law allows, and disallows, them to do in the field of CSR (Parkinson, 1993; Villiers, 2006). In that sense, as Halina Ward remarks, the insistence on CSR as ‘voluntary action alone’ is misleading as company law will necessarily have a very basic impact on CSR. Charlotte Villiers, for example, explains why corporate law systems such as in the UK, that are designed for profit maximization and risk taking with little comeback from the legal system, are not conducive to effective CSR enforcement. The corporate law concepts of limited liability and the separate legal personality of
the firm act as barriers to holding companies and shareholders to account for their harms even when, she argues, global corporations are complicit in human rights abuses. What is more, an effective CSR agenda depends on a clear understanding of the nature of the business corporation itself. Peer Zumbansen here argues in favour of a radical re-thinking of the nature of the business corporation, away from the control-oriented images of the corporation in ‘shareholder’ or ‘stakeholder’ models, towards a more refined understanding of the firm in its various, highly differentiated and specialized contexts (the ‘learning firm’). This, he argues, is a necessary first step in beginning to rephrase the question of the firm’s corporate responsibility, and in devising adequate rules of corporate governance.

This then raises the question of the role of the state (Tullberg, 2004). A number of contributions discuss the role and responsibility of the state to participate in the control of corporate activity. Joe Corkin, for example, examines the extent to which the state has a role in regulating the behaviour of corporations, and suggests that this is still necessary. Charlotte Villiers has similar concerns on the basis that involving corporate actors in the process of regulating their business practice by means of CSR has the effect of increasing their power. Their recognition as part of CSR gives to corporations more power to act for their own economic agenda. To harness corporate power effectively external regulation is necessary. Apart from law and legal standards, the state has at its disposal a range of other means, including public policy, as noted by Halina Ward, and its public spending power, as mentioned by David Ong, to create an environment conducive to CSR, in order to control business behaviour.

International law and institutional structure do not necessarily render the role of the state obsolete. Indeed, states continue to enjoy considerable power politically and financially vis-à-vis corporations and international institutions. This power signifies that they still have a responsibility to ensure that companies behave properly and that human rights are not trespassed upon. Indeed, the notion of power and imbalances in power are identified as key by several of the authors of this collection, for example, Villiers and Dine and Shields.

But how far does and can the state in reality reach in terms of regulating or enforcing CSR in a globalized context? The question of effective enforcement is, on the other hand, particularly difficult to answer in an international context. International law gives rise to certain challenges and concerns as are identified by MacLeod. These include the traditional notion that only states are subjects of international law and the difficulties of binding non-state actors to international law standards (Clapham, 1993; McCorquodale and La Forgia, 2001; Muchlinski, 1999; Nijman, 2004). Zumbansen however notes that it is possible to justify making corporations subject to international law rules by pointing out that transnational norms have changed the nature and role of the firm from being purely an economic actor. Is it possible then to justify enforcing
international or transnational norms or regulations with or without voluntary mechanisms? What is the role for international institutions, whether that be the UN, human rights bodies, or international financial institutions? Dine and Shields, for example, discuss the competition between international free trade law and the international human rights system, and what this has meant for the fair-trade movement. Has the CSR agenda evolved as a complementary to international trade law?

In this context, the role of individuals and citizens also becomes important, whether this be citizens, as noted by Joe Corkin, civil society, as expressed by Sally Wheeler and David Ong, or consumers and employees, as highlighted by Peer Zumbansen. Running throughout the collection is the debate on the notion of democracy and what this means in this context (Dalton, 2004). The right to participate (Pateman, 1970), whether as an employee of a company, as a stakeholder in any society, or as a citizen, are discussed by several authors in this book. As Corkin suggests, the danger in CSR is that corporations misappropriate the political system and concepts such as citizenship with the effect of increasing even further their own power without risk of being held accountable. There is a danger that corporations are allowed, by such an approach, to gain too much political strength at the expense of the state and ultimately of citizens and social well being. The state must continue to have a role and has a responsibility to participate in the control of corporate activity, in order for its citizens to retain the collective power, as a political community, to regulate market activity.

But this raises the further question how to ensure that collective powers will be deployed democratically, and that citizens are properly engaged. Indeed, as Wheeler suggests, the state and conventional party politics may be obsolete but other methods of participation could be developed by engaging individual citizens and non-governmental organizations who must, in turn, be made as accountable as corporations. Without a developed form of civil society CSR and enforcement of CSR norms will not work. Yet a further concern is then to avoid problems of democratic deficit within CSR policy and NGO activity. Wheeler argues that these arise if individual citizens are led to endorse passively these activities rather than engage positively with them.

The state however is responsible to facilitate citizens’ engagement including, as Ong illustrates, providing adequate access to justice. In this respect Ong laments a lacuna in many CSR endeavours in that they fail to hold corporations adequately accountable for the environmental damage of their activities. He argues that as public control over environmental standards weakens, the need for environmental NGOs to assert the protection of the environment by way of judicial proceedings increases. Ong examines to what extent standing rules reflect this need.

This brings us back to the question as to who should hold the responsibility
for CSR: should it be the more abstract entities of the state or the company, or individuals, whether they be employees, members of civil society organizations, consumers or others? And even once these responsibilities are identified, then the various legal systems, whether they be international or domestic, often have difficulties imposing duties and obligations on these various public and private actors.

The CSR debate, and particularly the debate on law and CSR, forces us to ask broader questions about the relationship between market and state, and the role of business in society (Ward). As such it has great potential. It might lead to innovative notions of the corporation shifting boundaries between market and state or a different kind of interaction between the market and the state as we have seen for example with public services, where corporations are taking on tasks that strictly belong to the state, as noted in Zumbansen’s chapter. Its potential is what makes the debate on CSR so crucial and timely, but also what causes frustration and danger. Given the competing and conflicting policies and definitions within the CSR agenda, it is important for CSR not to be used as a ‘deflection device’, something identified by Dine and Shields in their chapter, to detract from the substantive questions of corporate power and corporate control, and effectively allow it to enhance the interests of global corporations.

While there may be considerable benefit in raising a number of questions, the book also attempts to provide some solutions and practical ways forward. Charlotte Villiers puts forward a range of possibilities. First, one could consider extra-territorial application of state obligations, a particularly political issue in the international law field and one which has received recent attention from international courts. In addition, the requirement that states, in ratifying treaties, incorporate those standards into domestic law may indirectly ensure responsibilities for both public and private actors. Furthermore, developing the notion of corporate complicity and finding ways of translating soft law standards into hard law can provide additional protection. Collective measures (for example through international bodies) and individual measures (by particular companies themselves, NGOs and others, as Corkin suggests) need to be taken together in order to enforce the various standards. Wheeler’s chapter on engaging individuals offers greater optimism on the power of political activity in bringing the CSR agenda to fulfilment.

We hope that the book provides valuable food for thought on this broad range of issues.

NOTES

1. See R (On the Application of Al-Skeini and Others) v. the Secretary of State for Defence,
REFERENCES


2. Corporate social responsibility in law and policy

Halina Ward

INTRODUCTION

This chapter is an attempt to draw together two of the themes in my work with colleagues and research partners over the past six years at the International Institute for Environment and Development.¹

The first of the two themes addressed in this chapter is an analysis of the links between corporate social responsibility and law. The second concerns the links between CSR and public policy.

As to the first of the two themes – links between CSR and law – the roots of IIED’s work lay in a frustration that the definitional insistence that ‘CSR is only about voluntary action over and above compliance with legally defined minimum standards’ and the consequent separation of ‘CSR’ and ‘corporate accountability’ serves no one well – from the most conservative businessperson, to the most ambitious ideals-driven NGO or the most market-oriented government official.

Over the period from 2002–4, IIED worked hard to expand the boundaries of mainstream thinking on ‘what is CSR’ by insisting that its legal dimensions needed properly to be factored in. We pursued this endeavour in written papers and projects, in presentations, and in our advocacy. But the task we had set ourselves was Sisyphean and ultimately we admitted defeat, choosing to work under the more comfortable umbrella of ‘business and sustainable development’ rather than ‘corporate responsibility for environment and development’.

The second, closely related theme that this paper addresses concerns the role of public policy in the evolution of CSR. Here the frustration, shared by many of the colleagues with whom I have worked, has been that the business-centric focus of CSR has left public policy innovation on the sidelines and public policy-makers with little guidance on how to engage. With my colleagues Tom Fox and Bruce Howard, we developed a fairly crude framework, at the request of the World Bank, that could be applied to help public sector actors in middle and low-income countries think through the roles that they might play in enabling responsible business practices.
Today, working on a project with partners in Kosovo at Riinvest Institute to develop a public policy framework for mining and community development there, it is striking how little of the last decade’s relevant literature on mining and community development has addressed public policy. In contrast, case studies of ‘good’ or ‘best practice’ business action and partnerships abound. Guidance for public sector actors is sorely lacking at precisely a point in the evolution of the CSR agenda when public policy is being asked to adapt to the experiences.

As we note in the final report of another recent project, *CSR at a Crossroads*, which was carried out by IIED working jointly with Craig Smith at the London Business School, increasingly it seems that CSR business leaders and NGOs agree on the need for a clear, progressive public policy framework for CSR (Ward and Smith, 2006). But progress in CSR is hampered by limits to active consumer engagement in responsible business and a willingness to pay; as well as continued evidence of the inconsistent financial business case for CSR.

This chapter, then, is a reflection on the journey that IIED has made over the past six years in these two areas.

**THE DEFINITIONAL DILEMMA OF CSR AND ITS RELATIONSHIP WITH LAW AND POLICY**

Corporate social responsibility – CSR – is underpinned by public policy. It has undeniable links with law. But the relationship between CSR, law and public policy has been difficult to pin down, whether prescriptively or descriptively. A major reason is differing views on the optimal relationship between state and market among people working to promote CSR.

At its most basic level, the concept of CSR aims both to examine the role of business in society, and to maximize the positive societal outcomes of business activity. (Ward *et al.*, for UNDESA, 2007). It is about viewing business as part of society, not somehow separate from it.

Business as part of society, yes. But immediately this statement begs the question: ‘but what is the role of business in society’. In short, ‘what is business for”? Among the most famous answers is that attributed to Milton Friedman; namely that ‘the business of business is business’. Close relatives of Dr Friedman’s sentiment can be found in the ideas that the purpose of the limited liability company is to make a profit for shareholders, or to contribute to overall societal welfare by making a profit for shareholders.²

In the field of company law, reflections on the basic purpose of companies in society are found in competition for policy primacy between advocates of ‘enlightened shareholder value’, and those advocating instead ‘pluralism’. The
essence of the pluralist approach can be found in the principles of corporate design adopted by participants in the Boston-based multi-stakeholder initiative Corporation 2020, namely that the purpose of the corporation is ‘to harness private interests to serve the public interest.’

There are many ways of expressing ‘CSR’ – and no consensus on either its definition or the outcomes to which it should lead. In essence, positions taken by different stakeholders on the key question ‘what is CSR’ have two underlying faultlines: first, the extent to which importance is placed on the centrality of the ‘financial business case’ for responsible business behaviour in defining the scope of CSR practices. Second, the extent to which government is seen to have a role in framing the agenda – and how (Ward and Smith, 2006).

These faultlines are reflected in two broad types of definitions of CSR: first, those that focus on outcomes – including outcomes in terms of ‘business impacts’, ‘commercial success’ and wider societal goals; and, second, those that stress the voluntary nature of CSR (‘voluntary’ in that CSR relates to business activity that is not mandated by legislation, whether or not it is effectively ‘mandated’ as a matter of good practice through the action of various ‘drivers’ of CSR).

The extent to which a business fulfils its societal obligations must be both a function of what it is legally required to do, and what it chooses to do (Ward and Smith, 2006). Yet the second type of definition focuses only on one side of the picture – what a business chooses to do. Normative questions of what a business ought to be required to do run the risk of falling between the cracks in both sets of definitions. CSR should encourage greater reflection on the balance between different kinds of normative frameworks for business action; and the role of other kinds of approaches – including ‘best practice’ case study guidance – in areas where normative approaches are considered inappropriate.

In any event, ‘voluntary’ CSR within enterprises can only be implemented to the extent compatible with the basic legal framework within which enterprises operate, namely the various laws around the world relating to business organizations, and the constitutions of individual enterprises. On the one hand, for companies that do not have social purpose embedded within their constitutions, this means that company law itself sets constraints, principally related to the balance between shareholders and boards of directors in the governance of companies, and the fiduciary duties of directors. The impact and implications of those limits have recently been the subject of active campaign pressure in the UK, in the context of the long-running Company Law Review and its associated Company Law Reform Bill (now Company Law Reform Act).

Drawing a balance between the definitional faultlines for CSR in any given
economic sector or country is partly a matter of ideology. In this sense, CSR is fundamentally political. But drawing a balance is also, importantly, determined by assessing the significance of different market actors (NGOs, consumers, financial institutions, buyers, for example) in driving responsible business practices. In many parts of the world, the market-based drivers of CSR – such as NGO and consumer pressure, or shareholder activism – are often absent or at best very patchy. The result is that market-based CSR cannot thrive.

A framework for understanding the ‘enabling environment’ for CSR that we first applied in the context of work with colleagues in the RING Alliance (RING Alliance 2003) appears to have stood the test of time, for at least the short-term. The ‘enabling environment’ for CSR, we suggested in a paper for the UN Global Compact, was a product of the drivers, the tools and the human capacities and institutions directed towards that goal. This framework suggests that CSR is most likely to flourish when each of these underlying ‘pillars’ is as strong as it can be.

The drivers of CSR, for someone who holds a narrow view of its definitional scope, are inherently market-oriented in nature. They encompass the range of external and internal factors that generate the ‘business case’ for CSR, from reputational risk management; campaign pressure from non-governmental opportunities, to the potential to create new business opportunities through socially beneficial innovation. The tools of CSR are then the market-based instruments and systems that are designed to foster improvements in business behaviour – including corporate codes of conduct; labelling schemes; environmental or social management systems. And the human capacities and institutions underpin both the tools and the drivers of CSR – they allow them to take effect in their particular sectoral or geographical context. Key human capacities, for example, include the understanding and ability of all key stakeholders – from business managers to citizens – to engage in CSR. The key institutions include enforcement agencies; non-governmental organizations; and teams of individuals working on CSR within businesses.

The ‘enabling environment’ for CSR is far from optimal anywhere in the world. In the UK, as one business person in the CSR at a Crossroads project remarked, ‘the real problem is that we currently don’t have governments or consumers publishing the bad guys or rewarding the good’. In short, neither the market nor the public sector is playing its role in such a way as to lead to optimal CSR outcomes. Consequently, for public sector actors, the options are to identify those kinds of interventions that may ‘optimize’ the enabling environment from a variety of public policy perspectives; or to reconsider the significance that CSR is given as a potential contribution to overall public policy goals. Even for those governments committed to making the most of the potential for voluntary market-driven CSR, there seems to have been little real
evidence of alignment between a commitment to market-based CSR, and a commensurate willingness to invest greater resources in ensuring that the market-based drivers of CSR – including civil society advocacy and consumer activism – are able to evolve and flourish.

If one accepts, for example, that one of the major drivers of CSR lies with company perceptions of reputational risk, one would expect to see greater signs of public investment, from within CSR departments in key Ministries (or at least those most clearly and directly linked to them), in the civil society actors who work to create those reputational risks – campaign groups, trade unions and activists.

This is not to suggest that there are not problems that need to be addressed in targeting such support – including the thorny questions of NGO legitimacy and accountability. Nonetheless, one would expect to see greater visible links between investment in donor support for civil society engagement in CSR and corporate accountability than is currently the case.

Certainly, the limited results to date of efforts to bring donors together to share insights and experiences of work on CSR (Fox, 2002; Fox and Prescott, 2004) suggest that the emphasis is much more on engagement and investment to catalyse the development of partnerships involving business and civil society, than on creating local civil society capacity to challenge irresponsible behaviour or create reputational risk for businesses. Partnership – or ‘co-investment’ with development cooperation agencies is also one way in which companies can visibly and comfortably engage with public policy goals related to development (Nelson, 2006), albeit often as much the public policy goals of the ‘home country’ donor concerned, as of the country in which projects are implemented.

Definitions of CSR must depend on both country contexts and the perceptions of different stakeholder groups. In those parts of the world where the ‘enabling environment’ for a narrow vision of market-driven CSR is very far from optimal, societal concerns about ‘responsible’ business behaviour often lie with basic issues of business compliance with legally binding minimum standards, and the business contribution to good public governance or the delivery of broad public goods such as health and education. In many middle and low-income countries the primacy of the domestic challenges of poverty reduction and economic development can also lead to a strong emphasis on the contribution of business to the achievement of broad societal goals through traditional means such as employment generation and payment of taxes.

Given the failure of markets in many parts of the world to deliver ‘market drivers’ of CSR, it is important also to understand CSR in its wider context, including for example: (a) the overall impacts of trade and investment liberalization; (b) economic transformation processes; and (c) wider issues of good public governance.
INTERNATIONAL POLICY CONTEXTS FOR CSR

The international policy context for dominant contemporary visions of CSR has largely been set by three distinct debates: the great debate over the pros and cons of economic globalization; ongoing discussion of the significance and meaning of sustainable development as an overarching aspiration for all organs of society; and the global imperative to reduce and ultimately to eliminate poverty. Each can be linked to competing thematic priorities within CSR – and to some extent competing definitions too.

CSR and Globalization

The most immediate international contextual trigger for the contemporary CSR agenda can readily be seen in the 1990s debate over the significance, impacts and implications of globalization of the economy and communication. As international institutions provided vehicles for horse-trading over the terms of economic globalization – with the newly created World Trade Organization as their centrepiece – evidence also emerged of cases where economic globalization had been associated, not with improvements in the quality of life of human beings around the world, and in the quality of the environment, but in their precise opposite; in impoverishment, marginalization, and environmental degradation.

Economic globalization – in the form of trade and investment liberalization, privatization, and deregulation – was, and is, still often claimed to be inherently neutral; a means to an end – at the same time as the many contexts in which its value is proclaimed might lead one to suspect that it is viewed as a good in its own right.

The dogma of economic globalization has often been, in effect, that the potential benefits of market liberalization can be realized if the right policies and practices are in place at the national level to distribute the benefits in ways that further social and environmental progress and equitable human development. Any negative impacts of liberalization, from this starting point, are a result of poor public policy – not liberalization per se.

At the same time, concern over the negative impacts of economic globalization began increasingly to link back to a leitmotif of earlier critiques of multinational corporations; namely the role of business in lobbying governments, even to the point of destabilizing them, to adopt policies favoured by business. In the context of the great debate over globalization, a slightly modified focus entered the debate; not on the role of business lobbying in undermining developing country governments; but the mismatch between business lobbying for investment-friendly policies without placing any matching emphasis on the need to develop and maintain strong environmental and social institutions. For some
critics, the economic power of big business lay behind a ‘race to the bottom’, in which maintenance of low environmental or social standards, or in some cases even a lowering of standards was an appropriate strategy for attracting foreign direct investment.

If positive public outcomes such as sustainable development could only result from economic globalization when supported by appropriate policies and institutions at the domestic level, a number of strategies for responding to the potential mismatches might be deployed. One such strategy is reflected in the mainstream CSR agenda – namely a focus on the role that market actors, specifically businesses, could play independently of public sector actors to ensure that economic globalization is supportive of social and environmental progress. In this approach, business might even, in the best cases, play a role in fostering a ‘race to the top’ in which environmental or social standards and legislation become positive factors – to be traded up, not traded away – in a global competition to attract investment and talent (see, for example, Zadek et al., 2005).

The UN Global Compact is a prime exemplar of these links between globalization and CSR. The UN Global Compact was launched at the personal initiative of then-UN Secretary General Kofi Annan to a community of international business leaders at the Davos World Economic Forum in 1999. Secretary General Annan called for a new compact of shared values and principles between the United Nations and the business community to give a human face to the global market. ‘Globalization is a fact of life,’ he began:

But I believe we have underestimated its fragility. The problem is this. The spread of markets outpaces the ability of societies and their political systems to adjust to them, let alone to guide the course they take. History teaches us that such an imbalance between the economic, social and political realms can never be sustained for very long.

CSR, from this perspective, is the flip side of globalization.

The definitional dogma that CSR is inherently ‘voluntary’ in character readily finds resonance in this characterization of its recent origins in the great debate about the impacts of economic globalization. But CSR works best when the institutional and policy setting in which it is implemented is conducive to socially and environmentally beneficial outcomes. Its value as a substitute for wider efforts to ensure that liberalization of markets delivers sustainable development is inherently limited.

**CSR and Sustainable Development**

Sustainable development is most commonly defined in the terms adopted by
the 1987 World Commission for Environment and Development, namely that sustainable development is ‘development that meets the needs of the present without compromising the ability of future generations to meet their own needs’.10 To this end, sustainable development carries with it the idea that economic, environmental and social considerations must all be integrated in the formulation and implementation of policy. It is associated with a number of related principles – including the principle of intergenerational equity, which focuses on equity between people alive today and future generations; and the principle of intra-generational equity, which focuses on equity among those alive today. And it is equally widely recognized that sustainable development cannot be effectively pursued or implemented without the support of wide rights of public access to information and participation.11

The 1992 UN Conference on Environment and Development in Rio de Janeiro, dubbed the ‘Earth Summit’, marked the adoption of sustainable development as a global policy imperative. The formal outputs of that Conference reflected the notion that an essential prerequisite for sustainable development was the integration of environmental considerations into economic development. Business, too, was addressed. Agenda 21,12 a 600-page blueprint for action across stakeholder groups to achieve sustainable development, stressed the need for cleaner production and responsible entrepreneurship. The notion of eco-efficiency – producing more while using less – was hailed as the way forward for businesses that wanted to link environment and development.

Today’s agenda on business and sustainable development is both broader and deeper than that of the early 1990s. The social dimensions of sustainable development have gained in prominence. Ten years on from Rio – at the 2002 World Summit for Sustainable Development – the notions of poverty reduction and good governance as underlying factors of sustainable development had gained prominence.

References to integration of economic, social and environmental issues appeared only in sections of the Johannesburg Plan of Implementation addressing the international institutional settings for the pursuit of the international sustainable development agenda.

As this chapter argues below, there are signs that the poverty reduction agenda is now overtaking sustainable development as a global policy imperative. And there are signs that, while many businesses have now dropped the term ‘corporate social responsibility’ in favour of ‘corporate responsibility’ or ‘business and sustainable development’, the term ‘sustainability’ is being used by business people in ways that have little to do with the notion of ‘sustainable development’ and much more to do with ‘susttainability’ in the sense of ‘enduring commercial success’.13
**CSR and Poverty Reduction**

Internationally, the rallying point for the global campaign to reduce poverty lies with the UN Millennium Development Goals.14 These eight goals were agreed among UN member countries as a set of time and target bound aspirations for development at the 2000 UN Millennium Summit. They were adopted alongside the UN Millennium Declaration15 in 2000 by 189 nations, with a target date of 2015 for achievement.16

The Millennium Development Goals tackle pressing development challenges ranging from halving global poverty and hunger to protecting the environment, improving health and sanitation and tackling illiteracy and discrimination against women.

Millennium Development Goal 1 is to ‘eradicate extreme poverty and hunger’, with the associated target of halving, between 1990 and 2015, the proportion of people whose income is less than US$1 per day. Environmental issues are reflected in goal 7; to ‘ensure environmental sustainability’, with the associated target of integrating ‘the principles of sustainable development into country policies and programmes and revers[ing] the loss of environmental resources’.

MDG 7 has often seemed to be the poor relation of MDG 1, despite efforts (including by IIED) to stress the value of investment and attention to environmental issues in efforts to combat poverty (see, for example, Bass, 2006). Investment in environmental assets is potentially one of the most effective ways of achieving poverty reduction. Yet there is a visible tendency to delink poverty, environment and sustainable development reflected in the international policy agenda, and mirrored in the evolution of the CSR agenda.

By the time of the World Summit for Sustainable Development (WSSD) in 2002, poverty reduction had, arguably, overtaken sustainable development as a global policy priority. In its introductory chapter, the WSSD Johannesburg Plan of Implementation17 (one of the two formal inter-govern-mentally agreed outcomes of WSSD18) suggests that ‘poverty eradication, changing unsustainable patterns of production and consumption and protect-ing and managing the natural resource base of economic and social develop-ment are overarching objectives of, and essential requirements for, sustainable development’. But Chapter II of the Johannesburg Plan of Implementation agreed at WSSD is devoted to Poverty Reduction, and notes that: ‘Eradicating poverty is the greatest global challenge facing the world today and an indispensable requirement for sustainable development, particu-larly for developing countries.’19

The Johannesburg Plan of Implementation further subsumes sustainable development under poverty reduction when it goes on to note that ‘concerted and concrete measures are required at all levels to enable developing countries
to achieve their sustainable development goals as related to the internationally agreed poverty-related targets and goals’.

The international community’s renewed focus on poverty reduction has arguably sidelined sustainable development, allowing economic growth to re-establish itself as a ‘good’ in its own right. For example, within the international implementation process for the Millennium Development Goals, the 2005 UN General Assembly World Summit Outcome, adopted at the United Nations on 16 September 2005, includes a statement that the nations present ‘reaffirm [their] commitment to eradicate poverty and promote sustained economic growth, sustainable development and global prosperity for all’. This notion of ‘sustained economic growth’ is inherently antagonistic to the notion of ‘sustainable development’.

Today, ‘poverty reduction through economic growth’ is a far more frequently heard expression than ‘poverty reduction through sustainable development’ or even ‘sustainable development through poverty reduction’. For businesses, poverty reduction is a less familiar call to arms than sustainable development. But it is in some respects less challenging: its adoption poses fewer direct threats to economic growth.

The CSR agenda has to a great extent mirrored these overall developments. There is strong contemporary interest in exploring the relationship between ‘business and development’ and ‘business and poverty reduction’. And a variety of publications and initiatives have been launched with a view to identifying ways in which business action can help to achieve the Millennium Development Goals. Many of these are based on an insight that increases in overall economic activity among poor communities are good for development.

This is particularly visible in current interest in business strategist C.K. Prahalad’s call for action to tap the poor in the form of an untapped ‘fortune at the bottom’ (or ‘base’) of the pyramid, or ‘doing business with the poor’. The basic notion is that:

Improving the lives of the billions of people at the bottom of the economic pyramid is a noble endeavour. It can also be a lucrative one . . . Everyone knows that the world’s poor are distressingly plentiful. Fully 65% of the world’s population earns less than $2000 per year – that’s 4 billion people. But despite the vastness of this market, it remains largely untapped by multinational companies. (Prahalad and Hammond, 2002)

The base of the pyramid (BoP) model of business development aims to provide ‘win–win’ solutions for multinational corporations to achieve commercial success while helping the ‘aspiring poor’ in low-income countries to prosper through consumption. But there is nothing inherent in the design of the BoP approach to ensure that it will deliver businesses that respect environmental and social, as well as economic, considerations, and actively build
environmental and social capital. BoP businesses themselves need to be responsible. They should not work unfairly to nudge out local players from markets. They need to be businesses that respect sustainable development, not only pursue poverty reduction through economic activity at the base of the consumer pyramid.

The BoP approach can in turn be linked to interest in the importance of the ‘enabling environment’ for a flourishing private sector, which is now evolving to allow space for consideration of the role of private enterprises, through application of business expertise in fostering the growth of the indigenous enterprises that are so important to development.

In conclusion, today, the tools of sustainable development – notably partnership between governments, businesses and others – are increasingly coupled with the policy priorities of poverty reduction; which themselves appear increasingly disconnected from the global imperative for sustainable development. Sustainable development itself has degraded in value as a call to action, since it all too often appears to be all things to all people. At WSSD, it even lost much of the notion of ‘integration’ across environmental, social and economic themes that was at its heart when it was adopted as the focus of the 1992 UN Conference on Environment and Development.

The current fashion for considering the ‘business contribution to development’ or to ‘poverty reduction’ reflects these wider international trends. CSR has mirrored the international policy context.

HOW CSR RELATES TO LAW

Elsewhere (Ward, 2003), I have argued that there are several distinct ways in which voluntary CSR is linked to law; and that these links make the insistence on CSR as ‘voluntary action alone’ misleading even for the most conservative of business people.

First, CSR has already given rise to legislative developments; for example in areas such as mandatory social and environmental reporting (itself the subject of recent fierce lobbying in the UK – and a government U-turn discussed further below), requirements in the UK for pension funds to publish information on their social or environmental policies, or social labelling.

Other legal innovations – including many in middle and low-income countries – can readily be sited in the context of CSR, even if they did not consciously reflect a commitment to the agenda on the part of the governments that have adopted them. For example, legislation as far apart as Ghana and Western Siberia addresses the terms of negotiated agreements between natural resource companies and local communities.

Second, laws relating to business organizations already exert a very basic
impact on what it is possible, and impossible, for companies to do in the field of CSR. Company law provides a very basic constitutional framework for the pursuit of profit by a great many of the world’s businesses. Laws relating to defamation, to misleading advertising, taxation, and competition policy, among others, also frame CSR.

Third, law is quite simply part of what surrounds the implementation of CSR. For example, when the terms of a buyer’s code of conduct – say on labour issues – are incorporated into a contract with a supplier, they become legally binding on the supplier. In this sense CSR transforms into legally binding commitments without the intervention of legislators.

Fourth, law, and litigation, can bring new light to the most difficult ‘boundary’ issues of CSR; often acting as substitutes for the current unsatisfactory institutional settings for CSR. Most visible cases that test the circumstances in which parent companies of multinational corporate groups may be held accountable for negative human rights or environmental damage in ‘worst case’ scenarios such as the Union Carbide disaster in Bhopal, or the allegations of corporate complicity under apartheid South Africa. The US Alien Tort Claims Act 1789 offers one legal vehicle for redress in these circumstances. In England and Wales, and a variety of other jurisdictions, the ordinary principles of civil liability have also been tested in these transnational cases, for example in litigation in London against Cape plc by South African former asbestos mine workers and community members suffering from asbestosis and mesothelioma, or against Thor Chemicals by former workers at its Cato Ridge plant suffering the effects of mercury poisoning (Ward, 2004).

Fifth, as we have seen already, ‘soft law’ instruments – including international policy statements on poverty reduction or sustainable development – have the clear potential to inform the course of CSR. Some are directly intended to impact on the behaviour of companies – such as the OECD Guidelines for Multinational Enterprises.

Sixth, the norms of international law in fields including labour and human rights (for example the Universal Declaration of Human Rights) are sometimes directly adopted by companies as a direct reference point in their overall policy statements on CSR.

Seventh, the institutional processes associated with the implementation of international agreements, including multilateral environmental agreements, are increasingly seeking to engage with private sector actors to achieve the goals of these agreements.

Eighth, non-binding CSR codes or policy tools have the potential, over time, as they are adopted, to inform the application of basic notions of reasonable behaviour, or the scope of duties of care, as applied to companies and their officers. Each of these links tends to be downplayed by the insistence that CSR is inherently ‘voluntary’. And that, in turn has had a tendency to
minimize business and policy analysis of the links, making them more difficult to manage.

HOW CSR RELATES TO POLICY

CSR and law are undeniably linked. And it is implicit from this fact that public policy expressed in the form of legislation, regulation or law, is part of the setting in which CSR is implemented, wherever that may be. Furthermore, the limits to both corporate accountability through law and to the ‘voluntary’ CSR agenda lie with the public good governance agenda.

Public Sector Roles in CSR

In work carried out by IIED for the World Bank Group’s CSR Practice, based on an initial international review of public sector engagement in CSR (Fox et al., 2002), we identified five distinctive (if rather generic) roles for public sector engagement with CSR. In their most recently amended form, these are: (a) regulating; (b) facilitating; (c) partnering; (d) endorsing; and (e) demonstrating.

In practice, there are no bright lines between these roles – their value is simply to bring some shape to the extraordinarily wide range of initiatives around the world that may be said to be linked in some way to the promotion of CSR. The categorization of ‘roles’ is crude, too, in that it does not answer many important questions, including issues concerning how to make choices between different policy instruments. And many barriers lie in the way of effective public policy for CSR including lack of political will, corruption, lack of public sector capacity to take on new agendas or private sector capacity to absorb their relevance, and poor institutional capacity to implement policy once adopted.

The key challenge, for those governments that choose to engage, is to shape and apply CSR, to the greatest extent possible, to meet both national public policy goals and, at the same time, locally defined needs in areas such as capacity development, employment, environmental protection, social provision and poverty reduction. (Ward et al. for UNDESA, 2007).

Both the role of public policy and law in driving socially desirable business innovation, and, importantly, the negative role of public policy and law in constraining or undermining socially desirable business practices need to be given attention. In other words, just as important as what public sector actors can do to support enterprises that are considered socially particularly responsible are vexed issues of what should not be done.

There are many examples of situations where public policy fails to provide an appropriate ‘enabling environment’ for responsible business practices, or
socially desirable forms of enterprise. And some CSR-related legal innovations have themselves been challenged on the basis that they impose unnecessary costs on business, or stifle innovation or competitiveness. For example in the UK, ‘gold-plating’ (essentially over-implementation) of an EU Directive was the reason proffered by Chancellor Gordon Brown for dropping proposals for an Operating and Financial Review (OFR).

The OFR would have provided for mandatory reporting on social and environmental issues by the UK’s largest listed companies. In November 2005, Brown announced to a meeting of the Confederation of British Industry that:

> best practice is of course for companies to report on social and environmental strategies relevant to their business. But I understand the concerns about the extra administrative cost of the goldplated regulatory requirement that from April next year all quoted companies must publish an operating and financial review. So we will abolish this requirement and reduce the burdens placed upon you.27

Far from the negative role of public policy and law amounting to a call to roll back the state or allow business to get on with ‘the business of business’, it may amount to a more fundamental challenge; to revisit basic frameworks for the pursuit of profit and economic growth, with a view to integrating lessons from the last decade of CSR understood in the context of sustainable development.

The strongest links between public policy and CSR would be reflected in reform of legal frameworks for business organization, including company law. In a domestic parallel to the ongoing discussion over reform of the international economic architecture, the argument here would be that sustainable development (and/or other values associated with CSR) should be integrated within the basic legal framework governing the formation and functioning of business enterprises; not exclusively an ‘add-on’ in the form of environmental, or labour, or anti-corruption legislation – to name but a few examples.28 Such links are, so far, slow to evolve.

In the UK, discussion on the proper conceptual framework for linking company law with the pursuit of corporate responsibility took place between 1998 and 2006 in the context of the UK Company Law Reform process. Ultimately, a conservative approach prevailed; one that underpins even a voluntary market-based vision of CSR to only a limited degree.

The tussle in the UK Company Law Reform process was essentially between ‘enlightened shareholder value’ and a ‘pluralist’ approach to company law. In the ‘enlightened shareholder value’ approach, the basic responsibility of a company director is to promote the success of the company in the collective best interests of its shareholders.

The ‘enlightened shareholder value’ approach expresses the idea that, when underpinned by public rights of access to information about company impacts,
policies and performance, profit and responsibility could go hand in hand with only minor changes to company law. Rights of access to information are a necessary corollary, in this model, because procedural rights provide market-based actors with the information that they need to fulfil their role as drivers of ‘voluntary’ market-based CSR. The minor changes to company law that might be appropriate in this limited vision are simply those needed to make it clear that, where it is appropriate to the pursuit of shareholder value, directors may take account of the kinds of environmental or social considerations associated with the practices of CSR.

In contrast, in the ‘pluralist’ model, the pursuit of shareholder value as the overall job and primary role of the limited liability company would be replaced, and directors would have to place the success of the company on the scales along with other considerations such as the interests of employees or environmental protection.

The 2006 Companies Act, as adopted in November 2006, reflects a limited vision of the ‘enlightened shareholder value’ approach. Its provisions on directors’ duties make clear that a director’s duty is to promote the success of the company for the benefit of its members as a whole. However, in doing so, a director must have regard to a non-exhaustive range of factors including:

b) the interests of the company’s employees, c) the need to foster the company’s business relationships with suppliers, customers and others, d) the impact of the company operations on the community and the environment, e) the desirability of the company maintaining a reputation for high standards of business conduct.

The new Companies Act provisions on access to information – far from providing citizens with rights of access to information on the impacts, policies and practices of companies – provide a basic framework for directors to report on how they have fulfilled their duties. Directors of all companies save for those falling within the scope of a separate ‘small companies regime’ must in future include a ‘business review’ within the annual directors’ report, to include a description of the principal risks and uncertainties facing the company. The purpose of the review is to help members of the company (not external stakeholders) to assess how the directors have performed their duty to promote the success of the company. Additionally, for quoted companies, Section 417 provides that the business review must include certain information about environmental matters, the company’s employees, and social and community issues.

**Links between CSR and Good Public Governance**

There are wider links between CSR and public governance, as distinct from public policy specifically directed at CSR. There is a strong business interest
(if not a mainstream ‘business case’) in addressing issues of good governance overall. For responsible businesses, that interest extends well beyond the traditional ‘enabling environment’ for private sector activity and investment, to a recognition of the value of strong civil society, investment in the public goods necessary for human development, respect for human rights, and effective mechanisms for the collection and distribution of taxes, among other areas. These basic areas of public governance must all properly be considered integral parts of the ‘enabling environment’ for corporate social responsibility. As Jane Nelson suggests, many businesses are aware of the risks and costs of high levels of income inequality and environmental degradation (Nelson, 2004).

Even more broadly than this, CSR, when understood as a market-based approach, seems to work best where public governance capacity and institutions are strong. In countries, or regions, where public governance is weak, stakeholder demands for CSR create uneasy dilemmas for businesses. Some large companies – particularly those in the extractive sectors who are used to working in remote parts of the world where central government casts only a weak shadow – have expressed concerns about the extent to which corporate social responsibility has given rise to demands that they deliver public goods to the communities where they work – healthcare, education or infrastructure – in areas well beyond their core competences.

Business acting alone cannot take on the job of creating the public governance and watchdog institutions of a well-functioning society. But business experience can point to problem areas and, with others, support the development of well-functioning societies (Bigg and Ward, 2003). As an analyst with the management consultancy McKinsey expresses it: ‘in certain parts of the world – particularly some poor developing countries – the rule of law and basic public services are notable by their absence. This can render the ‘business of business is business’ mind-set positively unhelpful as a guide for corporate action’ (Davis, 2005).

Less problematically, businesses are increasingly exhorted to ‘align’ their CSR activities, to the greatest extent possible, with public policy goals in the countries in which they operate. The core of the idea of ‘alignment’ could potentially however lead to a tension when national and local public sector priorities are themselves in conflict. Subnational (local and regional) government has a key – underexplored – role to play in channelling the CSR activities of locally operating businesses to meet locally defined development needs. The dilemmas that this can present are particularly powerfully illustrated in extractive industries such as oil and gas or mining, which may be destructive of the environment or human health, without providing lasting benefits at local level.

The greatest decision-making challenges arise in those businesses, and countries, where the balance of public policy influence between civil society,
business and government is skewed heavily in favour of one or more at the expense of others. In countries with authoritarian governments, the dilemmas tend to be particularly acute. (IIED, 2006).

The challenges extend to every level of CSR; from management of core impacts and social investment to public policy engagement. When institutions of civil society or of local or regional public governance are weak, social unrest may disrupt core business operations; even the best-intentioned business-led social investment programmes can fail to realize their potential; and when civil society or citizens have limited public policy influence, assumptions – whether justified or unjustified – can grow that economic actors do have influence – and that they should use it.

**Business Action at the Public Policy Interface: Strategies and Boundaries for Action**

Defining appropriate ‘boundaries’ for business action that intersects with public policy is one of the most challenging issues of corporate responsibility internationally. The challenge is much more than theoretical. People who work in business often need to make strategic choices about the boundaries of what is appropriate for the business as a business.31

Sometimes these decisions about ‘boundaries’ are implicit, and do not require a special process of deliberation. At other times, judgments about ‘boundaries’ are more difficult because they require action (or inaction) in circumstances where making a choice could lead to: (a) conflict with public authorities; or to (b) action that is not supported by a clear ‘financial business case’; or (c) generate uncomfortable expectations from other stakeholders.

Since modern companies do not generally wish to operate as governments or usurp the proper role of governments, and since foreign investors are generally guests on defined terms, companies operating in such conditions are understandably reticent to challenge the status quo. To do so could court investment instability. And whilst companies committed to making the best possible contribution to sustainable development have a commitment to working with stakeholders outside the business – including NGOs – this is difficult when it is not based on a social consensus that gives all key stakeholders a clear role in public policy-making.

A further dilemma is that corporate responsibility analysts and some ordinary citizens too, in both home and host countries, expect the economic impact of companies on domestic economies to be matched by positive public policy engagement and influence on a range of issues that do not connect to core business with a bright line; from environmental protection, corruption, and human rights through to democracy itself.
The external interest in these issues is reflected in wider discussions on ‘responsible lobbying’ by companies (AccountAbility, 2005) or on how best to get corporate responsibility to deliver step changes in overarching governance frameworks (for example on HIV/AIDS) (SustainAbility, 2004), and on ‘private investment in public capacities’ (Roemer-Mahler, 2006).

The outcomes of a recent workshop series on ‘private investment in public capacities’ suggest that:

The ‘boundaries of corporate responsibility’ are the outcome of complex negotiations between host country governments and companies, influenced by other factors such as civil society and international organizations and the ideological and political ambience. However, quite fundamental conceptual and analytical problems remain to be resolved. The normative (what companies should do) and the analytical (what they actually do) require careful distinction. (Roemer-Mahler, 2006)

But there have also been efforts to define safe space for companies. As a UK journalist writes in 2003, ‘The new frontier for CSR is not voluntary do-gooding but engaging in honest debate with government about how to frame market-based interventions, whether by taxes or regulation, to reward good behaviour and penalise those that dump their environmental costs on others’.32 In an example of action at this ‘new frontier’, Jane Nelson (2006) suggests that governments, business groups and development agencies can work together to develop fiscal incentives to encourage increased investment and/or philanthropic giving to developing countries or to specific development issues and to discourage social and environmentally irresponsible behaviour and externalities. She goes further in subject matter too, recommending that companies engage in public policy dialogue as a key element in their contribution to the fight against global poverty.

Generic prescriptions cannot be given on the initiatives or outcomes of the balancing exercise that companies engage in when they decide how to engage at the public policy interface. Emerging high-level principles lie in the notion that companies should limit their activities to those that lie within their ‘core competencies’ or ‘assets’, or to tackling issues within their appropriate ‘spheres of influence’, which is often defined, rather unhelpfully, as ‘the individuals to whom the company has a certain political, contractual, economic or geographic proximity’.33

The management strategy approach of ‘core competences’ suggests that businesses should focus on doing what they do best – in their areas of ‘core competence’. For example, Michael Warner of the Overseas Development Institute in the UK suggests a realignment of more of the core business competencies and resources of business with national and provincial development priorities. He points to competences such as those relating to production technology, employee health, operational infrastructure (power, water, roads,
telecommunications), borrowing capacity, distribution networks, project/contract management, market research and marketing, product R&D, human resource development, financing and accounting expertise, administration and legal expertise and HSE management (Warner, 2002).

Closely related to this ‘core competences’ approach is an approach based on application of businesses’ ‘assets’ which is advocated by the Shell Foundation in its 2005 report, Enterprise Solutions to Poverty. The Shell Foundation suggests that ‘Big companies possess a wide-ranging set of tangible and intangible “assets” that can be of huge value in the fight against poverty, especially via an enterprise-focused attack’.

The report divides these assets into three categories: the ‘generalised business DNA’ that is encapsulated in people, knowledge and techniques likely to be found in great profusion, especially in big business; the ‘convening power’ of business, understood as ‘ shorthand for the subtle and overt ways by which a company’s track record, reputation, brand, political reach and financial clout makes other people listen and respond to what the company has to say’, and, thirdly, the ‘company and sector-specific physical and market knowledge-based assets that lie at the core of the unique processes of value creation and capture on which every company relies’. However, it notes that ‘typically these are not the assets MNCs offer, or are asked to use, in order to discharge their . . . sustainable development commitments’.

The two notions (‘core competencies’ or ‘assets’ on the one hand and ‘spheres of influence’ on the other) reflect two competing trends in CSR. The notion that companies should take action within their ‘spheres of influence’ is based on the insight that companies’ activities and impacts may themselves give rise to influence – which should be applied in the public policy sphere as much as core business operations. This invites discussion on what influence a company has – in part a political exercise. In contrast, the notions of ‘core competencies’ or ‘assets’ operate as a more direct constraining notion, inviting discussion on ‘what are the competencies or assets that arise directly out of your core business?’

USING ‘HARD CASES’ TO HELP UNSTICK PROBLEM AREAS

The obstacles to getting an optimal relationship between CSR, law and policy are formidable. They range from public sector corruption (itself often fed by business), to lack of civil society capacity, to the tyranny of international competition in an era of open markets, and continuing mutual incomprehension between business, civil society and public policy-makers.

These are barriers that cannot comprehensively be tackled through the CSR
agenda itself. However, the practical challenges are themselves related to higher level conceptual obstacles to getting an optimal relationship between CSR, law and policy. This chapter has suggested throughout that the principal conceptual obstacles to getting an optimal relationship lie with the fundamental definitional challenges of CSR consensus over the appropriate balance between the ‘financial business case’ and the ‘legally mandated business case’ in any given setting.

Greater attention to ‘hard cases’ in the CSR agenda, the circumstances that demand business or policy choices in areas of least consensus in terms of normative guidance, could help to unlock new understanding in relation to this basic conceptual dilemma. Thoroughly discussing the implications of ‘hard cases’ in different sectoral and political settings could help to open up discussion on the basic state/market problem and the relationship between CSR, corporate accountability and good public governance, so that its resolutions become more helpful than they have hitherto been.

A handful of ‘hard cases’ are highlighted below. Many others could be added; for example ‘what are the boundaries to business action at the public policy interface’; or ‘are partnership-based approaches inherently good’. The point here is not to identify an exhaustive list of ‘hard cases’, but rather to point to their value as units of analysis.

**Are Small Businesses Inherently ‘Better’ than Big Businesses?**

A focus on ‘CSR and development’ or ‘CSR and poverty reduction’ may lead to the suggestion that there is inherent value in promoting and sustaining small and medium sized enterprises; for example, through support for business linkages between large and small companies designed to build capacity, or through ‘local content’ commitments on the part of foreign investors.

Undoubtedly, the economic significance of SMEs in middle and low-income countries as an overall proportion is very great, with SMEs around the world representing 90 per cent of enterprises and accounting for 50–60 per cent of employment at national level (Luetkenhorst 2004). Certainly, there are real risks that CSR tools such as environmental or social requirements incorporated in supply chains may harm small producers; or at the very least that the distribution of costs and benefits of adopting such requirements falls disproportionately on smaller producers.

Beyond hard economics, whether SMEs are inherently more socially beneficial than larger companies is a matter of opinion. They are perhaps more likely to contribute to social capital in the localities of their operations, as they are more likely to be embedded in their communities. But they may also be less likely to be subject to rigorous inspections in relation to labour or environmental standards.
Consideration of this question can help to define the scope and boundaries of the relationship between CSR and enterprise development. My former colleague Tom Fox offers a way forward (Fox, 2005). He notes that SMEs as they stand are a major economic force, upon which large numbers of people in developing countries depend for their livelihoods. At the very least, CSR practices should be shaped in a way that does not adversely affect the overall economic viability of SMEs in developing countries. And it is also important to reflect that the cumulative social and environmental impacts of SMEs are highly significant, even though individually they may be small.

Whatever else, a commitment to business and sustainable development should mean that a combined ‘environmental/economic/social’ filter is placed on all CSR-related activities that involve promotion of SME growth; so that CSR does not lead to the promotion of businesses that are themselves irresponsible or harmful.

**Should Businesses Refuse to Invest in Countries with Terrible Track Records on Human Rights?**

Transnational litigation under the US Alien Tort Claims Act raises many basic questions about the governance of multinational corporations in a globalized economy, where states have not yet adequately caught up with the ability of companies to coordinate activities over and above the boundaries of territorial sovereignty. In addressing ‘worst case’ scenarios of human rights violations with a nexus to business action, the ATCA cases point directly to a second set of questions: should businesses refuse, voluntarily, to invest in countries with terrible track records on human rights? What criteria should they use in considering this thorny issue? Or is the only obligation of business, once a decision to invest has been made, to do the best within its ‘sphere of influence’ (or through the application of its ‘core competencies’) to ensure that any harmful impacts from its investment are minimized? Should ‘home country’ governments instead play a greater role in setting boundaries for the operations of ‘their’ multinational corporations, using unilateral investment restrictions to set a clear policy lead?

Attention to this question helps to flesh out the boundaries of ‘what business is for’. If business activity cannot bring net benefits because of the human rights circumstances in which it takes place, even a limited view of the social function of businesses would suggest that business activity should not take place. But that idea is far from universally accepted. And, by focusing on foreign investors, not domestic enterprises that provide opportunities that may be all that keeps some citizens of such countries from destitution, it creates ethical divisions among businesses based on the country in which they are headquartered.
When is it Right for a Business to Disobey Domestic Legislation?

It is often suggested that the baseline for responsible business behaviour is ‘compliance with the law’. Yet what if the domestic legislation of countries in which business operates is at odds with fundamental principles of human rights reflected in the Universal Declaration on Human Rights, or core labour conventions, such as those addressing freedom of association, or non-discrimination between men and women?

The case of business investment in apartheid South Africa has in the past been used as a focal point for efforts to address this question. It raises issues about whether there are certain globally applicable minimum norms that businesses everywhere should adhere to. The question itself is closely linked to the core jurisprudential question of ‘when is it right to disobey the law’, but has not received the same quality of analysis in relation to companies as individuals. Focusing on this question can help to address the role of minimum norms for business behaviour; issues about the purpose of business; and the role of ethical values as distinct from ‘business case’ arguments in guiding responsible business behaviour.

Are Fewer Norms for Business Behaviour Inherently Better Than Many?

It is common to hear business representatives bemoaning the burdens and red tape that result from being faced with a profusion of environmental and social codes, guidelines and standards. The issue has development implications too, when producers in middle and low income countries are forced to absorb the compliance costs of differing environmental and social standards adopted by different customers in their supply chains at the same time as increased global competition places a ‘price squeeze’ on them. One response is convergence or harmonization among norms. Its close relatives are ‘mutual recognition’ and ‘equivalence’ – in essence, recognizing the equivalence of different standards based on their appropriateness for the contexts in which they are developed.

At the same time, there is also concern that CSR should be ‘localized’, and more directly shaped by stakeholders in middle and low income countries who have, so far, had far less impact on the agenda than stakeholders based in the world’s richest countries. This concern may point to continued experimentation to build ‘equitable’ or ‘inclusive’ standards.

The current process to define an international guidance standard for social responsibility within the International Organization for Standardization (ISO) is, at international level, the closest that the CSR agenda has yet come to pursuit of global convergence. In that process discussions on this important issue centre both on the desire of participants for flexibility; the standard’s
nature as a ‘guidance’ standard only (and the implications that may have for any normative content), and the desire of participants from countries with different social, cultural and economic conditions to ensure that the standard does not inherently or implicitly favour one set of circumstances in which social responsibility might be implemented over another.

**Should there be Minimum Standards that all Business Around the World should Abide by? If so, what should their Content be?**

This question is closely related to C above, and also to D. The question is generating real challenges in the ongoing process within the International Organization for Standardization (ISO) to develop ISO 26000, which is to be an international guidance standard on social responsibility. Within the OECD, the OECD Guidelines for Multinational Enterprises are one approach. The UN Global Compact and the UN Norms on the Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights can also be understood in this way.

There is little consistency between even these competitors for the position of ‘global minimum standards’, even before other non-business-centred instruments such as the Universal Declaration of Human Rights or the ILO Declaration on Fundamental Rights and Principles at Work. In a 2004 paper for Insight Investment (Ward et al., 2004), we tested a number of potential criteria for identifying the content of such standards, including criteria related to norms ‘established by the UN and ratified by governments’, and to ‘core ethical principles of business practice’. Each was problematic in different, multiple, ways.

Addressing this question can help to unlock understanding on assumptions or market choices on which the ‘ethical’ underpinning of CSR is based. And it can also help to test the boundaries of the increasingly widely understood notion that the practice and implementation of CSR has to be ‘localized’ – tailored to the differing cultural, geographical, social and economic circumstances in which it is applied.

**Is Making the World’s Poorest People Market Actors Inherently Good?**

This question is closely related to the first (p. 27). A focus on this question provokes consideration of the relative significance of economic growth; poverty reduction, and sustainable development as overarching outcomes or ‘public goods’ associated with CSR. As discussed, there is nothing inherently supportive of sustainable development in the notion that the world’s poorest people should become more significant market actors through the adoption of innovative business approaches on the part of the world’s largest multinational corporations.
WHAT COULD, AND SHOULD, LAWYERS DO?

In a book whose authors have been brought together by a leading UK law school, it is perhaps appropriate to conclude with some thoughts on the role that lawyers could, and should not, play in efforts to ensure that the links between CSR, law and policy, deliver outcomes that favour sustainable development. In doing so, I draw heavily on a 2005 paper (Ward, 2005), itself experimentally predated by a publication in the *University of St Thomas Law Journal* (Ward, 2004a).

This is a new area of analysis. Remarkably little has been written about the practice of commercial law as an economic sector in its own right. Even in the literature that has considered the relevance of law to CSR, it is the policy context and content of law that has been the focus. The practice of business law and its nexus with CSR have received little attention.39

Business lawyers would do well to think of CSR not only as an opportunity to develop a new area of practice, or an inspiration to new kinds of community investment or *pro bono* advice, but also in terms of its impacts on the existing ‘core business practices’ of commercial lawyers, and its implications for the engagement of commercial lawyers with wider public policy issues.

In-house business lawyers are already heavily involved in CSR. A 2003 Legal Director/Baker and Mackenzie survey of heads of legal and general counsel at 105 multinational companies with operations in Europe indicated that, of the companies surveyed, 55 per cent had a CSR policy, and of that 55 per cent, more than a quarter of general counsel or heads of legal said they had a role in devising the policy, rising to 50 per cent among those who sat on the main board of the companies.40

Potentially, CSR brings fresh perspectives to a central question: ‘what do lawyers do and how can it be justified?’ It raises questions about the balance between lawyers’ ethical responsibilities to individual clients, and their broader responsibilities to serve the interests of justice. At its most far-reaching, this implies a basic challenge to legal ethics, particularly the balance between the principle of duty to the client, often expressed as a duty to act in the best interests of the client – and the notion that lawyers owe wider duties to ensure that their practice reflects a commitment to the proper administration of justice. While there has been almost no reflection on the nexus between corporate responsibility and the wider public functions of the legal profession, that may be precisely what is now needed.

There is potentially a real tension between CSR and legal risk management approaches. For example, lawyers who choose to take a short-term view of their client’s interest in the context of alternative dispute resolution processes, or non-judicial investigation processes provided by corporate responsibility tools including the OECD Guidelines for Multinational Enterprises, can
undermine the potential value of those tools, playing straight into the hands of critics who argue that voluntary dispute resolution is no substitute for hard legal accountability.

Lawyers who launch into litigation on behalf of corporate clients without thinking through the wider implications can damage clients’ reputations. One need only think here of the McLibel litigation, an epic courtroom battle between food giant McDonald’s and two environmental activists, in which the activists defended themselves in a libel action which became the longest trial in English legal history, lasting for a total of 314 days. The action concerned statements made in a leaflet ‘what’s wrong with McDonald’s’ – some of them upheld. After damages were reduced on appeal, the judge awarded McDonald’s a total of £40 000 plus legal costs. McDonald’s was reported to have spent £10 million on the action. One newspaper wrote ‘Not since Pyrrhus has a victor emerged so bedraggled’.

In the US, Californian litigation against sports goods company Nike threatened for some time to hold back progress globally in voluntary company reporting on environmental and social issues. Business lawyers were partly responsible, issuing warnings of the new risks for companies who chose to issue social and environmental reports.

In short, CSR can, on occasion, generate calls for lawyers not to act, or to act in different ways, when advising businesses, or litigating on their behalf. But can business lawyers really drive changes in the corporate practices of their clients or (if they are in-house advisers) employers? Many external legal advisers would argue that they have little scope to shape the fundamental business strategies adopted by their clients, or to do much more than carry out their wishes, within the boundaries set by existing rules of professional conduct. These advisers would argue that they have little opportunity to influence business strategies. But not even all external lawyers are in this position. There is a distinct breed of external lawyer whose role is to act as overall ‘wise counsellor’ or ‘trusted adviser’ independent of any immediate legal risk management issue. So the scope for action on the part of external legal advisers is likely to be determined by a combination of the predisposition of their clients to seeing their external legal advisers in this way; the business case for those clients to practise CSR, and the extent to which the external legal adviser may him or herself be subject to various kinds of incentives to integrate CSR-related considerations into the delivery of advice.

In-house lawyers are in a different position; integrated within the structure of the company that employs them – and, in some cases, on its board. They may be more likely to be asked to advise on which courses of action are desirable, rather than simply presenting options. And as the survey results cited earlier suggest, it would appear that business lawyers have been directly responsible for shaping the approach that a significant number of multi-
national corporations take in their responses to the corporate responsibility agenda.

Business lawyers need to become more visible in the promotion of corporate responsibility. They need, clearly, to think about how to integrate legal risk management with corporate responsibility approaches – particularly in those areas where there are tensions between the two.

This is not a call for ‘legalization’ of corporate responsibility, nor for corporate lawyers to become dominant players in the agenda. Far from it. There is innovation, creativity and dynamic energy in the best of CSR that must not be stifled through excessive lawyering. But this is a call for careful reflection; for ‘deep’ not shallow integration of corporate responsibility in the practice of business law; and for restraint. CSR needs a distinctive breed of business lawyer if it is to come close to meeting its potential. And external business lawyers need to be prepared to view their own practices as businesses, subject to the same generic dilemmas and challenges of CSR as those facing other sectors.

It will not be enough for the legal profession to respond to CSR through _pro bono_ advice, community initiatives, and the development of new CSR-related practice areas. Indeed, doing so may result in the legal profession visibly trailing other business sectors that are more ready to address some of the underlying challenges. The legal profession has a great deal to offer to the progressive development of responsible business practice. Lawyers are already deeply embedded within the agenda, just as law is already a significant part of corporate responsibility.

**CONCLUDING REMARKS**

The central underlying dilemmas of CSR concern the relationship between state and market in different contexts, and ongoing debate about the purpose of business.

This chapter has outlined some of the conceptual and policy competitions that define the trajectory and boundaries of CSR. First, a competition between those who are advocates of state-centred visions of responsible business behaviour and those who advocate a market-led approach; reflected in discussion about whether CSR is inherently ‘voluntary’. Second, a policy competition between poverty reduction and sustainable development, reflected in the extent to which the role of economic growth as a goal in itself is incorporated within each. Here, ‘poverty reduction’ coupled with ‘economic growth’ currently appears to have the upper hand.

The ongoing competition between different visions of the purpose of enterprise today has a quiet resonance in two framing concepts for setting the
boundaries of CSR; namely ‘spheres of influence’ and the notion of ‘business core competencies’ or ‘assets’. Until the relative place and role of each in CSR overall is clarified, there are risks that the ‘core competencies’ notion resonant in the idea that ‘the business of business is business’ will act as a brake on public policy engagement and innovation by businesses seeking to use their advocacy skills within ‘their sphere of influence’.

The next stages of the CSR agenda will depend on the outcomes of these different competitions in different settings. It is by no means certain that only one vision will prevail at any given time – there will always likely be space for mavericks and innovators.

Today IIED has a research programme on Business and Sustainable Development, not Corporate Responsibility for Environment and Development. The programme works on many issues that could not comfortably be situated within mainstream notions of CSR. Uncertainty about the meaning and content of ‘sustainable development’ in diverse circumstances has proved a more comfortable framing territory from which to pursue the business-centred aspects of our mandate to ensure ‘that markets support, not undermine, sustainable development’ than the CSR or corporate responsibility agenda.

The links between CSR, law and policy remain, nonetheless, a rich field for clear-headed research, analysis, and innovation.

NOTES

1. The chapter draws heavily on papers, projects and publications that I have been involved in during my time working at IIED, and on conversations, email exchanges and ideas that originate with my colleagues and research partners. Where appropriate, I have highlighted relevant documents and publications. All views expressed are my own and not necessarily those of IIED.

2. See, for example, the speech by Lord Browne of Madingley at the Global Business and Poverty Conference, on 19 May 2004, available online at http://www.bp.com/genericarticle.do?categoryId=98&contentId=2018395, last visited 2nd September 2007.

3. Corporation 2020 is a multistakeholder initiative which seeks to answer the question ‘what would a corporation look like that was designed to seamlessly integrate both social and financial purpose?’ See further www.corporation2020.org


6. See generally the website of the CORE coalition, at www.corporate-responsibility.org.uk
7. See, for example, General Agreement on Tariffs and Trade (GATT), Secretariat, Trade and
   the Environment, Chapter 2 in International Trade 1990–91, Vol. 1, available at
8. See What is the Global Compact, http://www.unglobalcompact.org
9. Press Release, Kofi Annan, Secretary-General Proposes Global Compact on Human Rights,
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    http://www.ila-hq.org/pdf/Sustainable%20Development/Sus%20Dev%20Resolution%20+
    %20Declaration%202002%20English.pdf
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    University of Michigan, 14 November 2006.
16. See also the Millennium Declaration and Goals; 2006 report, available at
    pdf
    POIToc.htm, last visited 3 September 2007.
18. The other is the Johannesburg Declaration on Sustainable Development, available online at
    visited 3 September 2007.
20. UN General Assembly Resolution A/RES/60/1 of 16 September 2005, Available online at
    http://domino.un.org/UNISPAL.NSF/0080ef30efcfe525585256c38006eacae/af55614504378
22. As the crude indicator of a ‘Google’ search will clearly confirm.
23. I am grateful to my colleague Emma Wilson for her articulation of many of these challenges.
24. For an excellent analysis of the links between product standards and law, see Harm
25. 28 USC § 1350.
26. See, for example, the report of the OECD Workshop on Multilateral Environmental
    Agreements and Private Investment: Encouraging Business Contribution to MEA
    Implementation, available online at http://www.oecd.org/site/0,2865,en_21571361_-
    34841611_1_1_1_1_1,00.html
27. Speech by the Rt Hon Gordon Brown MP, Chancellor of the Exchequer, at the CBI Annual
    Conference in London, 25 November 2005, available online at http://hm-
31. The remainder of this section draws heavily on the report of a workshop organized by IIED
    for members of staff of BP-Azerbaijan, entitled ‘Boundaries to business action at the public
32. Simon Caulkin, ‘Corporate Lobbyists Must Stop Stalling on Regulation’, The Observer, 31
    August 2003.
Perspectives on corporate social responsibility


34. See further http://isotc.iso.org/livelink/livelink/fetch/2000/2122/830949/3934883/3935096/home.html

35. Available online at http://www.oecd.org/dataoecd/56/36/1922428.pdf, last visited 3 September 2007. The Guidelines also apply to businesses in those non-OECD countries (currently eight) that have indicated their intention to adhere to the Guidelines.


39. One clear exception is Dick Taylor’s excellent piece, ‘Corporate responsibility and the legal profession’, published by the law firm CMS Cameron McKenna and available online via http://www.ibanet.org/publicprofinterest/CSR.cfm, last visited 3 September 2007.

40. ‘Benchmarker: walking the tightrope: how high can you go?’ in Legal Director, March 2003, pp 28–9. The questionnaire for the survey did not offer a definition of CSR, leaving it to respondents to interpret the term as they chose.

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3. Misappropriating citizenship: the limits of corporate social responsibility

Joseph Corkin

INTRODUCTION

Corporate social responsibility is a slippery concept with shifting definitions, but at the very least involves a company going beyond its strict legal obligations to take into account the impact its business has on stakeholders other than its shareholders. At its most idealistic, however, it calls for business to assume a more social role; re-positioning companies as integral social partners from whom good ‘corporate citizenship’ is expected, rather than seeing them as isolated entities, valued only for their wealth generating potential, but in need of external control to prevent them damaging that which society holds dear. In critiquing these more idealistic variants, this chapter only touches superficially on the more or less sterile, empirical debates about business’s capacity to regulate itself, versus the need for state intervention. It concentrates instead on why that state intervention (or the threat of the same) is normatively desirable in itself. In taking responsibility for promoting the social good, the state, in all its manifest forms, realizes its citizens’ popular sovereignty because it is via the apparatus of the state that they, operating as equal members of a self-governing political community, exert control over the market, to push business (whether directly, through formal legal intervention, or indirectly, by the threat of the same) in what they consider a socially useful direction in which it would otherwise not travel.

The idea of corporate social responsibility is generally studied from the perspective of business – how companies can behave more responsibly – but can be re-interpreted as an implicit call for a rethink in the relationship between business and the state; with the role of one being bound up with the limitations (and therefore potential contribution) of the other to the social good. This chapter grapples from first principles with the theoretical limits to business’s capacity to assume social responsibilities (neoclassical economic theory, game theory and systems theory all figure) to reveal when state intervention is likely to be necessary to guarantee desired social goods. It then also considers the problems the state faces in judging the form such intervention should take, before
coming full circle to pick out the bare bones of a fruitful partnership between the two.

A traditional business-centric approach that is overly optimistic about the social responsibilities business is capable of assuming may result in complacency on the part of the state, which fails to appreciate when its interventions are necessary. A naïve state-centric approach on the other hand risks overlooking the contribution business can make to securing many social goods, whilst glossing over the difficulties the state faces in securing them alone, thereby encouraging ineffective or unnecessary intervention. Though this might look like a crass caricature of two opposing positions, followed by an overly neat triangulation, the literature is so polarized as to practically invite such a response. The revolutionary fervour of the true believers in corporate citizenship who, eager to carve out territory for their new discipline, exaggerate its potential, as well as its novelty, runs up against the reactionary opposition of the statist non-believers who are equally determined to resist their land grab and defend the traditional frontiers of the state, as well as their public law disciplines, from such incursions. In reality, corporate social responsibility is neither the best thing since sliced bread, nor some transient flash in the pan. Moreover, just because it is constitutionally invisible – taking place below the radar of any traditional understanding of the constitution (easily subsumed by existing ideas – there being nothing new in companies behaving socially responsibly in win–win situations, or the state using its regulatory and fiscal powers to manufacture such situations) – corporate social responsibility is not constitutionally uninteresting, provided the focus is on the subtle interplay between heterarchy and hierarchy it entails.

SO WHAT IS A COMPANY’S SOCIAL RESPONSIBILITY?

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, which is to say, engages in open and free competition without deception or fraud. (Friedman 1962: 133)²

Friedman’s famous description of the limits of a company’s social responsibility figures at one point or another in many pieces about corporate citizenship, but is only so despised by those convinced of business’s capacity to demonstrate citizenship because they are using restrictive, short-term notions of profit. In particular, it is necessary to incorporate a temporal dimension into the idea that companies exist to increase profit because sometimes they will sacrifice a short-term profit to reap a larger long-term profit, making it easier to speak of them being obliged to maximize their value (what shareholders would realize if they were to sell their stake). So, whilst company directors are
legally obliged to pursue their shareholders’ interests, this fiduciary duty is entirely compatible with taking into account wider stakeholders (customers, employees and their families, suppliers, subsidiaries, partners, investors, the local community, society in general and the environment), even when this is at the expense of short-term profits, provided this increases the company’s value (Berle, 1954). If this is all corporate citizenship is about, it is entirely consistent with Friedman’s assessment of the role of business.

Systems theory is as good a starting point as any to understand how companies are forced to behave in this way (Luhmann, 1995). Like any social subsystem, the market is a system of communication defined by the boundary it makes with its environment. Its interior is a zone of reduced complexity, separated from the chaotic exterior by the special mode of its operation. It is ‘autopoietically closed’; operating by continually reproducing itself according to the strict binary code that gives it its distinctive identity, which in the case of the market is profit/loss. The participants read (simplify) their environment in these special terms; selecting that which is relevant to the subsystem and ignoring that which is irrelevant. Companies are in business to make profit and avoid loss and thereby, ultimately, to maximize shareholder value. That is all they are set up for and equipped to do. There is no room for an independent role for extraneous matters like social, ethical and environmental ‘responsibilities’ because a company will only understand them as its responsibilities if its profits depend on it doing so (it reads its environment through the prism of profit and loss). When a company sees some sort of socially responsible behaviour as its ‘responsibility’ this is only because it anticipates that behaving in this way will maximize its profits. The fact that the behaviour is also the right thing to do socially, ethically or environmentally is only contingent. This makes it sloppy to talk of companies ‘assuming responsibilities’ towards their wider stakeholders because these responsibilities are never really assumed, other than contingently, as a means to maximize shareholder value, and, to the extent that a company acts socially responsibly, knowing this will reduce its value, the responsibility will have been imposed, whether because the state has, or has threatened to, regulate or tax the behaviour it deems socially irresponsible, or because consumers, employees and others exert their own market pressures. These pressures work with, not against, the profit motive.

The social implications of this slavish devotion to profit/value need not be so bad because companies are still, to an extent, capable of checking themselves. Empirical studies generally show a positive correlation between a company’s social and financial performance (Margolis and Walsh, 2003), making the promotion of shareholder value a driver of, rather than a hindrance to, a great deal of socially responsible corporate behaviour. Business schools push the business case for corporate citizenship because the precautional approach to the unknown and uncertain it prescribes is anyway a sensible way
to go about managing the risks to which companies are exposed and it also reveals hidden win–win opportunities to generate profit. A company that nurtures its intangible assets – whether employee morale or reputation in the community – is likely to create tangible commercial advantages; generate goodwill and loyalty from consumers; aid recruitment and retention of employees; and avoid the public relations disasters of corruption scandals and environmental accidents. If it thinks about the social, ethical and environmental dimensions of its business it will assess a greater range of options than a company that does not and this may lead to smarter choices that seize counter-intuitive (socially responsible) opportunities to generate profit/value. It might establish scholarships and foundations, donate money or volunteer employee time to charities and community projects, or do anything else that generates good, the cost of which is less than the profit that can be extracted from the goodwill generated. Moreover, these are peripheral activities that do not impact dramatically on the core business and can be useful in distracting attention from its social or environmental damage.

Consumers increasingly assess a company’s broader social and environmental performance and the more socially and environmentally aware they become, the more it might use its credentials as a good ‘corporate citizen’ to carve out a niche for itself in the market. It will spend good money nurturing its brand image if it anticipates this will enable it to establish a market position from which to reap even more money (discounted to its present value) in the future. There is nothing revolutionary in this – it is just good capitalism – and two examples from the high street serve to illustrate. In January 2007, Marks and Spencer announced a £200 million plan to make its business carbon neutral. Its share price (value) jumped immediately because the market considered this ‘green positioning’ would produce more than enough cachet among consumers (convertible into future profit) to offset the cost of its implementation. Meanwhile, in the book, Pour Your Heart Into It, Howard Schultz, the chairman of Starbucks, describes it as ‘living proof that a company can lead with its heart and nurture its soul and still make money’. Quite apart from the debate about whether Starbucks is as socially responsible as it makes itself out to be, there is a chicken-and-egg problem here because the company self-consciously promotes this image of itself (leading with its heart and nurturing its soul) as a business strategy (to make money). As the management gurus Collins and Porras argue, a durable business needs more than vision, values and leadership; it must be centred on a core ideology or identity (Collins and Porras, 1994). Love it or loathe it, Starbucks certainly has this.

A leading law firm, asked to consider whether institutional investors were legally entitled to take into account a company’s environmental, social and corporate governance performance when deciding whether to invest, found it not only permissible, but arguably required, because it would help them
predict future financial performance and therefore long term shareholder value. Likewise, some of the world’s leading stockbrokers found a company’s social performance impacted so much on shareholder value (short and long term) that investors who paid no attention to environmental, social and governance issues were taking unnecessary risks with their portfolios. And, internally, the Companies Act 2006 requires company directors to promote the success of their company for the benefit of its members as a whole and therefore to have regard to the likely long term consequences of any decision, including the interests of employees; the need to foster relations with suppliers, customers and others; environmental and community impacts; the desirability of maintaining a reputation for high standards of conduct; and the need to act fairly. Though this appears to widen their fiduciary duties, it in fact only codifies the common law, leaving the maximization of shareholder value as the fundamental duty – these additional considerations are no more than pointers as to how they might best go about fulfilling it.

Though company directors might make more socially responsible decisions were they to see their companies as Enlightenment institutions that incorporate real people into a common enterprise accountable to society, capitalism is simply not set up that way. The separation of ownership from control means directors cannot avoid their fundamental logic, which is to create profits and value for the shareholder. We must therefore be sceptical about any attempt to redefine business’s social role that would try to assign responsibilities companies are systemically incapable of assuming. Though the *homo economicus* of neoclassical economics is a theoretical construct found rarely in a real world where individuals do not make decisions purely on the basis of their own rational self-interest, the neoclassical account of the company, as an amoral profit/value maximizing entity, is pretty realistic. Ultimately, it is the bottom line that counts and the bottom line is that they are locked into a prisoners’ dilemma in which they must compete with one another on the basis of profit/value alone. Incapable of genuine altruism, they only take into account others’ interests if it is in their own interest to do so and if they are operating effectively will never knowingly reduce shareholder value to behave socially responsibly. To the extent that the two are irreconcilable, their social ‘responsibilities’ will always give way to the interests of their shareholders.

Though they might behave socially responsibly today, forgoing immediate profits that they might otherwise have passed on to their shareholders, they will only do so if they anticipate this will result in them being more than compensated by future profits whose present value (discounted to take into account what they will only accrue in the future) is higher than that forgone. Equally, they will behave socially irresponsibly if they calculate that, all things considered (from damage to their reputation and employee morale, to the risk of them provoking unwelcome state intervention) this will increase their net
present value. Social responsibility is what directors say their company will demonstrate if freed from the regulatory ‘red tape’ constraining them, but nothing will prevent them trampling all over the social good protected by that red tape if they are suddenly free of it and calculate that this will maximize their company’s value. No matter what a company’s glossy brochures and slick websites claim about how it takes its social responsibilities seriously (and these statements are now ubiquitous), when push comes to shove, companies are neither prepared, nor able to behave responsibly towards wider stakeholders if this reduces their value. So, away from the high street, where public image counts for less, Dorothy Thompson, the Chief Executive of Drax Group that owns Europe’s second largest coal-fired power station, is more candid about what she understands by corporate citizenship:

There’s a word we sometimes use: we see ourselves as responsible. If you’re faced with two decisions, and one’s going to make you a lot of money but give no environmental benefit, and one’s going to make the same amount of money but result in an environmental benefit, it’s very clear which one you go for.9

If all things are equal, she will do whatever is environmentally responsible, but that is a very big ‘if’. She will not sacrifice profit because, as she puts it, ‘my shareholders wouldn’t support it. They invest in us for profit. We’re not a not-for-profit organization.’

COLLECTIVE CORPORATE SOCIAL RESPONSIBILITY

The idea that business might take more account of its social and environmental impacts coincides with a broader blurring of roles between business and the state, in which we increasingly come to expect companies to interact with one another to draw up and voluntarily abide by industry standards that ‘impose’ obligations over and above those legally required of them. Though these standards would seem to bite into profits and reduce their ability to innovate by making it more difficult to differentiate their products from those of their competitors, consumers do not have the time, money, inclination, or expertise to assess all that is on offer and are given confidence to consume by standards that assure them of a product’s quality, interoperability, or social or environmental credentials.

Companies behave as if these heterarchically-generated codes and product standards are binding, even if the normativity is little more than a response to market imperatives by representative associations, standardization organizations or other bodies located in an amorphous regulatory space between them and the state. The result is that thousands of standards developed by business and either diffused through market processes, or incorporated into law by
reference, following little more than cursory scrutiny, have enormous influence; affecting the safety of the products we buy, the risks we face and the environment we live in. In the UK, financial services, advertising, as well as newspapers and magazines are regulated, in part, by the industry concerned, whilst the same is true at the European level of banking, electrical goods and services, as well as information and communication technologies. Likewise, the privately-funded European Committee for Standardization sets standards in fields as diverse as the resistance of floor coverings to cigarette burns to the temperature rating of sleeping bags.

Without first inquiring into the direction these collective efforts push business, the mere fact that certain standards emerge as an industry’s de facto code tell us little about whether we should welcome such self-regulation. Companies certainly have some incentive to look beyond their own narrow interests because if they wish to use these standards to signal something about themselves or their products, they must ensure they are attractive to, and trusted by, at least some stakeholders. So, Meidinger even finds ‘hidden democratic genius’ in business labelling schemes competing with one another for public acceptance because the ‘continual pressure . . . may foster more democratic responsiveness than is traditionally the case with state regulatory agencies’ (Meidinger, 2007: 13). But, just as traditional political processes exhibit failures, these self-regulatory processes will also inevitably fail to incorporate the interests of all affected stakeholders and will give disproportionate weighting to those they do. Moreover, when an industry’s dominant companies act to raise their standards, whether by lobbying for state regulation or colluding with one another to establish an industry norm that, though technically voluntary, is difficult for competitors to ignore, the protection secured for the social good may well be anti-competitive; motivated by the desire to make life more difficult for (or even wholly exclude from the market) competitors whose goods or services do not comply. Similarly, companies that unilaterally raise their standards and successfully anticipate a levelling up of state regulation have an advantage as first movers because, unlike their competitors, they face no new compliance costs. Levelling up the standards to which an industry is subject might also create new income streams, or enable the market to sustain higher profits, because higher standards tend to increase both the cost of a product and the profits that can be extracted from it.

Whilst these self-regulatory processes can at times be problematic, limitations in the state’s regulatory resources also make them inevitable. Lacking regulatory capacity, and with insufficient ‘in house’ expertise to perfectly judge its own interventions, the state relies a great deal on business regulating itself and is frequently restricted to either casting an eye over (but generally accepting at face value) an industry’s research findings, or to comparing and choosing from amongst (without altering) its standard practices. Instead of
developing its own novel standards, it does little more than officially endorse standards that have originated in heterarchical networks; translating, or upgrading them, into the quality of state law, but leaving business the *de facto* regulator.

This spontaneous generation of legality in self-organizing, heterarchical networks, in which norms emerge, and are enforced, in all sorts of unexpected places, is similar to what Sciulli calls societal constitutionalism (Sciulli, 1992). It has entwined business and the state in a multi-faceted regulatory partnership because these networks still operate in the shadow of its hierarchy. The state might mandate business to formulate and enforce norms within a broad framework it determines; sanction business to formulate norms, which it subsequently subjects to a degree of scrutiny, before approving; coerce business into developing its own code, whilst threatening to impose one if it fails to do a satisfactory job; or avoid intervening altogether, entirely vacating a field that it might otherwise have regulated and thereby putting the onus on business to regulate itself voluntarily – independently of hierarchical pressure, whether exerted directly, in the form of state regulation, security law, fiscal rules, environmental law, labour law or whatever, or indirectly as a shadow (the threat of the same) (Black, 2001).

**SO IS HIERARCHY STILL NECESSARY?**

Markets are arenas of voluntary cooperation that function only when the participants respect one another’s property rights and honour the promises they give in relation to them. This will only happen when conditions are right to offset the incentive to cheat. This does not depend, in all instances, on a state hierarchy because spontaneous social orders can arise even when individuals merely pursue their rational self-interest. Examining the circumstances in which such conditions present themselves gives more insight into the circumstances in which business might behave responsibly and when it will not.

Whilst competition over the use of property is inevitable in conditions of scarcity and prompts the evolution of rules and institutions that focus on its allocation (Hume, 1751: 14–34), a ‘war of all against all’ is not an inevitable consequence of a Hobbesian ‘state of nature’ because some cooperative interaction can occur without the *Leviathan* to facilitate it. If individuals interact regularly they have an incentive to build their reputation within the group, which they do by abiding by its behavioural rules, which have developed spontaneously to facilitate its interactions (Axelrod, 1984). The more they interact, the more their interdependent choices become part of a continuous process in which every decision is a link in a chain with which they build their
credibility for future interactions. Those who employ a non-cooperative strategy in repeat games and refuse to recognize these rules will quickly find it difficult to locate a partner for future games. They will be ostracized; ‘punished’ by being excluded from some or all future interactions (Tullock, 1985: 1075–6; Benson, 1994). Markets are therefore theoretically possible without the hierarchical imposition of rules.

Nor is this purely theoretical and two examples (one ancient, one modern) serve to show this. *Lex mercatoria* was the body of rules that developed amongst medieval merchants to regulate their dealings with one another and, having evolved from common usage (custom), enabled medieval markets to function with little interference from the state. Administered by specialist merchant courts, compliance depended on the threat of being excluded. Similarly, stock exchanges today set their own rules that determine how their members trade securities with one another and how those rules are enforced.20 And, despite computerization, these stock exchanges are nearly always accompanied by a parallel ‘upstairs market’, in which larger traders employ brokers to exchange information informally, seek out counterparties using personal contacts and negotiate trades. The unwritten nature of the rules of this market-within-a-market and the way they are enforced is similar to the operation of an ‘old boys’ club’.

If medieval merchants and their latter-day equivalents in red braces behave responsibly towards one another, without the state intruding overly in their business, why can’t we leave all forms of business to regulate themselves? What distinguishes these markets from other more heavily-regulated markets and what does this say about the limits of corporate citizenship?

Whilst traders, brokers and medieval merchants deal continuously with one another in relatively small, homogeneous communities and have a strong incentive to behave fairly towards one another, businesses that operate across large, disparate communities and interact with (and have impacts on) many others have no such incentive – their credibility counts for something, but much less; creating more opportunities to get away with behaving irresponsibly, exploiting the commons, imposing externalities and generally free-riding on others. Traders, brokers and medieval merchants trade amongst themselves and their interactions have few externalities, whereas companies that produce goods and supply services to the public are in a wholly different situation because their externalities are both more complex and more widespread. They have more stakeholders and the relevant community for assessing their standards of conduct is therefore larger and more diverse. In these circumstances, the market functions only when there is a ‘protective state’ (Buchanan, 1975) that, as a minimum, defines the property rights that are its subject matter; determines the rules by which these rights can be exchanged and enforced (allowing the participants to deal voluntarily with one another); and maintains
the rule of law by exerting a monopoly over the legitimate use of coercion to offset the participants’ incentive to cheat. This is, however, only a bare minimum because it takes no account of the externalities they might impose on one another in such a free market and that the state might step in to prevent. It turns out then that medieval markets and today’s financial markets are the exceptions that prove the rule (that a state hierarchy is necessary to sustain a market). And, ultimately, even in these exceptional cases, a state hierarchy still operates in the background, in a Hobbesian sense, to maintain the rule of law, upon which the intermediate systems of rules – *Lex mercatoria* and the stock exchange rules – depend.

Privatization, deregulation, devolution, the contracting out of public services and the state’s use of private consultants has so entwined business in activities traditionally the preserve of the state that, on adding to the list the fact that it now regulates in concert with business, with which it is no longer in a simple zero-sum game, the relationship begins to resemble something contractual, rather than hierarchical (Freeman, 2000: 675; Black, 2001; Schepel, 2002). However, it is important not to over-egg the break with hierarchy. Though the state must learn to understand itself in a world of increasingly horizontally configured relations (Murphy, 1997: 184), heterarchy has not replaced hierarchy, only hierarchy often slips into the background, as the default (or fall back) position, with the state asserting it less directly. It asks business to behave responsibly, in return for keeping out of its affairs, but reserves the right to step in should business do a bad job, so that, even when it chooses not to step in, it still asserts its hierarchy (if weakly) simply by tacitly consenting to the outcomes of these self-regulatory processes.

So, although the idea of a regulatory partnership between state and business implies a heterarchically-structured relationship – a marriage of equals – the constellations formed continue to make business the subordinate partner and the state ultimately authoritative. In the final instance, the state must assert itself over business to bring it under some semblance of hierarchical control, even if only tenuously, because, in its absence, any apparently voluntary self-regulation (whether by an individual company or by companies acting collectively), that goes beyond the trivial idea of behaving socially responsibly when this coincides with maximizing value (including the possibility that a company might run a short-term loss to recoup a long-term gain), will, in reality, be coerced; a reaction to the background threat of potential state intervention and an attempt to minimize its impact on their value. No matter how loudly the advocates of corporate citizenship claim business is capable of regulating itself genuinely altruistically, any self-restraint that hits a company’s value is never truly voluntary and will only happen because it is situated in the shadow of hierarchy, which leads it to try to head off future regulatory interference by convincing the state it is superfluous because it already takes its social respon-
sibilities seriously. It calculates that the profit forgone keeping its own ship in order will be less than what it stands to lose were it subject to the intervention it tries to pre-empt.\textsuperscript{21} And if an activity justifies some form of self-restraint, in order to protect some social or environmental good, the state must ultimately have an interest in regulating it, so that there is always the possibility it will step in should business fail to do an adequate job. It was in this sense that Durkheim described all law as public law and all functions of society as social; there being no functions that ‘are not, in greater or lesser degree, under the supervision of action by governmental bodies’ (Durkheim, 1933: 127).

Similarly, only in a limited sense does mandated, sanctioned and coerced self-regulation occur separately from the state, so that there is ‘regulation in many rooms’ (Black, 2001: 121) because, in practice, the state is at the core of each (they are, after all, each defined in terms of a relationship with the state). All that changes is the directness of the involvement. Though the state adapts its regulatory strategies to accommodate a greater role for business, ultimately no mode entirely escapes the shadow of hierarchy looming over it. No matter how subtle, complex and detailed the mechanisms that guide business’s responsibilities and encourage it to pursue the social good are, a state hierarchy lurks in the background, spurring self-regulation by casting a shadow over its heterarchical interactions. To claim otherwise and to dismiss the idea that popular sovereignty depends on an authoritative, hierarchically-situated elected body as wishful thinking, trapped in ‘the conceptual grip of the hierarchical model’ and wedded to an old-fashioned constitutional formalism (Freeman, 2000: 672), moves too quickly from an exaggerated description of the way regulation really happens (the world has moved on, but not that far) to some sort of normative justification for that ‘reality’. Whilst meaningful normative theories must always be confronted by sociological realities – in this case that the state has, over the years, devolved tasks to business and there are reasons to welcome its input – we must be careful to avoid abandoning old constitutional ideals when they might be re-invigorated to cope with changed circumstances. The state still asserts its hierarchy, but does so more subtly; working with, not against, these heterarchical processes.

Though the regulatory spaces governed by norms generated in largely heterarchical processes are never wholly autonomous of the state hierarchy, which adapts its law to them (and them to it), the form this mutual irritation, or ‘structural coupling’, takes depends entirely on the context. The shadow metaphor is useful because it rightly implies that the state will frequently be more successful effecting change by working with (only casting a shadow over) business, rather than trying to steer it too heavily or too directly. The need for hierarchy is undiminished, but the lesson is that the state might learn to assert it more subtly.

Self-regulatory processes, in which norms emerge heterarchically, to
supplement, enhance and occasionally displace state regulation, need not mean market power replaces the capacity of the self-governing political community to shape its own destiny, provided new forms of constitutionalism can be found to bring the structures through which business’s input is felt under some semblance of public scrutiny and control (Gerstenberg, 1997: 351; Teubner, 1997: 159). The state must remake its own regulation so that, instead of operating incompetently and clumsily upon these heterarchical processes, it wields its hierarchy ‘responsively’ (Nonet and Selznick, 1978; Ayres and Braithwaite, 1995), or ‘reflexively’ (Teubner, 1983: 274; Teubner, 1987), to proceduralize them, in something akin to what Black calls the ‘“post-regulatory” regulation of self-regulation’ (Black, 2001: 105). Regulation becomes more a process than an end state. The state prompts or coordinates self-regulation by employing smarter, softer and more creative instruments of control and persuasion (for example carbon trading schemes), rather than classic, interventionist (command-and-control) regulation. It moves forward experimentally; building upon its own, as well as business’s capacity to learn and adapt; stimulating socially responsible corporate behaviour, without codifying every last detail; and creating strands that connect up the heterarchical networks through which self-regulation happens, which it does, for example, by setting up or facilitating the work of consumer groups that drive corporate social responsibility through the market pressures they generate in public information campaigns, or by endorsing NGO- or industry-sponsored labelling schemes22 to reassure consumers of their robustness, thereby allowing companies to convert their social responsibility into commercial advantage by credibly differentiating their products. Annual directors’ reports in the UK will, for instance, have to include information on environmental matters, as well as employee, social and community issues,23 whilst, across the EU, companies can sign up to the Eco-Management and Audit Scheme24 and have their environmental performance independently scrutinized to gain recognition for activities that go beyond minimum legal requirements. Likewise, the EU’s Eco-Labelling Scheme allows companies to attach a widely recognized symbol to goods and services whose environmental impacts are less than those of comparable products performing the same function.25

Whilst constitutionalism used to be concerned with disciplining the powers of the state alone, this has been overtaken by the need to discipline quite different social dynamics that demand a form of constitutionalism no longer centred on the state (Teubner, 2004). However, this does not mean it is possible to connect the political community to these self-regulatory processes simply via an ‘increasingly “constitutionalized” administrative law’ that would seek out ‘an approximation of the general public interest, or common good, in proceduralism and pluralist representation’ (Everson, 1999: 293). No amount of proceduralism will entirely substitute for the shadow cast by an elected state
hierarchy over these heterarchical processes, which not only creates the conditions for them to occur in the first place (by guaranteeing the rule of law, protecting property rights, supplying the mechanisms for enforcing promises as to their exchange and constituting the legal persons making those exchanges), but, in the final instance, also renders their outputs legitimate by making an important connection back to the citizen and their popular sovereignty. The internal relation between law and political power, based on the idea that the rule of law and democracy sustain one another, means that all lawmaking, including that in which the state merely appears in the role of an intelligent adviser or supervisor that makes procedural law available, must remain linked to an elected state hierarchy in a transparent, comprehensive and controllable way (Habermas, 1996a: 441; Habermas, 1996c: 1541). However which way, behind all the proceduralism there must be a popularly elected body.

MISAPPROPRIATING CITIZENSHIP

The term ‘corporate citizenship’ misappropriates the idea of citizenship in any meaningful form because it implies companies enjoy equal membership of a self-governing political community and will make a public use of their reason to move beyond their own private interests to seek out ‘a reasonable political conception of justice’ for society as a whole (Rawls, 1997: 801), when, in reality, they behave (as the system requires them to do) as amoral, self-interested actors, interested only in maximizing their value. Moreover, loose talk about companies possessing citizenship risks tacitly authorizing their subversion of the political process to their own strategic ends. And this open invitation (as if they needed any encouragement) is only likely to exacerbate what is already problematic because it further diminishes real citizens’ ability to use their own rights of political participation to steer the political process, whilst failing to impose on these faux citizens the correlative duty of citizenship to use that right to strive for the betterment of all.

The idea of corporate citizenship also risks complacency on the part of the state, which is tempted to abdicate responsibilities only it could assume because it assumes incorrectly that they are being picked up by business. Always keen to divest itself of troublesome tasks, the idea allows it conveniently to pretend that business is shouldering that which had been its responsibility when this is far from the case. Business is not the best agent of the social good because companies will always struggle unilaterally to behave socially responsibly and frequently face insurmountable transaction costs (and anti-trust constraints) in doing so collectively.

The argument that the state is incapable of intervening sensibly in business
affairs and should instead leave companies to get on with regulating themselves is, at its crudest, little more than a blunt reassertion of *laissez faire* economics. Freeman, however, considers this a touch simplistic and trusts the self-correcting mechanisms built into these heterarchical processes, including ‘internal procedural rules’, ‘responsiveness to market pressures’, ‘agreements or bargains with other actors’, ‘informal norms of compliance’, ‘third-party oversight’ and ‘peer pressure’,26 to secure their accountability and restrain companies when their private interests do not align with the public interest (Freeman, 2000: 665). Nevertheless, it is doubtful whether such mechanisms can sustain this weight. They do not look nearly robust enough to restrain a company that is struggling to make a profit in an uncertain economic environment and in the face of increasing global competition when the social good requires it to do one thing and its short-term profits another. And, anyway, beyond this empirical question there remains the more fundamental normative problem with the idea of corporate citizenship; that there is an inherent value in regulating markets through traditional, legally-constituted state hierarchies with solid democratic mandates because these structures (constitutional orders) connect the law that emerges through them to the popular sovereignty of the citizen, whilst ensuring it is certain, consistent and neutral in application. This constitutionally-mediated legitimacy is potentially denied when business is asked informally to show restraint and the state largely relies on its voluntary codes and product standards.

To rely on interactions between companies and consumers, and companies and their employees, to drive corporate social responsibility from the bottom up, via the market, shifts power away from the political community to use the political process to drive it from the top down, via the apparatus of the state. So, whilst reliance on corporate citizenship might empower individuals as consumers and employees, who can then regulate business via their individual consumption and employment choices, it dilutes their real (in contrast to some imagined corporate) citizenship. The more the state divests itself of what had previously been its responsibilities, the harder it is for citizens collectively to regulate business’s impact on their daily lives by operating upon the market as a political community, via the political process and the state hierarchy it steers. They are forced instead to turn to their market power as consumers, employees or specialist interest groups, which instead exert pressure on business individually. This has the potential to impoverish the political public sphere because there is correspondingly less deliberation about how we move forward collectively, as a political community. Society is more atomized; fragmented into sub-groups, each with their own specialist interests, agendas and concerns. And, even if the net control over business (consumer, employee and citizen power combined) were greater, it is still a cause for concern because consumers and employees have a say commensurate with their spending or
bargaining power, whereas citizens have an equal say (each person only has one vote). Those with limited market power who rely on elected state institutions to give them influence over the way the market is regulated lose out and even the affluent struggle to make fundamental changes because they can only police corporate citizenship at the edges; creating islands of good practice – a consumer boycott here, a Fairtrade latte there.

A political community seeks to govern itself and master its own destiny through the state institutions it controls, making the mix between self-regulation and the regulation of business a deeply political issue appropriately steered by the citizen. Much of the political process revolves around working out how best to juggle the need to restrain market power (to mitigate the damage it would otherwise do to various social goods if left unchecked); to respect its capacity to supply private goods; and to find ways to harness that capacity to supply public goods. It is for citizens to come together as a political community and determine through the political process what social goods they value; how they are to be secured; to what extent business should be left to get on with the job; and to what extent its excesses should be reined in. In place of relentless obeisance to the market, the market becomes no more than an instrument to be shaped to society’s purposes, which demands we think of it, not as a natural, inevitable phenomenon (with the political community left to operate in the space it leaves) but as man-made and to be bent to the political community’s will by the state institutions it steers and upon whose rules and protection it ultimately depends. The political community must take primacy over the market. All too often, politicians speak of markets and globalization as forces that have been unleashed, but which can no longer be controlled, when, in reality, they are man-made and, constituted by man, are also subject to his mastery. In spite of the pressures that globalizing markets exert on state power, it is essential that the state (relocated to whatever level is necessary to maintain the upper hand) remains the dominant player in the regulatory partnership with business, so that the market serves society’s needs (as determined through the political process) and not the other way around.

The problem is that, whilst self-regulatory processes at the national level are caught up, or embedded, in legal-constitutional orders that give state hierarchies reasonably effective means to discipline them with a comprehensive set of state laws, these means are worryingly absent at the global level. So, although nation states can successfully shove these processes off into ‘the grey areas of non-legal factuality’, multinationals that operate in multiple regulatory contexts are ‘effectively escaping from the thoroughly institutionalized framework conditions of the nation state without comparable framework conditions growing up, or even being within sight’ (Teubner, 2003). To the extent that they compete on a global market, for which there is no adequate state hierarchy to ratchet up a level regulatory playing field and ensure market
competition plays itself out in more socially responsible ways we are likely to see ongoing deregulatory pressures. Intergovernmental cooperation, especially on a highly formalized level, as occurs in the European Community, is vital in standing up to these.

In another sense, globalization might be harnessed to make business behave more socially responsibly. This chapter is written from the perspective of the industrialized world and is premised on a functioning, democratic constitutional order that gives citizens extensive control over the state apparatus, which, in turn, casts a strong hierarchical shadow over business. Many do not live in such privileged circumstances. However, the more integrated the world’s economy becomes the more scope there is for relying on the strong rule of law and shadow of hierarchy that exists within rich, industrialized nation states to reach out into parts of the world where the rule of law and the shadow of hierarchy is weaker. Multinationals, anyway keen to extend standards that apply in one jurisdiction to those in their supply chain overseas, might be persuaded to attain higher standards than those required of them for local legal compliance in the developing world (to which they have outsourced much of their production) by consumer and regulatory pressure exerted elsewhere in the industrialized world. Effectively, standards of corporate behaviour are driven up by piggy-backing on the industrialized world’s consumer spending power, developed civil society and rule of law traditions. Though, taken to extremes, this starts to smack of regulatory imperialism, rife corruption and a lack of democracy in much of the developing world mean that many do not have the luxury of steering a state hierarchy to make business respect the social goods they care about (let alone the global commons we all care about), so they are not really disempowered by any such extra-territorial reach.

COMPANY DIRECTORS AS INDIVIDUALS

People arrive at a factory and perform a totally meaningless task from eight to five without question because the structure demands that it be that way. There’s no villain, no ‘mean guy’ who wants them to live meaningless lives, it’s just that the structure, the system demands it and no one is willing to take on the formidable task of changing the structure just because it is meaningless.29

Only people can have responsibilities. A corporation is an artificial person and in this sense may have artificial responsibilities, but ‘business’ as a whole cannot be said to have responsibilities, even in this vague sense.30

Though seemingly pointing in the other direction, these two quotations have something important to say to the potential for socially responsible corporate behaviour. One message coming from the corporate citizenship
literature is that company directors, as individuals, would prefer not to leave their conscience at the boardroom door. They are therefore usefully distinguished from the companies they direct because, unlike fictitious corporate legal persons (but very real *hominis economici*), they are made of flesh-and-blood, have private moral concerns and really are capable of assuming responsibilities; only the market systematizes them to ignore their private desires to do the right thing to the extent they conflict with their overriding duty to create profit and value for their shareholders, even when this means doing something they consider socially irresponsible. However, to the extent that their systematization is never complete and will sometimes fail because of weaknesses in their shareholder-principal’s ability to control them, these private desires to do the right thing can flood back in and companies may well behave genuinely altruistically, in the sense that their directors will expend money, or forgo profits, doing (or not doing) things they consider socially (ir)responsible even when this is unjustified by any resulting effect on the companies’ value. Managerial/behavioural analyses certainly reveal more complex motivations for director behaviour than the enlightened self-interest of rational choice theory. So, directors might do enough to generate a level of profit/value that will placate their shareholders, whilst prioritizing something quite different; whether sales (Baumol, 1968), their own salary, perks, security, power, or prestige, or even their reputation as ‘captains of industry’ and good global citizens.

Perversely then, the only instance when a company might put its social ‘responsibilities’ before its maximization of shareholder value is when it malfunctions, so that what appears to be corporate citizenship is really non-systemized trickery on the part of the directors. The socially responsible corporate behaviour occurs in the gap left by weaknesses in the principal-agent relationship between the shareholder and director that stems from information asymmetries. The director-agent understands better than the shareholder-principal what is likely to maximize the company’s profit/value, which he can then exploit to carve out sufficient autonomy to get away with pursuing his own agenda; disguising as profit-serving or value-producing that which amounts to flattering his own ego by behaving philanthropically with his shareholders’ money. The company director that generates less profit to behave socially responsibly, knowing that the pay-off in increased value (future profit) is inadequate to compensate, is effectively devoting financial resources that he might otherwise have invested to increase the company’s value or returned to its shareholders as dividends. His altruism consumes part of the company’s productive wealth and the forgone profit/value will be swallowed by less scrupulous competitors.

That said, the state can no more change the idea that companies are in business to create value for their shareholders (by simply assigning them some
other priority) than rely on the wiggle room directors can create for themselves to make their companies behave socially responsibly. Directors will never truly break free from a system that requires them to maximize profit/value because shareholders will always look to reassert their own interests and demand they deliver just that. But, just because the state must (if it is unprepared to unravel the fundamentals of the capitalist system) work within these constraints does not mean it is powerless to effect change in companies’ social performance. It sets the rules of the game in which companies pursue profit/value and, recognizing they are trapped within a system whose rules it makes and referees, the onus is on it to use this power to harness them to the purposes of the political community by motivating them in socially useful directions, even as they compete with one another for profit. When it spots inequalities in bargaining power, or market failures that mean the pursuit of profit/value no longer coincides with that which is socially useful, the onus is on it to step in and change the parameters of the game to realign the two. It alters the regulatory and fiscal framework in which companies operate to align true costs and benefits; ensuring social and environmental externalities that would otherwise be ineffectively built into market prices are internalized to change what is profitable, thereby incentivizing that which is socially and environmentally responsible and, ultimately, sensitizing business to social goods it would otherwise ignore. It triggers this behaviour, either by working directly upon companies with state regulation, or simply by threatening the same and carefully signalling its intentions as to the form such interventions might take, thereby creating an environment in which business is steered (even re-programmed) towards serving societal interests, even whilst serving its own interests.

Although much of this chapter has been pitched in terms of what business cannot do and when we should not expect socially responsible corporate behaviour, it is also about when we might. Aware of the arena in which business might be persuaded to behave socially responsibly, even whilst maximizing shareholder value, the state might intervene more effectively to enlarge that arena. The problem is that this task is incredibly difficult. Complex markets throw up complex market failures and this is where the idea of a regulatory partnership between business and the state comes into its own. The state might gain traction by working with the goodwill and expertise of those within the business; the very company directors who are keen to be set free to do the right thing, but who need its help to do so because they cannot escape the market’s value-maximization logic. They need level regulatory and fiscal playing fields to do the right thing, so that instead of losing profits to competitors that undercut them by behaving socially irresponsibly – always the risk companies face in acting unilaterally – competition resumes on an elevated (socially responsible) plateau that allows them to pass the costs of complying
with higher standards on to customers, without the fear of being undercut by less scrupulous competitors. Directors are well placed to advise on the layout of that playing field. They know the industry they work in inside out; where the market failures are and so on.

Both the state and business depend upon ever more precarious, fragmented societal knowledge and need new ways to generate, handle and use it successfully. Just as democracy is a mode of inquiry that is suited to pooling widely dispersed intellectual skills and information (Dewey, 1927), at a meta-level, competition between companies ensures the market is generally good at pooling dispersed knowledge to ensure unmet needs are met.33 The two processes are therefore complementary and it is inevitable that, under conditions of globalization and growing social complexity, regulatory processes, in every imaginable field, at national and at supra-national levels, will incorporate business, which is no longer a passive recipient of regulation, but will actively regulate itself, lobby for state regulation and is used reflexively by the state to develop regulation. Even equipped with a full complement of specialized regulatory agencies, the state has no monopoly on the knowledge, expertise, skills, scientific understanding and organizational and monitoring capacities upon which effective law depends. Nor are these capacities ‘out there’, readily accessible to it, working independently of those it regulates (Ladeur, 1997; Vignon, 2001) and whose regulatory solutions are also likely to be more innovative. So, instead of attempting to regulate complex policy fields directly using blunt, top-down, substantive command-and-control regulation, the state adopts procedural solutions that co-opt companies into the regulatory process to exploit their capacity to gather information, discover risks, react to change and experiment.

The potential for such a partnership is enormous. In the BBC’s 2007 Reith Lecture, Jeffrey Sachs put the successful tackling of the hole in the ozone layer down to chlorofluorocarbon manufacturers (after initially denying the problem) whispering in the ears of the politicians ‘it’s okay, you can reach an international agreement, we can handle this’ and, on global warming, adds:

‘technological breakthroughs are similarly leading the companies to whisper in the ears of the politicians – ‘it’s okay, we can handle this’. And that’s the best news of all. Companies around the world are now in the lead of their politicians. In fact they’re telling the politicians we have to act, we want a framework, we need an incentive mechanism, we need a price structure so that we can move ahead with sustainable energy.’

CONCLUSION

The notion of corporate citizenship has caught the mood of the times. There is
a broad political consensus in the UK around the idea that the social responsibilities once shouldered by the state might be devolved, at one end of the spectrum, to civil society (voluntary organizations and the like), and, at the other end, to business. So, Tony Blair contrasted the first half of the twentieth century, in which he said ‘we learnt that the community cannot achieve its aims without the help of government’, with the second half, in which ‘we learnt that government cannot achieve its aims without the energy and commitment of others’.34 Meanwhile, David Cameron dismisses the idea of the state as ‘the sole agent of social progress’35 and commits himself to ‘rolling forward the frontiers of society’,36 leaving civil society and business to fill in where the state has been rolled back.

In 2003, as representatives of the world’s civil society gathered at the World Social Forum in Brazil, its political and business leaders met (appropriately enough in the exclusive Swiss ski resort of Davos) for the World Economic Forum, amongst other things, to define business’s social role, which they put down to:

the contribution a company makes to society through its core business activities, its social investment and philanthropy programmes, and its engagement in public policy. The manner in which a company manages its economic, social and environmental relationships, and the way it engages with its stakeholders (such as shareholders, employees, customers, business partners, governments and communities).37

Though not meant in any revolutionary sense, they are still lofty claims for business, but not necessarily unjustified. In many ways, companies really can make vital contributions to local, as well as global, social and environmental problems, but, more often than not, they will only do so in partnership with the state, which operates in the background to steer them towards that which is socially or environmentally useful. So, it turns out that those in Switzerland had something important to say to those in Brazil and vice versa. Business can do a lot; the state ensures it does even more; but, in monitoring, cajoling and gathering and disseminating information about them both, organized civil society has the potential to reinforce both the steering capacity of the political community over the state – to ensure it exerts its hierarchy over the market to drive business in what the community deems a socially useful direction – and the steering capacity of the consumer over the market because it raises awareness about issues citizens might want to take into account in their electoral choices and consumers might want to take into account in their consumption choices.

If markets are to serve the societies in which they operate, the political community cannot afford to leave their regulation to business alone because the only regulation that will take place will be that which serves the company’s profit/value, which will not always serve the social good, despite Adam Smith’s famous claim that:
It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own self-interest. We address ourselves, not to their humanity but to their self-love, and never talk to them of our own necessities but of their advantages. (Smith, 1776, Book 1, Chapter 4)

There is nevertheless a deal of sense in the claim. The ‘invisible hand’ will generally ensure ‘greed is good’ and that a company’s single-minded pursuit of profit/value, in competition with other companies, will serve the social good by efficiently organizing economic activity and guiding it towards supplying demand, but sometimes the state must step in because markets cannot do everything and, more particularly, cannot do social responsibility when this gets in the way of maximizing shareholder value. But, instead of calling futilely on company directors to forget about maximizing shareholder value and concentrate instead on behaving socially responsibly – something their shareholders will never let them do anyway – the state might better leave them to get on with doing what they do best (generating profit by supplying demand) and therefore work on business indirectly by working on the invisible hand, which means tinkering around with the market’s framework conditions to ensure business respects and even nurtures those social goods it would otherwise neglect or trample over, even whilst pursuing profit/value.

The relationship between business and the state – heterarchy and hierarchy – described here is more nuanced than some crude left–right dichotomy. It is not an argument for more regulation, only for the importance of the state in ensuring the political community is able to take control of the form that regulation takes. The political community must steer the extent to which, and the mode in which, the state exerts its hierarchy over the market to realize the citizen’s popular sovereignty. On some occasions it will consider state intervention unnecessary because business can be left to regulate itself; making any resulting loss to some social good of giving the market free rein a price worth paying for the resulting efficiencies that serve some other social good(s).

The corporate citizenship ‘revolution’ is less revolutionary than its most convinced proponents would have it; being little more than good capitalism (in the narrowest sense of the word ‘good’). But, whilst systems theory shows that, when push comes to shove, companies are incapable of behaving genuinely altruistically, it reveals nothing of the various ways in which they might behave socially responsibly, even whilst maximizing their value. So, whilst the literature on corporate ‘citizenship’ or ‘social responsibility’ describes no paradigm shift, it is nevertheless vital in pointing to coincidences between a company’s fundamental responsibility to maximize value and its contingent ‘responsibility’ to the social good, especially when the connection is obscure. The value of flagging concrete opportunities for companies to demonstrate ‘citizenship’ that they might otherwise have missed (beyond the
usual associations with ethical posturing, green-washing and triple bottom line reporting) remains true, even though these can be comfortably accommodated within the traditional capitalist model and, ultimately, offer no serious alternative to regulating the market via a state hierarchy. So, if corporate citizenship is to be of academic interest beyond business schools peddling MBAs with modules on ‘Doing Well by Doing Good’ the research agenda must be extended beyond the discovery of ever more ingenious ways to maximize shareholder value, in ways that just happen to be socially, ethically or environmentally sound, to exploring business’s interactions with the state and the changes that only hierarchy can bring about. It must take on board the idea that these suggestions also speak to the state; prompting a change in emphasis by effectively saying to it ‘hold on, look what business is capable of, if only it is given the right stimulus’ because, whilst they offer no substitute for hierarchy, they still offer guidance as to how the state might exert its hierarchy in smarter ways.

NOTES

1. The idea of the state used here extends to all those public institutions that exercise legislative or administrative (executive) power, whether at the European, national or sub-national level and whether democratically elected or part of the bureaucratic apparatus.
2. For a famous earlier statement, see Berle (1931).
3. The fact that it is more interesting to teach, and nicer to feel you are turning out students with a social conscience, rather than cold-blooded entrepreneurs, is an added bonus.
5. See http://starbucks.co.uk/en-GB/_Social+Responsibility/
8. Section 172.
11. Advertising Standards Authority.
14. European Committee for Electrotechnical Standardization.
15. European Telecommunications Standards Institute.
16. EN 1399.
17. EN 13537.
18. In the forestry sector alone there is the Forest Stewardship Council, the Sustainable Forestry Initiative, the Programme for the Endorsement of Forest Certification, the Canadian Standards Association’s Sustainable Forest Management Certification Scheme and the Malaysian Timber Certification Council.
19. See, e.g. Nash equilibria.
20. The London Stock Exchange, for example, can discipline its members for breaching its rules by, amongst other things, levying an unlimited fine or expelling them (Rule C305).
21. E.g., in February 2006, five of the largest food manufacturers in the UK (Danone, Kellogg's, Kraft, Nestle and PepsiCo) agreed to put nutritional labels on their products. These multinationals were coming under increasing media pressure to be more open about the nutritional values of their products and their move effectively pre-empted the issuance of more prescriptive regulatory guidelines that were being drawn up by the UK's Food Standards Agency, which they anticipated in a weakened form with their labels, presumably in the hope of avoiding more prescriptive guidelines.
24. Established by Reg. 1836/93, subsequently replaced by Reg. 761/01.
26. Where an industry’s dominant companies pressure their competitors to adopt and comply with voluntary codes.
27. This premise is not uncontroversial, but to ground it properly would take more space than is available here. Others consider our private economic rights are prior to our political liberties (Hayek 1960); that freedom of contract must be absolute because we forfeit our autonomy simply in having to obey collective decisions to which we have not consented individually (Wolff 1976); or that transfers not effected through consensual (market) transactions breach the second formulation of the categorical imperative by treating another, not as a rational being, but as a means to an end (Nozick 1974). Contrary positions tend to build on the idea that individual autonomy is not a purely formal/negative idea ('freedom from'), but has both material/positive ('freedom to') and public (participation in collective decision-making) dimensions (Habermas 1996b).
28. The global economy closes off some policy space at the national level, which is then recovered by nation states that cooperate with one another to reassert their control at supranational levels (Milward 1992).
31. For problems contracting with asymmetric information, see generally Spence and Zeckhauser (1971).
32. The idea that the state should work out what companies need to do to improve their social performance and then devise a set of incentives that encourage them to take those actions is, of course, not new. See, for example, Schonfield (1965).
33. The idea of competition as a ‘discovery procedure’ (Hayek 1978).
34. NCVO Annual Conference 1999, reproduced at www.ncvo-vol.org.uk/events/speeches/?id=1265.
37. www2.weforum.org/site/homepublic.nsf/Content/Global+Corporate+Citizenship+Initiative.html

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4. The United Nations, human rights and transnational corporations: challenging the international legal order

Sorcha MacLeod

To change international social reality, we have to break the mould in which that reality has been formed.¹

INTRODUCTION

What is the place of Transnational Corporations (TNCs) in international law? There is no doubt that some TNCs exert substantial informal power at the international level while lacking corresponding duties. Indeed, it is often said that some TNCs wield greater economic power than many developing and industrialized states.² Moreover, TNCs can enjoy rights, such as the right to property, under international law in a similar way to individuals.³ Under traditional conceptions of international law, however, only states are players on the international stage: international law is the law of states and states alone are subjects of international law.⁴ TNCs, therefore, exert their substantial power at the international level without being subject to corresponding duties in international law.

In this respect, the position of TNCs may be contrasted with that of other non-state entities operating on the international plane. Obvious comparators include Inter-Governmental Organizations (IGOs) which wield varying levels of power and influence and may, as a consequence of international legal personality, have rights and duties under international law. Key examples are the WTO and the EU.⁵ Individuals too, now have duties under international criminal law, as well as human rights.⁶ The position of IGOs and individuals in international law suggests that there is no principled legal reason for excluding TNCs as subjects of international law.

Indeed, as far back as 1964, as Kamminga points out, Wolfgang Friedmann was suggesting that ‘private corporations are participants in the evolution of modern international law’.⁷ TNCs and private actors have long been recog-
nized in international treaties. For example, under the UN Convention on the Law of the Sea 1982, the restrictions relating to appropriation of the seabed apply to natural and juridical persons as well as to states. Likewise, the Convention on Civil Liability for Oil Pollution Damage 1969 provides that the owner of a ship (natural or legal person) will be held liable for pollution caused by that ship. More recently, Article 10 of the UN Convention Against Organized Crime makes reference to the liability of legal persons. The international community, therefore, has already recognized that private actors, including TNCs, may incur international responsibility in some contexts.

Are there reasons to limit the reach of international law in this respect, so that it does not include the imposition of human rights responsibilities on TNCs? Cassese, writing in 1986, suggests that ‘States have not upgraded [corporate entities] to international subjects proper’ (Cassese, 1986). The reason for this is that:

Socialist countries are politically opposed to them and the majority of developing countries are suspicious of their power; both groups will never allow them to play an autonomous role in international affairs. Even Western countries are reluctant to grant them international standing; they prefer to keep them under their control – of course, to the extent that this is possible. It follows that multinational corporations possess no international rights and duties: they are only subjects of municipal and transnational law. (Cassese, 1986: 103)

Cassese’s summation of the debate on TNCs which has taken place within the international community over the past 35 years bases the reasons for the lack of extension of human rights responsibilities to private actors, especially TNCs, on the political contours of the status quo rather than on a fundamental legal principle. As Clapham points out (in the context of the ICC):

As long as we admit that individuals have rights and duties under customary international human rights law and international humanitarian law, we have to admit that legal persons also have the necessary international legal personality to enjoy some of these rights and conversely be prosecuted or held accountable for violations of their international duties. (Clapham, 2000: 190)

Developments in international law, such as that of the ICC, imply that the Westphalian concept of the nation state and sovereignty built upon Vatellian discourse (that is only states are subjects of international law) is under challenge. This chapter considers one aspect of that challenge to the traditional approach to international law, the application of human rights duties to TNCs. It is inspired by Allott’s observation that international law is the creation of the human mind, and therefore can be recreated by the human mind. An examination of the emerging application of international human rights law to TNCs demonstrates what may be regarded as a more general sea change in the international legal order.
EARLY ATTEMPTS AT REGULATING TRANS-NATIONAL CORPORATIONS

Early attempts by the UN to regulate corporate behaviour came through the parallel efforts of the International Labour Organization (ILO) and the United Nations Commission on Transnational Corporations (UNCTC) during the mid-1970s. The ILO is noteworthy for its tripartite structure, involving states, employers and labour, thereby deviating from the state-centric norm. Albeit non-binding, the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy ‘invites governments of State Members of the ILO, the employers’ and workers’ organizations concerned and the multinational enterprises themselves’ to ‘observe’ the principles enshrined within it. While the Declaration is limited to workers’ rights, and does not extend to other human rights, it is nevertheless significant because it recognizes that business entities have the power to violate international standards and thus seeks to regulate that power, as well as accepting the appropriateness of asking them to adhere to those international standards.

Likewise the UNCTC acknowledges the power and influence of TNCs in its founding documents. One of its key objectives was:

To secure effective international arrangements for the operation of transnational corporations designed to promote their contribution to national development goals and world economic growth while controlling and eliminating their negative effects.

To that end the UNCTC undertook the creation of a Draft Code of Conduct on Transnational Corporations at its first session in 1975. From the outset there was no objection in principle to imposing obligations on TNCs on the basis they could not be subject to international legal duties. As Muchlinski notes, the Draft Code had its roots in the movement towards the New International Economic Order promulgated by the G77 nations and it became apparent that the political problems which plagued the NIEO spilled over into the UNCTC and led to its ultimate demise. There was considerable disagreement:

over whether the Code should be addressed only to TNCs, as desired by the Group of 77, or whether it should also extend to the treatment of TNCs by host governments, as desired by the major capital-exporting countries. Ultimately the capital-exporting countries succeeded . . . Thereafter the draft Code would consist of two main parts: the first on the activities of TNCs, the second on the treatment of TNCs. (Muchlinski, 2000: 100)

The G77 group expressed considerable disquiet about TNC activity including *inter alia* preferential treatment demanded by TNCs, political interference,
arms trafficking, obstruction of access to technology and a ‘lack of respect of
the socio-cultural identity of host countries’. There was also substantial
disagreement surrounding the ever contentious issue of compensation for
expropriation. As such, this grouping saw the proposed Code ‘as a means of
subjecting the activities of TNCs to greater regulation’ which supports the
assertion that there was no general objection to TNCs being subjects of inter-
national law. In contrast, the industrialized, capital-exporting nations sought to
‘use the Code primarily as a means of protecting TNCs against discriminatory
treatment contrary to the international minimum standards accepted by these
states’. The industrialized states were keen to confer rights on TNCs and
again, the mere fact that states were attempting to ensure the imposition of
international standards, no matter their content, indicates that there was no
apparent opposition to TNCs being treated as subjects of international law.

In terms of content, the Code’s human rights provision was meagre and
generalized:

Respect for human rights and fundamental freedoms
14. Transnational corporations shall respect human rights and fundamental free-
doms in the countries in which they operate. In their social and industrial relations,
transnational corporations shall not discriminate on the basis of race, colour, sex,
religion, language, social, national and ethnic origin or political or other opinion.
Transnational corporations shall conform to government policies designed to extend
equality of opportunity and treatment.

This obligation was not elaborated upon save for the specific provisions relat-
ing to apartheid and incorporation of the ILO’s Tripartite Declaration into the
Code. Furthermore, the enforcement provisions of the Code were relatively weak,
and redundant in the absence of state adoption. In essence, disputes were
required to be settled at the domestic level and this included governments
acting on behalf of corporate nationals. Nevertheless, a reporting mechanism
was also proposed, a classic device used in relation to states under international
human rights instruments, and which again suggests no principled objection to
TNCs being treated in a similar way to states in international law.

Throughout the 1970s and 1980s attempts were made to complete the
Code. The most recent version appeared in 1990. By 1992, efforts had
reached a stalemate and ‘the code concept was abandoned due to its apparent
ambitiousness and irreconcilable North / South differences’ (Joseph, 2000: 84). Muchlinski contends that:

In the international arena, the fears generated by calls for a New International
Economic Order on the part of LDCs led to a reaction by developed nations.
(Muchlinski, 2000: 11)
This reaction manifested itself in a shift in focus by the UNCTC which reflected the neo-liberal economic concerns of the capital-exporting nations and the interests of business.\(^{27}\) There was still a state-centric focus, although it was more about protection of the principle of state sovereignty than the issue of TNCs as subjects of international law. By 1994, the UNCTC was absorbed into UNCTAD and this effectively ended any possibility of using the Code as a mechanism to control human rights abuses by TNCs.

The reasons for the demise of the UNCTC appear to be as follows.\(^{28}\) Attitudes emerging from the New International Economic Order, the Charter on the Economic Rights and Duties of States and the concept of Permanent Sovereignty over Natural Resources led to developing states querying the wisdom of allowing transnationals access to their territory and their natural resources in particular. The Soviet bloc countries were in favour of regulation for obvious ideological reasons. What is important here, however, is that it appears from the documentation that at no time did any state, developed or developing, object to the idea that transnational corporations could be bound by international law. The UNCTC failed due to a lack of political agreement on how to regulate TNCs rather than on the ground that they could not be brought within the regulatory structure of international law. The principle that TNCs could be subject to international law, including international human rights law, was not contested.

**RECENT DEVELOPMENTS WITHIN THE UN**

In recent years, the UN has demonstrated a renewed interest in bringing TNCs within its domain, including an interest in deterring TNCs from committing breaches of human rights. Numerous allegations of corporate misbehaviour arose throughout the 1990s and involved accusations of complicity in torture and slavery as well as allegations of direct violation of other human rights standards.\(^{29}\) In particular, much publicity was given to so-called sweat-shops and child labour.\(^{30}\) The UN responded by creating the Global Compact and the Norms on the Responsibility of Transnational Corporations and Other Business Enterprises.\(^{31}\)

Kofi Annan’s 2000 Global Compact is a voluntary initiative which, like the ILO, adopts a participatory stakeholder approach\(^{32}\) and now consists of ‘Ten Principles’ (originally Nine Principles – corruption was added in 2004) to which member companies consent to adhere.\(^{33}\) Participants agree both to support and respect human rights and also to ensure that they are not complicit in human rights abuses. As well as the general human rights principles, participants also agree to adhere to minimum labour and environmental standards. The GC makes clear that it is not a ‘regulatory instrument’ nor does it ‘police,
enforce or measure the behavior or actions of companies’. Instead it focuses on:

public accountability, transparency and the enlightened self-interest of companies, labour and civil society to initiate and share substantive action in pursuing the principles upon which the Global Compact is based.

The GC emphasizes partner dialogue. This could be regarded as the Compact’s greatest failing because, while there are several hundred participant companies, there is no enforcement mechanism and many observers believe that the GC will be hijacked and utilized by transnational corporations as a mere marketing tool. Indeed there have been examples of this already. Nonetheless, the GC responded by enhancing its integrity measures and overall it can be said that the GC’s wide stakeholder participation policy renders it a good example of a cooperative approach to regulation. While the GC does not impose binding standards upon TNCs, it does recognize that the values it champions among participants have their roots in existing international legal principles:

The Global Compact is an ambitious and unprecedented experiment to fill a void between regulatory regimes, at one end of the spectrum, and voluntary codes of industry conduct, at the other. It is a cooperative framework based on internationally established rights and principles.

In terms of content, the Ten Principles relating to human rights, labour standards, the environment and corruption were laid down by the GC and corporations are asked voluntarily to ‘embrace, support and enact’ internationally recognized standards in these four areas. These core values are derived from the Universal Declaration of Human Rights, the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on the Environment and the UN Convention against Corruption. A great deal of emphasis is placed upon the benefits of ‘socially responsible business’ such as the ‘advantages of a good social reputation’, ‘reduction of damaging criticism’ as well as ‘being more in touch with markets, customers and consumers’. Companies committed to the GC further undertake to promote the GC via corporate documentation, for example in annual reports, mission statements, training programmes and press releases. Importantly, the GC harnesses UN ‘inter-agency cooperation’, bringing together the ILO, UNEP, UNHCR and UNDP.

Although the GC is a voluntary initiative, it differs from other projects in several ways. First, corporations subscribing to the GC are required, as a condition of their participation, to submit on an annual basis concrete examples of measures taken to comply with the Ten Principles. These are to be
posted on the GC website to ensure that there is an element of transparency in
the process. During the initial 2001 pilot phase, of the 30 corporate submis-
sions none were deemed ‘worthy of publication’.47 Several problems were
identified ranging from ‘substantial degrees of organizational change’ to ‘diffi-
culties assessing the priority of corporate citizenship relative to that of profit-
generating business activities’.48 In an attempt to resolve some of these
problems, companies are now required to formulate their public submissions
in accordance with a ‘concise template’ in order to focus on the ‘strictly factual
elements of company experience’.49

After these early teething problems, in 2007 the GC registered its most
successful quarterly reporting period with 428 companies submitting a
Communication on Progress, representing a 41 per cent increase on 2005.50
Notwithstanding this development, the increasing number of non-compliant
participant companies gives cause for concern. In total there are currently 568
non-communicating companies and 372 inactive companies.51 The impact of
this classification remains to be seen. Nevertheless, the GC has responded
positively to genuine stakeholder concerns, although, it is unclear whether or
not it will have a positive impact on TNC behaviour. There is a risk that it will
merely encourage TNCs to focus on the style, rather than the substance of their
submissions.

Second, in addition to reporting requirements, the GC convened the GC
Advisory Council in January 2002 which comprised ‘senior business execu-
tives, international labour leaders, public policy experts and the heads of civil
society organizations’.52 Notably, it was the ‘first UN advisory body
composed of both private and public sector leaders’.53 Whilst the GC is
‘neither an instrument for monitoring companies nor a regulatory regime’, the
Advisory Council had a significant role to play.54 It had four key priorities: (1)
safeguarding the ‘integrity of the GC’; (2) serving as ‘advocates’ of the GC;
(3) providing ‘expertise’ and (4) offering ‘advice on policy and strategy’.55
The Advisory Council issued guidelines ‘regarding the official use of the
Global Compact logo’ after NGOs expressed concern about corporate abuse
and exploitation.56 Notwithstanding these guidelines, in March 2005, the
Global Compact Office (GCO) felt compelled to release a new, detailed policy
on the use of the GC names and logos.57 The use of the GC name or logo is
not permitted for promotional purposes, branding nor as a ‘permanent graphi-
cal element of stationery’58 nor may there be any suggestion or implication
that the GCO ‘has endorsed or approved’ any particular activity.59 Anyone
wishing to use the name or logos must first seek authorization from the GCO
and if permission is granted authorized users must then submit ‘samples of all
materials that bear the Global Compact name and logos’ to the GCO.60 The
Advisory Council was replaced by the Global Compact Board in 2005, but it
has largely the same objectives and responsibilities.61
Other developments include the expansion of the GC Learning Forum to encompass a ‘global academic network’ which engages in relevant research and analysis. There also seems to be a genuine desire to foster stakeholder participation in the process and recognition of the importance of ‘high-level advocacy’.

The general impact of the GC remains to be seen. For our purposes, however, what the GC experience demonstrates is that it is possible for private actors such as TNCs to work with the UN on the international plane. Again, no objection in principle from international law has impeded the work of the GC. Moreover, some TNCs at least seem willing to comply with human rights obligations emanating from international treaties. This is especially true when the content of internal codes of conduct is examined. These include many references to the key international human rights instruments referred to in the GC.

A parallel UN attempt to regulate TNCs commenced when the Sub-Commission on the Promotion and Protection of Human Rights under Resolution 1998/8 decided to establish a working group to examine TNC working methods and activities. This resulted in the publication in 2003 of the Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with a view to their adoption by member states. What is important to note is that the Norms seek to impose legally binding obligations upon TNCs.

The Norms were welcomed and rejected in equal measure. Despite the non-binding character of the Norms, NGOs have largely supported the initiative and have welcomed this attempt to ensure that business entities respect human rights standards and the move away from soft law standards. On the other hand, many member states, corporations and business organizations rejected the Norms as inappropriate, unworkable and erroneous and contend that they operate contrary to the state-centric model of international law. It is therefore not surprising that the Norms did not enjoy an easy birth and were subsequently rejected by member states at the Commission on Human Rights on the basis that the Norms had:

not been requested by the Commission and as a draft proposal, has no legal standing, and that the Sub-Commission should not perform any monitoring function in this regard.

Notwithstanding this rejection, the Commission on Human Rights at its 60th session, at the behest of the UK and other states, requested that the High Commissioner for Human Rights (HCHR):

compile a report setting out the scope and legal status of existing initiatives and standards relating to the responsibility of transnational corporations and related
business enterprises with regard to human rights, inter alia the draft norms contained in document E/CN.4/Sub.2/2003/12/Rev.2 and identifying outstanding issues.70

Further, the High Commissioner was asked to identify ‘options for strengthening standards on the responsibilities of transnational corporations . . . with regard to human rights’ after consideration of existing standards (including the Norms) and extensive stakeholder consultation.71 The High Commissioner was also asked:

to consult with all relevant stakeholders in compiling the report, including States, transnational corporations, employers’ and employees’ associations, relevant inter-governmental organizations, non-governmental organizations and treaty bodies.72

Before considering the submissions made to the Office of the High Commissioner for Human Rights (OHCHR) in response to the requests, it is instructive to examine the content of the Norms. It should be noted at this point that the Norms must be read in conjunction with the accompanying Commentary which clarifies and elaborates on many of the issues raised.73

Professor David Weissbrodt, who led the Sub-Commission in drafting the Norms has described them as the ‘first non-voluntary initiative’ in corporate social responsibility (Weissbrodt and Kruger, 2003: 903). They are predicated on some basic instruments, namely the UN Charter and the Universal Declaration on Human Rights (UDHR) which are referred to in the Preamble.74 It is through these instruments that the Sub-Commission proposes to impose the obligation to protect human rights upon corporate entities and others. Articles 1, 2, 55 and 56 of the UN Charter root the Norms in the fundamental requirement to respect and observe human rights and fundamental freedoms. The UDHR makes reference to its principles being applicable to ‘other organs of society and individuals’ as well member states and governments and states that all should strive to promote respect for human rights, to ensure their universal recognition and to observe them.

The Norms Working Group concluded that dozens of international and regional human rights instruments can potentially engage the responsibility of TNCs and the Norms reflect this. They are varied in scope and nature and include inter alia the Genocide Convention, the Convention Against Torture, the Slavery Convention, the Conventions on the Elimination of All Forms of Racial Discrimination and Discrimination Against Women, the ICCPR and ICESCR, the Geneva Conventions, the Convention on Biological Diversity, the OECD Bribery Convention, the African Charter on Human Rights, the American Charter on Human Rights and the European Convention on Human Rights.75 Reference is also made to ILO instruments, the OECD Guidelines on Multinational Enterprises and the UN’s own Global Compact. So there is a
great breadth of human rights coverage, but consequently this means that the
obligation is formulated in general, vague and non-specific terms.\textsuperscript{76}

Notwithstanding the effort to compel TNCs to yield to international human
rights standards, it is important to note that Norm 1 emphasizes that the
primary responsibility for the promotion and protection of human rights rests
with member states at the international and national level and this encom-
passes ensuring that TNCs and others observe them. Over and above this reit-
eration of the general principle there is, however, a specific obligation
imposed upon business entities themselves.\textsuperscript{77} TNCs and others are obliged to
exercise ‘due diligence in ensuring that their activities do not contribute
directly or indirectly to human rights abuses’.\textsuperscript{78}

Within their respective spheres of activity and influence, transnational corporations
and other business enterprises have the obligation to promote, secure the fulfilment
of, respect, ensure respect of and protect human rights recognised in international
as well as national law, including the rights and interests of indigenous peoples and
other vulnerable people.\textsuperscript{79}

This has been criticized as being a major departure from traditional interna-
tional law and is the most controversial aspect of the Norms. However, this is
an overstatement because, as has already been shown, TNCs are already the
subjects of international law in a variety of areas.

The subsequent Norms deal with particular rights, so Norm 2 imposes the
obligation to provide equality of opportunity and to refrain from acting in a
discriminatory manner. Norm 3 refers to security of the person and prohibits
TNCs from either engaging in, or benefiting from, war crimes, genocide,
crimes against humanity and torture, that is, breaches of international human-
itarian law. Part D addresses the rights of workers and lays down a prohibition
on forced labour as well as the economic exploitation of children.\textsuperscript{80} It also
includes obligations to provide a ‘safe and healthy working environment’ and
adequate remuneration and requires TNCs to ensure freedom of association
and collective bargaining.\textsuperscript{81}

It is interesting to note that Part E is titled ‘Respect for national sovereignty
and human rights’ because here again is the emphasis on the national imple-
mentation of human rights standards and indeed a more traditional approach
to international law. Under Norm 10, businesses are required to observe
‘applicable norms of international law, national law and regulations’ in all
states in which they operate. They are also specifically prohibited from engag-
ing in bribery.\textsuperscript{82} Norm 12 states that:

Transnational corporations and other business enterprises shall respect economic,
social and cultural rights as well as civil and political rights and contribute to their
realization.\textsuperscript{83} (emphasis added)
It goes on to identify particular rights in this context such as *inter alia* the right to development, adequate food and drinking water, privacy, education, housing, and freedom of religion.

Part F, Norm 13 relates to consumer protection and good business practices. Part G, Norm 14 imposes minimum standards of environmental protection which must be observed.

Importantly, Part H introduces an implementation and monitoring system and requires businesses to do the following:

1. Adopt internal codes of conduct implementing the Norms. 84
2. Submit to ‘periodic monitoring and verification by the United Nations’. 85
3. Provide ‘prompt, effective and adequate reparation’ to anyone adversely affected by a failure to comply with the Norms.

It is crucial to note that this is an attempt to implement a monitoring and compliance system, which is absent in any voluntary or self-regulation model of corporate social responsibility. This section is essential to the consideration of the human rights responsibilities of TNCs as it imposes specific legal obligations upon them. As has been demonstrated, such an attempt is entirely consistent with other areas of international law.

In parallel with Norm 1, Norm 19 stresses yet again that states retain the primary obligation to observe and enforce human rights standards:

> Nothing in these Norms shall be construed as diminishing, restricting, or adversely affecting the human rights obligations of States under national and international law. 86

But Norm 19 also points out that TNCs have obligations in international law in fields other than human rights:

> nor shall they be construed as diminishing, restricting, or adversely affecting other obligations or responsibilities of transnational corporations and other business enterprises in fields other than human rights.

Nobody is suggesting that the responsibilities of member states and governments to promote and protect human rights should be diminished. But the question of whether a complementary regime should be imposed on business divides those who responded to the UNHCHR’s *Note Verbale*. 87 as reflected in its Report on the Norms, presented to the 61st session of the Commission of Human Rights in March 2005. 88

Who objected to the Norms and on what basis? It is perhaps unsurprising that there is the usual divide between those supporting the ‘business case’ and those supporting the ‘case for obligations’. So, on the one hand there are the
businesses and trade organizations and many member states objecting to the introduction of the Norms and on the other, there are the Non-Governmental Organizations and Trade Union Organizations supporting their introduction. This is a fairly crude division. There are of course some member states that support the initiative. In fact, Norway goes so far as to express concern about the lack of an effective monitoring system.89

A good example of a supporting response to the Norms is that of Amnesty International. Amnesty has long supported the UN initiative. In its submission to the OHCHR, Amnesty praises the comprehensive nature of the norms, in contrast to the vagueness of, for example, the Global Compact and the OECD Guidelines. Amnesty concludes that the Norms strike an appropriate balance between the obligations of member states and those of business. Amnesty’s position is that both states and business have obligations to protect human rights. Amnesty also views the Norms as acting as a ‘catalyst for national legal reform’ and a ‘benchmark to judge the adequacy of national laws and regulations’.90 There is also a plea for the imposition of ‘transparent mechanisms and procedures’ to assess compliance. In other words, the Norms should be binding. This line is adopted by the major NGO players, for example, Christian Aid, Human Rights Watch and Oxfam.91

Opposing the Norms for a variety of reasons are among others, the International Chamber of Commerce, the Caux Round Table and the International Organization of Employers which states that ‘developing and applying international human rights is an issue for states alone’.92 Much of the concern relates to so-called ‘overlapping responsibilities’. The submissions by the business and trade organizations are vociferous in stressing that the primary, and indeed sole, obligation to promote and protect human rights rests with member states and governments. These submissions support increased ratification of human rights instruments by states.

The most scathing rejection of the Norms can be found in the submission of the United States of America.93 The US submission describes the Norms as dangerous and conceptually flawed. The submission contends firstly that the Norms have no status, legal or otherwise, because they exceed the mandate of the Sub-Commission and do not take the views of member states into account; second that the proposed monitoring regime also exceeds the mandate of the Sub-Commission; and finally that the Sub-Commission cannot create its own powers and functions. These are all procedural points concerning the powers of the Sub-Commission. They do not amount to a rejection of the principle that TNCs could be subjected to human rights obligations in international law.

But the US submission does articulate this view. The US argues that where widespread human rights abuses occur they are a result of state action or inaction, ‘not generally’ as a result of acts of ‘private enterprises’. It is worth pointing out that the US submission undermines itself in the recognition that human
Rights abuses are ‘not generally’ the responsibility of TNCs. This wording implies that, in some cases, TNCs are responsible for human rights abuses. The US submission reiterates that any failure to enforce human rights standards rests with governments at the national level. The submission contends that the Norms are ‘dangerously shifting’ responsibility away from states to private actors. However, as we have seen, there is no need for the question of whether TNCs can be held responsible in international law for human rights abuses to be seen as an alternative to the responsibilities of states in this respect. TNCs obligations to protect human rights in international law can be constructed as complementary or supplementary to states’ obligations, and indeed the Norms reflect this position.

The US submission also posits that the Norms are themselves contrary to international law, contending that they are an ‘attempt to impose international obligations on entities that have neither accepted them nor played a part in their creation’. It considers that the focus of the international community should be on the Global Compact and concludes somewhat dramatically that the Norms ‘have no basis in fact, no basis in law’ and are ‘doomed from the outset’. This position is supported in a submission by Maurice Mendelson who writes:

[I]nternational law remains, as it has always been, essentially a law between States, and it is on States that its obligations fall. This is empirically true as a matter of both historical and contemporary fact.

In essence, Mendelson’s analysis, and that of the United States, represents a conservative view of international law. The problem is that the US submission itself is based neither in fact nor law. It fails utterly to acknowledge the abundant evidence that TNCs have been responsible in their own right, as well as in complicity with states, for violations of human rights. Key to its assertions are descriptions of political endeavours which seek to address corporate misbehaviour. It categorically fails to demonstrate that there is any reason in international law why TNCs should not be the subject of international legal standards protecting human rights. The factual situation referred to by the USA and Mendelson simply no longer obtains. As discussed above, there are numerous examples of international treaties which impose legal responsibilities upon business entities. No good reason in international law to treat international human rights obligations differently has yet been articulated.

CONCLUSION

The issue of transnational corporations and human rights seems set to occupy
the attention of the UN for the foreseeable future. The Sub-Commission on the Promotion and Protection of Human Rights recommended that the Human Rights Council, the successor to the Human Rights Commission, adopt the Norms and consider establishing a monitoring body as propounded by Norm 16. Furthermore, it has been suggested that the issue remain on the Human Rights Council’s agenda and that the expert body advising the Human Rights Council should coordinate it for the sake of consistency. A Special Representative was appointed and his report will go before the Human Rights Council at the end of March 2007. While acknowledging that it is ‘difficult to maintain that corporations should be entirely exempt from responsibility’ for human rights violations under international law, nevertheless the Report concludes that international human rights instruments do not ‘currently impose direct legal responsibilities on corporations’. This too conservative an interpretation of the status quo, irrespective of the position of the USA, the Special Representative and others, ignores the fact that international law does impose duties on actors other than states in the international legal order. There is no reason in international law to treat human rights duties any differently in this respect.

The emerging application of human rights duties to TNCs will be regarded by many as a sea change in the way in which international law operates. Such change is consistent with other areas of international law. States are no longer the sole subjects of international law. The International Law Commission, for example, is already moving in that direction with its work on the responsibility of international organizations and as previously stated individuals have duties under international criminal law.

As Allott famously points out, there is no reason why such a change in international law cannot take place:

We make the human world, including human institutions, through the power of the human mind. What we have made by thinking we can make new by new thinking. (Allot, 2001: xxvii)

The international legal system is a human institution and can be made new by new thinking. There is no reason in principle why a twenty-first-century globalized society cannot have a twenty-first-century international legal system, which in turn demands the highest standards of behaviour from all of its participants.

ACKNOWLEDGEMENTS

Thank you to my colleagues John Merrills, Nigel White, Tamara Hervey and Duncan French for their helpful comments. Flaws, of course, remain my own.
NOTES


2. See for example the report issued by the Institute of Policy Studies, Anderson, S. and Cavanagh, J. (2000), *The Top 200: The Rise of Corporate Global Power*, December 2000 which concluded at p. 6 that of the ‘100 largest economies in the world, 51 are corporations; only 49 are countries’ and that ‘General Motors is bigger than Denmark; DaimlerChrylser is bigger than Poland; Royal Dutch/Shell is bigger than Venezuela; IBM is bigger than Singapore; and Sony is bigger than Pakistan.’ The report also states that the combined sales of the top 200 companies ‘are bigger than the combined economies of all countries minus the biggest 10’.

3. See for example Article 1 of Protocol 1 of the European Convention on Human Rights 87 UNTS 103 which specifically provides that ‘Every natural or legal person is entitled to the peaceful enjoyment of his possessions’. This has been interpreted as protecting both the company itself as well as its shareholders. See *X v. Austria* No. 1706/62, 21 CD 34 (1966). In the *Sunday Times v. UK* (No. 2) 13166/87 Judgment (1991) the newspaper’s right to freedom of expression under Article 10 ECHR was upheld.


5. Although the relevance of IGOs was dismissed out of hand by Maurice Mendelson in his submission to the OHCHR p. 6 at footnote 13: ‘It is irrelevant here to consider the limited role played by inter-governmental organizations, which are anyway the instrumentalties of States.’ Non-Governmental Organizations (NGOs) have influence but duties are rarely imposed upon them on the international plane, for example Human Rights Watch, Amnesty International, Oxfam. One notable exception is the International Committee of the Red Cross which has a formalised role under the Geneva Conventions. See also *Reparations for Injuries Suffered in the Service of the United Nations*, ICJ Reports 1949, p. 174.


11. Allott ibid. at note 1, p.xxiv (Preface): ‘[W]e must use the ordering power of the human mind, its power to re-order its own order, and to bring order to its disorder . . .’

12. Around the same time the OECD began its efforts to regulate corporate behaviour through its Guidelines for Multinational Enterprises 15 ILM 961–980 (1976). The most recent version of the Guidelines can be found at 40 ILM 237 (2001).


14. Ibid. For the most recent version see 41 ILM 186 (2002). Developing states ‘pressed for an ILO conference which could adopt a binding international code for MNEs’ although ultimately the non-binding Tripartite Declaration was settled upon after representations by the corporate sector. See also Muchlinski, P. (1999) at p. 458.

15. The UNCTC was established by ECOSOC as an advisory body. ECOSOC resolution 1913 (LVII) E/RES/1913 (LVII) of 5 December 1974.


20. The Code settled on the ‘adequate’ standard for compensation for expropriation which reflects the Hull Formula of ‘prompt adequate and effective’ compensation favoured by industrialized nations as opposed to the ‘appropriate’ standard preferred by developing states. UNGA Resolution 1803 (XVII) 1962 on Permanent Sovereignty over Natural Resources and UNGA Resolution 3281 (XXIX) 1974 the Charter of Economic Rights and Duties of States both refer to the ‘appropriate’ standard although there was disagreement as to whether it should be a binding obligation. The tension between the different viewpoints is evident in Texaco Overseas Petroleum Company v. Libyan Arab Republic 53 ILR 389 (1977).


23. Ibid. paras 15 and 25 respectively. Paragraph 15 purported to prohibit TNCs from ‘operations and activities’ which supported the apartheid regime in South Africa.

24. Paragraphs 57, 58 and 69 respectively. For state reporting obligations, see for example Article 16 of the International Covenant on Economic, Social and Cultural Rights 1966,
993 UNTS 3 and Article 40 of the International Covenant on Civil and Political Rights 1966, 999 UNTS 171.

25. A putative first draft of the Code was presented at the eighth session of UNCTC in 1982 but it has been criticized by Muchlinski (1999) as being an ‘incomplete document’ ibid at p. 593. Commenting that ‘no drafting had been done on the “preamble and objectives”’ and that there was considerable disagreement about the substantive content of the Code.


28. In this respect they differ from the perceived failings of the Global Compact and the Norms just a few years later.


32. Of 3800 participants in the Global Compact, there are 2900 corporate participants from 100 states. The remainder is composed of NGOs, UN agencies, business associations, labour organizations and academic members. See http://www.unglobalcompact.org/ParticipantsAndStakeholders/index.html [accessed 11.3.07].


35. Ibid.

36. For example DaimlerChrysler. See infra.


40. UN Doc. A/811 10th December 1948.
41. 37 ILM. 1233 (1998); http://www.ilo.org/dyn/declaris/DECLARATIONWEB.static_jump?var_language=EN&var_pagename=DECLARATIONTEXT [accessed 3.3.07].
43. 43 ILM 37 (2007).
44. ‘The Global Compact and Human Rights’ http://www.globalcompact.org
46. Ibid. at p. 8.
47. NGO Letter to Kofi Annan Recommending Redesign of Global Compact, 29th January 2002 at www.globalcompact.org. See also Global Compact Report 2002 at pp. 18–19 ‘According to a review conducted by an independent team of academics, none of the company submissions conformed to the guidelines suggested by the Global Compact Office, and 15 of the submissions did not directly address the implementation of the nine principles.’
49. Ibid. at p. 19. For the latest Communications on Progress see: http://www.unglobalcompact.org/CommunicatingProgress/index.html
52. Ibid. at p. 7. See Appendix A at p. 31 for a list of current members. The Council has created two working groups: the Working Group on Company Participation and Civil Society Engagement and the Working Group on Compact Leadership.
53. Ibid.
54. Ibid. at p. 17.
55. Ibid. at p. 7.
56. Ibid. at p. 7 and p. 9. See also note 63. Daimle Chrysler was accused of appropriating the GC logo in its corporate literature.
58. GC Policy at p. 2.
59. Ibid. at p. 1.
60. Ibid. at p. 2 and p. 4.
62. GC Report 2002 ibid. at p. 6. The report also notes that the GC is being taught increasingly on MBA courses ‘thus rooting the Global Compact in education’ See also http://www.unglobalcompact.com/HowToParticipate/academic_network/index.html#newgov
63. Ibid. at p. 13 and p. 6. See for example the Global Policy Dialogue on the Role of Business in Zones of Conflict at p. 13.
64. For examples of codes of conduct see http://www.business-humanrights.org/Categories/Companypolicysteps/Policies/Codesofconductcorporate [accessed 11.3.07].
on Human Rights on the responsibilities of transnational corporations and related business enterprises with regard to human rights, Submission by Amnesty International under Decision 2004/116 on the ‘Responsibilities of Transnational corporations and related business enterprises with regard to human rights’ to the UNHCHR, 29th September 2004. AI Ref. UN 411/2004; See also the Submission by Christian Aid, Submission by Human Rights Watch and Submission by Oxfam to the UNHCHR.

68. Responses to the Note Verbale from the High Commissioner for Human Rights, Decision 2004/116 of 20 April 2004 ‘Responsibilities of transnational corporations and related business enterprises with regard to human rights.’ For example, see submissions of the USA and BP. See also E/CN.4/Sub.2/2003/NGO/44 29 July 2003 ‘Joint Written Statement by the International Chamber of Commerce and the International Organization of Employers’.


70. Ibid. at (b).


72. Ibid.


74. USTS 993 (1945) and UN Doc.A/811 10 December 1948 respectively.


76. Norms 2 and 10.

77. Part I of the Norms sets out some definitions, importantly the definition of TNC and ‘other business enterprise’. During the drafting phase there was a great deal of discussion about the definition of TNC and ultimately it was felt by the Working Group that implementation of too narrow a definition could allow corporations to evade their responsibility under the Norms. See Weissbrodt and Kruger at 909.


79. Part A. General Obligations, Norm 1.

80. Norms 5 and 6.

81. Norms 7, 8 and 9.

82. Norm 11.

83. This wording mirrors that used in the International Covenant on Economic Social and Cultural Rights Article 2(1) state parties are obliged to achieve ‘progressively the full realization of the rights recognized in the present Covenant . . .’.

84. Norm 15.

85. Norm 16.

86. Norm 19.
87. Some regard the fact of its assignment to the UNHCHR as indicative of the demise of The Norms, see Backer (2006) at p. 287.
89. Submission of Norway to the UNHCHR.
91. Submission by Christian Aid, Submission by Human Rights Watch and Submission by Oxfam to the UNHCHR.
92. Submission by IOE to the UNHCHR.
93. Submission of the USA to the UNHCHR.
94. Ibid.
95. Norm 1 and Norm 19.
96. Submission to the UNHCHR by the USA.
97. Submission to the UNHCHR by Professor Emeritus Maurice Mendelson QC at paragraph 17.
101. Ibid. paras. 20 and 44 respectively.
102. Infra at pp. 2–3.

REFERENCES

5. Corporate law, corporate power and corporate social responsibility

Charlotte Villiers

INTRODUCTION

Can corporate social responsibility (CSR) be an effective solution to the problems relating to human rights or climate change in which corporations are involved? Political leaders, non-governmental organizations (NGOs) and consumer campaigners alike, point to the activities of multinational corporations as a key influence on the world’s social and environmental welfare. Corporate social responsibility is widely viewed as the avenue along which their activities must be steered. Companies have considerable power. Directly their activities have an impact on society and on the environment and their activities have capacity to do damage or create benefits socially and environmentally. The economic power of corporations, especially transnational and multinational corporations, also brings to them political power enabling them to influence social and environmental policy and regulation and such power extends to influencing the lives of individuals. These features of corporate power are more pronounced where they operate in developing nations whose governments have comparatively little economic power. Advocates of CSR assert that corporations are to be made accountable for their activities and for how they exercise their power and that CSR should lead to corporations having a positive effect on society and the environment.

Despite increased attention on CSR and claims that CSR has become an established feature of corporate policy during the last couple of decades, progress in terms of the effectiveness of such CSR has not been impressive. The divide between rich and poor across the globe continues to expand, the environment is increasingly suffering damage from industrial and trade activity, and companies continue to ‘have made themselves and even their entire industries targets by committing serious harm to human rights, labour standards, environmental protection, and other social concerns’ (United Nations, 2006: para 15). The United Nations observes that the extractive sector, followed by the food and beverages industry and apparel and footwear dominate reported abuses including complicity in crimes against humanity and
corruption, abuses of labour rights and abuse of land tenure and water (Ibid., p. 8, paras 25 and 26). Indeed, some of the same companies that claim to respect human rights and the environment are accused of committing among the worst human rights abuses. Thus according to Global Exchange¹ ‘on issues as diverse as assassination, torture, kidnapping, environmental degradation, abusing public funds, violently repressing political rights, releasing toxins into pristine environments, destroying homes, discrimination, and causing widespread health problems, familiar companies like Dow Chemical, Coca Cola, Caterpillar, Lockheed, Philip Morris, and Wal-Mart play a big role’.²

What explains the poor results of the corporate social responsibility agenda so far? One possible reason is that corporate social responsibility does not exist in substance and that it is essentially no more than an aspiration for ‘best practice’ or morally acceptable behaviour. This assessment results from the existence of a variety of different conceptions and viewpoints around the subject that overlap, compete and contradict each other. By relying on CSR it might arguably be valid to accuse legislators and policymakers of insincerity, especially as they appear eager to delegate their responsibilities to companies and consumers and civil society through a form of ‘privatized regulation’. Corporations are left to monitor themselves or to be monitored by external bodies such as NGOs who may not be directly connected to legal or political systems. Yet consumers and civil society lack sufficient information or support mechanisms to be able to keep corporate behaviour adequately under control. The effect is that companies are given licence to determine a CSR agenda of their own that meets with, and is limited by, their business aims. Moreover, companies, driven by immediate profit demands, have little short-term incentive for making efforts towards achieving a socially responsible existence. Ultimately, a CSR agenda is likely to give to companies more power by placing greater control in their hands and enabling them to pursue their profit-motivated objectives without need to worry about potential external limits placed upon them. The issue has to be tackled by making companies accountable for the way in which they exercise their power. CSR must be defined to contain a number of minimum requirements and to entail a system of corporate accountability through regulatory intervention and enforcement of obligations.

In this chapter I will argue that there is a normative case for demanding socially responsible behaviour from companies based on the reality of the existence of corporate power but that efforts towards making them responsible and accountable must be made jointly between companies, states, international institutions and the stakeholders affected by their activities. Power and responsibility are connected terms but power and responsibility are both also held collectively among these different constituent groups. I will first present an outline of the normative arguments for demanding socially responsible
behaviour by companies based on the fact of their power. In the second part I will describe briefly the types of CSR initiatives currently in place. In the third part I will identify problems with the concept of CSR as it is today recognized, highlighting the fact that there exist numerous definitions of CSR that lead to it being regarded as an umbrella or ‘catch-all’ notion for all the wishes of those outside companies. In this part I will also describe the obstacles presented by corporate law that stand in the way of achieving a workable CSR culture and I will argue that these are likely to be exacerbated by the emphasis upon a voluntary approach to CSR identifiable in most officially accepted definitions. Finally, I will argue in the fourth part that the presence of a countervailing force to the power of corporations demands a collective and societal responsibility for ensuring that corporations act for social and environmental benefit or at least do not cause them harm. CSR should not be left in the hands of companies. An enabling environment is necessary which allows companies to act responsibly. This requires the creation of enforceable regulations that will ensure that CSR is not just an aspirational term. States, international institutions and civil society together have power and responsibility to create the right regulatory environment and they have a responsibility to challenge corporations they perceive to be doing harm. Essentially, there is a shared political responsibility among all parties to create the structural processes necessary to ensure legally and socially responsible behaviour by corporations.

WHY CSR?

Writers such as Naomi Klein (2000), David Korten (2000) and Joel Bakan (2004) have narrated graphically the negative impact of corporate endeavours across the world. The sweatshop working conditions of employees of big brand names and their contractors highlight exploitation of workers in developing nations. The increasing division between rich and poor and the north and south of the hemisphere, global warming, loss of bio-diversity, over-fishing and other forms of environmental damage all have close associations with corporate activity. It is evident that a number of the world’s current most serious problems are caused by or could be alleviated by corporate activity. Carbon emissions and climate change, for example, are largely in the hands of corporations. Corporations also have the capacity to invade or protect the enjoyment of human rights. Thus the connection between corporations and the world order and condition is firmly established. Inevitably this leads to debate about how to ensure that corporations respond to this connection in a positive way. A CSR approach at least identifies this connection and suggests an obligation on the part of corporations to recognize their role in shaping the world’s
social and environmental conditions and to work towards having a positive impact or at least reducing as far as possible the inevitable social or environmental costs of certain corporate activities.

Another normative argument for CSR rests on a theoretical connection between power and responsibility. Power is frequently seen as both a condition for and a cause for responsibility and increasing power ‘is often seen as a cause for increasing responsibility’ (Stahl, 2005: 123). According to Lukes, for example, ‘the powerful are those whom we judge or can hold to be responsible for significant outcomes’ (Lukes, 2005: 66). He states that ‘the point . . . of locating power is to fix responsibility for consequences held to flow from the action, or inaction, of certain specifiable agents’ (Ibid., at p. 58). Similarly, according to Schaap, ‘to ‘have’ or ‘exercise’ power is to be morally and politically accountable for one’s actions (or inactions) and their consequences on others. Where power is not attributable to human agency, there is no one to praise or blame, no one to hold to account for the way things are, no one, moreover, capable of political action.’ Moreover, to Schaap, it is the ‘crucial conceptual relation between power and human responsibility’ that ‘gives the concept of power a place in our ethical vocabulary’. Indeed, ‘to relinquish entirely the important connections the concept of power has to human responsibility within our ethical vocabulary is to render the concept of power practically meaningless’ (Schaap, 2000: 130).

Companies, including multinationals, wield significant economic and political power and they have the capacity to strengthen or crush a local economy as well as to provide a living or not for individuals. Corporate power is a widely accepted fact. Referring to the extensive power enjoyed by companies Bendell notes the observation made by Korten that ‘the corporate interest rather than the human interest defines the policy agendas of states and international bodies’. Indeed, in political circles corporate lobbying is intensively used seeking to ensure that regulatory controls do not interfere negatively with companies’ business objectives. Corporate leaders involve themselves in strong media campaigns to achieve their business goals. The economic capacity of corporations compared with that of states or other actors is also considerable. In a globalized setting corporations operate in developing nations bringing with them ‘foreign direct investments’, and they can threaten by ‘capital campaigning’ to leave such nations through ‘capital flight’ if regulations are imposed that get in their way. The effect is that governments shape their policies ‘for the overriding imperative of appearing attractive to TNCs and thus the financial markets’ (Bendell, 2004: 10). This context gives corporations power in which they have capacity to effect outcomes. This could mean power to as well as power over; companies have power to act and they have power over others. Given the connection between power and responsibility the fact of corporate power appears therefore naturally to demand a form of corporate responsibility.
EXISTING CSR INITIATIVES

The normative arguments seem to be well recognized since there is today a widespread acknowledgement of the CSR imperative. There exists a large CSR industry and consultants, accountants, lawyers and others will advise companies on how to direct their CSR strategies and how to present them. Many brand names seek to attract customers and clients by advertising their socially and environmentally responsible credentials. Consumers are also increasingly showing a preference for ‘green’ and organically produced items. Shareholders are slowly looking more closely at socially responsible investment plans. Many large companies exhibit codes of conduct on their websites which reveal a social and environmental awareness. In addition, the annual reports of well-known companies indicate a willingness to engage in sustainable business activities that are concerned with matters of corporate social responsibility.

A report of the United Nations High Commissioner on Human Rights on the responsibilities of transnational corporations and related business enterprises with regard to human rights observes the identification of over 200 existing initiatives and standards relevant to corporate social responsibility. These can be classified in six categories: international instruments, nationally based standards, certification schemes, voluntary initiatives, mainstream financial indices, and tools, meetings and other initiatives (UN, 2005: 4–5). Some international treaties are directed at states and are relevant to business while other treaties may be directed specifically at business. Voluntary initiatives identified include a range of different approaches including codes of conduct, directives, policies, third-party and self-reporting initiatives established by individual companies, groups of companies, intergovernmental organizations or civil society groups and adopted by business on a voluntary basis. What seems clear from the UN’s Report is that the existence of so many initiatives reflects a recognition on the part of a broad range of actors that corporate activity must be monitored and controlled in order to protect society and the environment.

THE LIMITS OF CSR

Despite these positive indicators, there exists a consensus that what has been established so far has not achieved a significant level of success. Whilst there are examples of good corporate deeds and genuinely improved behaviours on the part of many corporations, these examples are sporadic, random and do not indicate a comprehensive or consistent pattern of socially responsible behaviours. Indeed, where some companies are able to demonstrate good deeds
some of those same companies are accused of exploitation in other aspects of their business. Shell, for example, publicly claims to be committed to CSR and specifically to reducing gas flaring, yet a Nigerian Court recently held against it (Friends of the Earth, 2007) for illegally flaring gas in Nigeria.6

Christian Aid also reported the limitations of CSR and highlighted three cases in which companies claiming to have a CSR policy were actually committing harms to the communities in which they were operating:

Shell claims that it has turned over a new leaf in Nigeria and strives to be a ‘good neighbour’. Yet it still fails to quickly clean up oil spills that ruin villages and run ‘community development’ projects that are frequently ineffective and which sometimes divide communities living around oilfields.

British American Tobacco stresses the importance of upholding high standards of health and safety among those working for it, and claims to provide local farmers with the necessary training and protective clothing. But contract farmers in Kenya and Brazil say this does not happen and report chronic ill-health related to tobacco cultivation.

Coca-cola emphasises ‘using natural resources responsibly’. Yet a wholly owned subsidiary in India is accused of depleting village wells in an area where water is notoriously scarce. (Christian Aid, 2004; Rimmer, 2005)

Thus, according to Friends of the Earth, CSR is failing because: CSR does not make a difference since companies do not deliver on promises.

More problematic still is the possibility that CSR is not only limited but in fact hinders progress towards ensuring more sustainable and socially responsible behaviour. Companies may use CSR as a mask for the ‘sometimes devastating impact that multinational companies can have in an ever-more globalized world’. Moreover, business has ‘consistently used CSR to block attempts to establish the mandatory international regulation of companies’ activities’ (Christian Aid, 2004).

What has gone wrong? Why is CSR not more effective? There are a number of possible barriers that stand in the way of a successful CSR culture. The proliferation of initiatives may be problematic in itself. For example, on the aspect of human rights alone there are broad variations in these initiatives as to objectives, scope and coverage, how they are to be implemented and monitored, and on the extent to which they have binding effect. First, as the UN Report states, ‘the widely varying existing initiatives and standards make any comparison of their scope and legal status a complex task’ (UN, 2005: 5). More fundamental problems are that these initiatives are created by different bodies, some of which may have more authority than others. Companies are left confused as to what is expected of them. According to Hohnen also, the number of initiatives with different levels of authority confirms the suspicion that CSR ‘amounts to a sort of a la carte where a company can pick and choose between clauses of the social contract it will respect’ (Hohnen, 2005). Indeed,
a degree of scepticism exists around corporate demonstrations of CSR. Sullivan notes, citing the examples of BP in Colombia and Shell in Nigeria, that companies with human rights policies include those that have had a major issue with human rights (Sullivan, 2003: 316), or are exposed to more sensitive countries, requiring their human rights policy to be used as a management or legitimisation tool, or they operate in a sector where there has been much criticism and NGO activity or in which a human rights policy gives to the company a competitive advantage. A corporate human rights policy may therefore be no more than a response to risk assessment and concern with risk to the company regarding damage to its facilities rather than a positive demonstration of an established and genuine CSR policy (Sullivan, 2003: 316–17).

Three major weaknesses in the CSR agenda require further examination. First, the definition of CSR is problematic. This is exacerbated in a globalized context where the definition of globalization is also open to debate. Without a clear definition it is possible for companies to make claims of socially responsible behaviour that cannot easily be challenged. Second, the voluntary approach to CSR that is apparent in most accepted definitions gives to companies power to set their own CSR agenda without fear of significant challenge. This increases their power even further with the potential for CSR to fail completely. Third, the external regulatory environment does not have sufficient checks in place to ensure that corporate actors behave in a socially responsible manner. These three weaknesses will be explored more fully.

**Definition of CSR Vague and too Broad**

Corporate social responsibility ‘can and does mean different things to different people’ (Hohnen, 2005). Throughout the twentieth century and now early in the twenty-first century the concept and definition of CSR have evolved and alternative themes have also emerged (Carroll, 1999). The changing features of CSR have serious implications because as is noted by UNCTAD, the ‘array of meanings and intended applications that have undergone substantial modifications over time . . . are important to note and understand because they influence the dialogue between governments, business and other civil society groups. The same term, or its variations may carry different implications among various parties regarding the legitimacy, obligations and impact of corporate social responsibility standards’ (UNCTAD, 1999: 2).

The dynamic and changing concept of CSR highlights both the potential limits and opportunities for better progress. At European level this issue has itself been a matter of debate and arguably the current position is likely to limit possibilities for the CSR agenda, primarily because the emphasis is on voluntary behaviour with little scope for substantive regulation or enforcement. The current officially accepted definitions of corporate social responsibility, in the
UK and in Europe, equivocate on (McInerney, 2005: 8) or even play down, the role of law generally. The UK Government, for example, states that CSR is a matter for voluntary business behaviour, (DTI, 2004: 4) beyond legal requirements and, repeatedly, the European Commission, with the support of the European Parliament, has defined CSR as ‘a concept whereby companies integrate social and environmental concerns in their business operations and in their interactions with their stakeholders on a voluntary basis’ and as ‘behaviour by businesses over and above legal requirements, voluntarily adopted because businesses deem it to be in their long-term interest’ (European Commission, 2001 and 2002). More recently the European Parliament in the adoption of its resolution on CSR expressly stated recognition ‘that a debate remains open among different stakeholder groups on an appropriate definition of CSR and that the concept of ‘beyond compliance’ may enable some companies to claim social responsibility while at the same time not respecting local or international laws’ (European Parliament, 2007, para 3). At the same time, however, the European Parliament recognizes the Commission’s definition that ‘CSR is the voluntary integration of environmental and social considerations into business operations, over and above legal requirements and contractual obligations’ (European Parliament, 2007, para 4).

At the international level also there appears to exist no universally accepted single definition of CSR. According to a Report to ISO COPOLCO on Desirability and Feasibility of ISO CSR Standards in May 2002 (pp. 3–4) there is no single authoritative definition of corporate social responsibility or social accountability. Other similar terms include ‘corporate citizenship’, ‘sustainable development’, ‘corporate integrity’ and the ‘triple bottom line’. The report identifies similar basic components and key elements. The World Business Council on Sustainable Development (WBCSD) defines CSR as ‘the commitment of business to contribute to sustainable economic development, working with employees, their families, the local community and society at large to improve their quality of life’. CSR is viewed as the third pillar of sustainable development, along with economic growth and ecological balance. Business for Social Responsibility (BSR) states that, ‘[w]hile there is no single, commonly accepted definition of . . . CSR, it generally refers to business decision-making linked to ethical values, compliance with legal instruments, and respect for people, communities and the environment’. More specifically, BSR defines CSR as: ‘operating a business in a manner that meets or exceeds the ethical, legal, commercial and public expectations that society has of business’.

What can be established from these various definitions is that CSR is about companies operating in a manner that at least meets legal requirements and that respects social and economic interests so that economic progress is sustainable rather than merely short-term. The Working Group of the ISO
COPOLCO noted in its Final Report (2002: 4–5) that ‘all definitions seem to revolve around the concept of the ‘triple-bottom line’ (TBL), which is a framework for measuring and reporting corporate performance against economic, social and environmental parameters.’ According to the Final Report. Several key points emerge:

(1) the process of production and the delivery of services is as important as the products and services themselves;
(2) substantive obligations are owed to all of a firm’s affected societal stakeholders throughout the supply chain, from customers, workers and their families, to suppliers, the greater community, the environment, investors, shareholders and governments;
(3) although compliance with the letter and the spirit of the law is essential, CSR/TBL may also call on firms to address issues not stipulated in the law;
(4) transparency, accountability, public disclosure, meaningful stakeholder involvement and reporting are key features; and
(5) an integrated, coherent, consistent and comprehensive approach to process and performance is essential.

It is possible to interpret the definitions as representative of an ambitious approach to ensuring good corporate behaviour. The fact that it appears to be concerned with behaviour that goes beyond legal requirements suggests that CSR adds a positive contribution to improving a company’s relationships with its workers, its consumers, the environment and the community. However, how realistic is this hope when even basic legal requirements are frequently breached? Moreover the legal framework could be said actually to contribute to the failure of CSR. The external regulatory environment does not provide an enabling framework to guarantee socially responsible behaviour. The legal environment in which companies operate in fact has the effect of increasing the power of corporate actors to operate without fear of sanctions when things go wrong as will be demonstrated in the next part of this paper.

Corporate Law Obstacles to the Achievement of CSR

Company law as a facilitative system

In most jurisdictions company law is designed to facilitate free trade, particularly in a world of economic competition. This objective lies at the base of the UK’s recent modernization of company law resulting from a fundamental review of the company law system entitled Modern Company Law for a Competitive Economy (DTI, 1998). That fundamental review was introduced with the aim ‘to bring forward proposals for a modern law for the modern world’. The Government was ‘determined that the nation should have an up-to-date framework which promotes the competitiveness of UK companies and
so contributes to national competitiveness and increased prosperity’ (DTI, 1998: 1, para 1.2). In the foreword to the first review document the then President of the Board of Trade, Margaret Beckett stated that the government was ‘determined to ensure that we have a framework of company law which is up-to-date, competitive and designed for the next century, a framework which facilitates enterprise and promotes transparency and fair dealing’ (Ibid., p. i). This facilitative corporate law system seeks to reduce the burdens of mandatory requirements that are resisted by business actors who argue that they impede efficiency. Yet a system that ‘permits the maximum amount of freedom and flexibility to those organising and directing the enterprise’ (ibid, p. 14, para 5.2(a)) carries with it the danger of encouraging business actors to move beyond risks to their finances and to engage in activities that risk health and the environment. In any event there are a number of fundamental characteristics, at least of the UK’s company law system, that could also stand in the way of a fully effective CSR system, not least, the emphasis on shareholder primacy.

Company law and shareholder primacy
In the UK and in the US the primary focus of company law is shareholder satisfaction. This arises first because shareholders are generally treated as owners of the company and second because of the implications of larger companies being structured by a separation of ownership and control. That separation makes possible the opportunity for self-serving behaviour by those in control at the expense of the shareholders’ interests. A shareholder focus facilitates a more protective stance towards the shareholders from those potential implications (see for example Berle and Means, 1932; Stokes, 1986).

A consequence of this legal model of the company is that CSR, regarded as a stakeholder-oriented issue (Harwell Wells, 2002), is given less attention than the primary objective which is to increase profits for the shareholders. Indeed, company law arguably actually mandates profit maximization and thereby sits in direct conflict with ‘any incurrence of uncompensable costs for socially desirable action’ (Parkinson, 1993: 260). Nevertheless, some provisions are designed to ensure that non-shareholder constituents’ needs are recognized. However, such provisions tend to increase the discretion of the directors and managers, thus giving them a potential defence against challenges from the shareholders rather than really protecting the non-shareholders. Indeed, the previous section 309 of the Companies Act 1985, which required directors to take into account the interests of employees when performing their business functions, was notorious for its denial to employees of the possibility of legal claims against the directors. A similar predicament was experienced in the United States where many states introduced non-shareholder constituency statutes in the event of potential takeovers. In reality such provisions have
done little to redirect the shareholder-centred focus of company law. One major protection that company law provides for shareholders is the privilege of limited liability and this principle has significant consequences for CSR.

**The problem of limited liability**

The privilege of limited liability is a prominent feature of the facilitative business environment objective of company law. The limited liability principle allows shareholders to be responsible for only a limited amount of their company’s debts in the case of insolvency; the paid up value of their shares. This has potentially devastating consequences for CSR because shareholders are encouraged to sanction more risky activities in the hope that their profits will grow but also secure in the knowledge that if the risk fails and things go wrong their own liability will be limited to the sum of money they invested. As is expressed by Plesch and Blankenburg, ‘the company is designed to provide [the shareholders] with money, while protecting them from the responsibility for their actions or inactions in relation to it. A company can be prosecuted or sued if it sells defective products, destroys the environment or sells weapons to the enemy, but its shareholders are immune . . . Shareholders have regulated protection, at a time when other regulation is being swept away in their favour’ (Plesch and Blankenburg, 2007: 5).

The combination of limited liability with separate legal personality makes a lethal cocktail for victims of harmful endeavours in terms of their ability to pursue a company or its shareholders for compensation. The possibility of creating group structures that protect companies from expensive lawsuits has become a target for critics of company law. The reality is that where a subsidiary is involved in violations it is often difficult to pursue such wrongs against the parent company, which is more likely to hold the financial means to compensate for the harm caused. The corporate veil element of the parent company’s separate legal personality protects that parent company from responsibility for the actions of its subsidiaries even if the subsidiaries are insolvent or uninsured. This has come about even in circumstances where the parent company retains control via cross-directorships policy and technical and financial controls. Although it is possible to hold a parent company responsible if the degree of control by the parent company is sufficient to establish breach of a duty of care such level of control may be difficult for an outsider to prove. In principle it might be possible to hold the parent company liable for negligence because it owes a duty of care as owner and controller of the foreign subsidiary in circumstances in which the parent company is aware of dangerous processes and operations run by the subsidiary. This was implied in the litigation involving Thor Chemical Holdings which shifted an unsafe system of work from the UK to South Africa and where there was a foreseeable risk of mercury poisoning. That case was eventually settled out of court.
so that the position in law is still such that the injustice caused by this type of situation to involuntary tort creditors remains to be addressed (Birds et al., 2004: 62–5). The International Labour Rights Fund (ILRF) found the same problem in litigation in the US where again, corporate structure is difficult to penetrate. The ILRF brings cases against the parent company, but it is usually the subsidiary that is actually involved with the violation. Then it is necessary to establish the corporate chain to get to the parent company and prove the link between the parent and subsidiary companies in order to pursue ‘alter ego liability’. According to the ILRF, ‘the corporate structure is very respected in the US and there is real ambivalence to breaking this which makes it very difficult to get to the directors of companies’ (Smith, 2002). Such problems are exacerbated when companies operate at an international level.

Company lawyers are familiar with the separate personality theory as a concept arising from the fictional personhood of the company. This fiction also limits the possibility of connecting the company to an obligation based on moral responsibility. Morality and moral responsibility are features of natural personhood associated with the ability to think and possibility of free will. As a fictional entity the corporation’s personhood is inherently limited as is the ability of the company to think for itself. It is difficult to attribute responsibility to something that is not a fully moral person. The difficulty of connecting human rights to corporate entities is also apparent when companies are viewed as artificial entities or as complex contractual associations. Corporate Social Responsibility is then removed from a notion of moral responsibility of the company.

Facilitating business has generally resulted in a deregulatory stance with regard to corporate activity. Thus the prevalence of a voluntary approach to CSR comes as no surprise. Yet arguably this approach has slowed progress towards an effective CSR system.

The Problems of a Voluntary Approach to CSR

The theoretical justification for the voluntary approach is that it encourages best practice and continual improvement by companies. One of the key benefits of voluntary initiatives such as corporate codes is that, by contrast with rigid, bureaucratic and externally imposed laws codes have ‘the flexibility to be tailored to the characteristics and circumstances of the business and to raise standards by encouragement and self-generated commitment’ (Picciotto, 2003: 144). Companies have created many instruments of their own including simple statements of principles that an individual company might subscribe to; industry-led initiatives in which groups of companies collectively implement codes of practice; instruments which are voluntarily adopted by companies and regulated by a system of third party accredited bodies; and process frameworks that give guidance on demonstrating responsibility and accountability.
Despite what appears to be a broad range of activity on the CSR front, and despite the perceived benefits of such voluntary initiatives, the evidence suggests that, in reality, CSR has hardly moved beyond the starting point. Klein, Bakan and Korten have publicized and popularized observations of a multitude of corporate harms, ranging from serious environmental destruction to impoverished communities. Their, and others’, documentaries would suggest that the voluntary approach to CSR cannot be relied on (see for example Christian Aid, 2004). Picciotto refers to ‘evidence that firms adopting a code do not perform any better against benchmarks to that code’s standards’ (Picciotto, 2003: 143). Friends of the Earth note that the vast number of voluntary initiatives both at governmental level and at corporate level have failed to achieve CSR (Friends of the Earth, 2001). Traidcraft also argues that ‘business practice falls short of internationally agreed standards. There is potentially a contradiction in the EU’s position that CSR is of a voluntary nature when some current business practice currently falls short of international standards that have already been agreed, such as the UN Universal Declaration of Human Rights and the International Labour Organization’s core labour standards’ (Traidcraft, 2001). According to Sullivan, companies’ definition of the rule of law is generally confined to market rules, enforcement systems and contract law rather than the whole framework of legislation that is necessary for social or environmental protection (Sullivan, 2003: 308). Indeed, what advocates of voluntarism fail to recognize is that there are different types of company that are to be regulated: those who know the law and are willing to follow it, those who do not know the law but seek to be law abiding, those who know the law but defy or ignore it and those who do not know the law and do not seek to be law abiding (McInerney, 2005: 24). Reliance just on voluntarism is unlikely to cover all types of company adequately, especially with regard to those companies not familiar with the law, whether or not they seek to be law abiding.

Friends of the Earth, in its response to the European Commission’s Green Paper, suggested a number of further possible reasons why the voluntary initiatives have failed to prevent continued abuses of corporate power:

they do not provide strong incentives for compliance to counterbalance the financial incentives for non-compliance; they rely on the ‘appearance of compliance’ through ‘self-regulation’ without even independent verification; and they fail to empower citizens and stakeholders. Instead, even where ‘stakeholder dialogue’ approaches are used, they present the issue of corporate responsibility as ‘top-down’ – defined by the company or government. This inevitably cannot satisfy stakeholders, even if it did help reduce impacts in practice.10

Linked to these problems is the fact that the perceived reputational incentive for CSR initiatives is actually rather weak. The voluntary approach is promoted by emphasis upon the long term business benefits of a CSR best
practice approach by companies. However, voluntary approaches are generally implemented, not out of altruism, but in response to consumer and community pressures, industry peer pressure, competitive pressures or the threat of new regulations or taxes (Haufler, 2001, ch. 5). Sullivan argues that the danger is that reliance on business arguments leads to debate based on costs/benefits rather than on moral rights and wrongs so further emphasizing ad hoc coverage and undermines the moral force of arguments so eventually weakens the threat to reputation (Sullivan, 2003: 315). It is not possible simply to consider CSR in isolation from the range of other pressures, incentives, sanctions and rewards that act on organizations. As Picciotto suggests, ‘reputational damage could quickly affect bottom-line profits, while investment in social responsibility could reap long term benefits’ (Picciotto, 2003: 139). One might therefore question the sincerity of the company’s responsibility and ask whether their goal is only to meet the demands of consumers and competitive pressure and recognition of the threat of negative consequences of any kind. Despite the questionable motives for companies’ CSR initiatives, in any event, the claim that CSR leads to a good reputation which ‘translates into improved sales and profitability or a higher stock price’ (McInerney, 2005: 22) may be challenged.

In reality, attention given to the activities of the large number of companies operating in the world is limited and consumers tend to focus on only a very small number of companies.11 Similarly, investor pressure is limited to listed companies and they are more likely to react only to larger scandals (McInerney, 2005: 23). Thus the reputational emphasis begins to appear somewhat hollow and not a stable ground upon which to rely for encouraging companies to continue to adopt CSR measures.

An important factor contributing to the failure of the voluntary approach is that it leads to selective self-regulation by companies, leaving regulatory gaps and inadequate enforcement of the principles adopted since they are ‘self-selected and self-monitored standards’ (Picciotto, 2003: 144). The emphasis on a voluntary approach to CSR has had the effect that CSR measures such as voluntary codes and schemes ‘are either cast aside by companies because they lack adequate enforcement regimes, or they are applied only in limited circumstances’ (Doane and Holder, 2007). The evidence shows a ‘history of companies opposing (or working to undermine) legislation that provides for the social, environmental and economic protection of citizens’ (Sullivan, 2003: 308). This results in a patchy coverage of CSR issues and in further suspicion that such ‘voluntary’ measures are no more than exercises in PR. Ultimately, the hard fact remains that ‘short term profit motivations will be a countervailing force to the adoption of CSR policies for all but the most community-minded corporations’ (Herrmann, 2004: 220). The ability of this voluntary approach to retain public confidence seems, therefore, destined to struggle.

Lack of enforcement mechanisms only deepens the problems. Private self-
governing codes and guidelines are applied in various ways but essentially they lack teeth and do little to restrain companies from pursuing their profits and exploiting the environment and the labour force in the process. Since some form of sanction is considered by some to be necessary for compliance, the non-binding effect of voluntary measures allows some to justify failure or refusal to support them with compliance monitoring procedures or imposing sanctions (McInerney, 2005: 24). The competitive nature of global trade indeed discourages companies from taking such measures to their full effect. Competition means that ‘the incentive to make a profit and remain competitive will potentially persuade a corporation to disregard the principles it has voluntarily adopted’ (Herrmann, 2004: 215, quoting Macek, 2002: 124).

More fundamentally, leaving CSR to voluntarism leads to a reliance on ‘economic morality’. Yet as Teubner points out, ‘the impotence of morality as a control mechanism in the face of imperatives of economic rationality… leads to an unfruitful situation necessitating choices between morals and law’ (Teubner, 1987: 158–9). This begs the question where does the law end and morality begin? Ultimately, the emphasis on voluntarism risks understating or marginalizing the law’s role, rendering it as seemingly irrelevant. Thus despite claims by the European Commission in its Green Paper that the voluntary approach ‘should not be seen as a substitute to regulation or legislation concerning social rights or environmental standards’ and that legislation is needed to provide a level playing field upon which practices can be improved (European Commission, 2001: 8), Ward notes that one problem of advocating the voluntarism approach is that it generates a ‘voluntary regulatory’ divide that ‘operates as a brake’ on the introduction of new legal or regulatory measures to deal with CSR issues (Ward, 2003: 1).

The European Commission argues that ‘an approach involving additional obligations and administrative requirements for business risks’ would be ‘counter-productive and would be contrary to the principles of better regulation’. Following this view the European Commission set up a European Alliance in 2006. The European Alliance for CSR is based on voluntary support of enterprises and its remit is to act as a ‘vehicle for mobilising the resources and capacities of European enterprises and their stakeholders’ supported by the Commission (European Commission, 2006). Thus, rather than create obligations, the role of the Alliance is to act as an enabler or facilitator of CSR activities voluntarily undertaken by companies.

McInerney and others point to the fact that throughout the OECD regulators recognize companies not in an adversarial sense but as ‘important partners in achieving regulatory objectives’ (McInerney, 2005: 20). Thus a partnership is built on the understanding that businesses will contribute to a socially responsible and sustainable growth and that in the words of the European Council, as adopted by the Commission, ‘in order to encourage investment
and provide an attractive setting for business and work, the European Union must complete its internal market and make its regulatory environment more business-friendly’. Similarly at the global level, pressures towards economic globalization have partly resulted in restrictions on state regulatory powers leading not only to the removal of border controls on the admission of investments but also the granting of legal rights to foreign investors who challenge domestic laws by alleging *de facto* discrimination or the infringement of a property right (Picciotto, 2003: 138). As is observed by McInerney, ‘privatization, competition, and a reduction of state involvement in the economy have become central components of economic policy more generally and development policy more specifically’ (McInerney, 2005: 17).

Much of the debate on CSR revolves around the activities of multinational enterprises and this global level of trade presents significant challenges for legal regulation.

**THE GLOBAL CHALLENGE TO CSR**

In a global context the pursuit of CSR appears especially urgent. Globalization is frequently blamed for the ‘impoverishment of a large sector of the international community and the increasing destruction of the human environment’ (Herrmann, 2004: 209–10). As is stated by Mepham, ‘many of the most difficult issues surrounding the international corporate sector occur in poor countries with weak and sometimes corrupt systems of government. Poorly regulated international investment in these environments can distort local development, fuel conflict and contribute to human rights abuses. This is particularly the case in poor countries that are heavily dependent on natural resources’ (Mepham, n.d.). Yet some of the same factors that weaken attempts at creating an effective CSR system are also present in the responses to globalization. For example, a clear definition for globalization appears elusive. Thus globalization has been described as ‘a slippery concept which means different things to different people in different contexts’ (Dine, 2005: 5).

Regulatory responses to globalization have also avoided hard law measures. The response to these problems has been for states and international organizations to adopt multilateral international initiatives and agreements that transcend national boundaries such as the ILO’s 1977 Tripartite Declaration on Principles Concerning Multinational Enterprises and Social Policy and the 1976 OECD Guidelines for Multinational Enterprises both of which were revised in 2000 and the UN’s Global Compact of 1999. The UN Global Compact is based on nine core principles, covering human rights, labour standards, and the environment. The OECD Guidelines on Multinational Enterprises, set out a list of guidelines for good corporate behaviour covering
human rights and labour standards. Other initiatives include codes, reporting standards and guidelines, labelling schemes, management systems, screening methodologies for socially responsible investment, auditable instruments, broad best practice guidelines, charters and benchmarks. Many of these initiatives have been recognized and endorsed by companies and companies engage in corporate philanthropy, create codes of conduct, and publish ‘triple bottom line reporting’.

Clearly some of the soft law initiatives of international organizations have problems of their own. For example, the UN Global Compact, besides lacking a strong enforcement mechanism also suffers from the fact that it does not impose conditions of membership or criteria to be met by companies before gaining membership and it has no system for dealing with complaints made against companies. Similarly weaknesses exist in the OECD Guidelines for Multinational Enterprises. For example National Contact Points require stronger powers of investigation of allegations made against companies (Mepham, n.d.).

A potential value of soft law lies in the incremental steps towards more hard law forms of the norms expressed. Soft law presents the opportunity to reach a compromise and encourages participation by companies who would otherwise be concerned with risk of liability associated with legally binding rules. Soft law has the advantage of providing a quick and flexible response to contemporary challenges and allows non-state actors to participate in international law where they cannot in traditional international law making processes. However these are limited by the fact that generally they lack enforcement mechanisms and sanctions. Whilst their non-binding nature does not necessarily reduce them to merely ‘aspirational’ measures, nevertheless, the problem is that such sources in practice amount to no more than appeals to corporate conscience for which there are no repercussions against those companies that disregard them. Nor do companies necessarily bear responsibility for violation of such laws. Indeed, one might ask if it is appropriate to impose responsibility on companies that operate in states which allow discrimination or forced labour. Ought not the host state bear – or at least share – that responsibility?

The traditional view of international law is that companies do not have international legal personality so they cannot be addressees of international law. Indeed, many international law norms such as certain human rights can be guaranteed only by the state, thereby ensuring only a limited role for corporations. However, ‘this approach is open to serious challenge and is being rapidly undermined by new national and international legal precedents’ (Mepham, n.d.). In reality corporations participate in international political and legal activities with states. A number of international documents address corporations directly such as the 1999 UN Global Compact and the 2003 UN Norms on the Responsibilities of Transnational Corporations and Other
**Business Enterprises with Regard to Human Rights** which lays down obligations directly on transnational corporations and other business enterprises with regard to the promotion and protection of human rights. International investment treaties and arbitration agreements also allow corporations to bring claims against states. Indeed, some investors have demonstrated their willingness ‘to devote large resources to block or overturn state actions by resorting to international law’ (Picciotto, 2003: 138). It is also possible to observe use of international law against corporations. This is witnessed in increasing reference in the US to the Alien Tort Claims Act of 1789. Although the Act has its limitations it does allow possibility of litigation against corporations for violations of international law outside the US. Additionally in the UK civil law claims have been made against companies for violation of human rights abroad.18

Another problem is the danger of legal imperialism at the international level – imposing one set of cultural and moral norms on another society with different needs. Whilst there are few effective sanctions available for breach of the soft law international initiatives, the imposition of sanctions can be problematic. In particular trade sanctions and treaty provisions may be seen as ‘foisting the standards of developed nations on less developed ones, thereby disadvantage them still further’ (Branson, 2000: 697).

Globalization is particularly challenging since it arguably ‘renders state regulation of corporate action problematic’ (Herrmann, 2004: 210). Indeed, state regulation seems almost irrelevant when multinational actors operate in multiple jurisdictions (Wallace, 2002: 11) allowing them to engage in ‘regulatory arbitrage’, avoiding state imposed obligations by moving areas of activity ‘to more relaxed legal jurisdictions or establishing parallel, if not competing, legal regimes that cater primarily to their interests’ (Herrmann, 2004: 211). This means that human rights and environmental protections introduced at state level are likely to have limited impact. Rory Sullivan suggests that many TNCs have ‘outgrown the ability of individual states to regulate them effectively’ (Sullivan, 2003: 307).

Moreover, globalization creates competition among states to attract financial capital and technology to support their growth and development. The effect is that it is illusory to rely on local laws to protect human rights because states may lower their standards to attract investment. This was apparent during the 1980s when, in order to attract investment, states would adopt ‘open-door’ policies and abandon access controls, ownership restrictions, and performance requirements (Picciotto, 2003: 136, citing Guzman, 1998: 641–2 and 655–6). The danger is that when operating in host countries without strong financial systems and in a context without an appropriate regulatory system, MNEs ‘can exploit the softness of the sustainable development concept and effectively work against sustainable development in practice’ (Herrmann,
What then is the most appropriate response to these challenges? One possible answer lies in the concept of power. The economic and political power that corporations have gained, in particular, compared with many individual states, appear to be supported by liberal corporate law systems and definitions of CSR that accept a relaxed response to corporate activity, largely leaving the solution to be constructed by the companies themselves. Does this mean that states and other actors are powerless to respond? In the next and final part of this chapter I will consider the distribution of power in the context of globalization and I will suggest that the appropriate response is to recognize a collective power and responsibility to ensure corporate accountability.

POWER

As was stated at the beginning of this chapter corporate power is an undeniable fact. Since for some theorists power implies responsibility, this logically implies a role for CSR. Stephen Lukes, for example, notes the relationship between power and responsibility: ‘an attribution of power is at the same time an attribution of responsibility for certain consequences’. Tullberg argues that perceptions of power have an impact on which expectations and commitments can be judged as realistic and therefore the issue of power is central for the normative discussion about corporate social responsibility (Tullberg, 2004: 325). Yet responsibility also breeds power: the two terms are symbiotic. Similarly by regarding CSR as a voluntary issue that relies on good or best practice regulatory matters get left to the powerful corporations and thereby give to them even more power. Arguably also, the language of CSR increases the power of corporations. Corporate citizenship, for example, permits companies to enter the political arena and legitimizes their lobbying activities. Citizenship allows them to claim rights too and they have taken advantage of this by claiming their own enjoyment of human rights. Partnership and dialogue disguise the lack of equality between corporations and their stakeholders and NGOs.

However, the danger is that an exclusive emphasis upon the connection between power and responsibility of corporations in the context of the debate on CSR leads to an assumption that power to change their behaviour must be delegated to corporations without any significant intervention by states, international institutions or other actors. This is likely to result in no positive change for society, human rights or the environment with regard to the impact of corporate activities. It becomes necessary, then, to examine more closely
how power is actually distributed in the global context in which we now find ourselves. The results of such an examination may have significance for how responsibility must also be shared if the connection between power and responsibility is fully to be recognized. To what extent are corporations powerful? How does their level of power compare to power enjoyed by states and other international institutions?

I have observed in this chapter that corporations are very powerful organizations. However, this fact should not overlook the reality that states also retain significant power and, collectively, not only may they act as a counterweight to corporate power but they also have responsibilities of their own to protect social and environmental welfare when permitting corporations to behave as they do. Not least, the United Nations Human Rights Council underlines the international law duty of states to protect against non-state human rights abuses within their jurisdiction, such duty extending to protection against abuses by business entities. Moreover, Tullberg suggests that the common economic measures of company power overestimate their power. Companies possess considerable economic power and comparisons of company revenues with national Gross National Product reveal that ‘the multinationals look like midsize countries’. Yet their revenues do not necessarily reflect accurately their position in comparison with states of similar GNP size. Those states may still have much larger workforces and they may have greater amounts available for social spending than companies with similar revenues. Tullberg notes that compared with the ability for social spending of states, corporate philanthropy is a ‘most marginal activity in the economy of society’.

In reality, states may have more ultimate power over a territory with the control of force, while companies are always subordinated to that power. Company executives are unlikely to influence as easily as governmental actors the outcome of major political decisions. Companies are able to threaten an exit from trade or production and such threats are regularly noted as examples of their power in the context of globalization. Yet the reality is that new partners will limit the impact of their withdrawal. As Tullberg suggests, ‘a company is never the only choice so an abandoned government will find another trading partner, foreign or national’ and will thereby weaken that company’s position. He adds that ‘It is reasonable to expect a larger impact from a politically coordinated boycott’, where ‘alternative companies will be harder to find’. Companies are also less able to protect human rights than are governments or international institutions arguably because individually such companies are unable to alter the structural conditions in which such rights are affected. As Tullberg suggests, ‘It seems likely that a boycott by companies motivated by human rights concerns would be much harder to sustain than an embargo by UN.’ Politicians individually may have more power than corporate executives not least because the executive suffers from a mandate deficit.
Moreover, ‘nationalization, price control, special taxes are all tools at the government’s disposal’ (Tullberg, 2004: 331). Tullberg later remarks ‘[T]hat the state, but not the companies, often is seen as a helping hand is not an indication that companies are more powerful than the state, but the reverse. It is homage to the supremacy of the state’ (Tullberg, 2004: 332). Tullberg is urging us not to get carried away with the notion of corporate power. He suggests that it is dangerous to perceive of companies and executives as the rulers of the world and that to rely on boardroom social responsibility is likely to result in no solution being found and a misdirection of responsibility.

The implication of Tullberg’s argument is that despite claims made in discussions about globalization which suggest a reduction of state power, at least insofar as their capacity to regulate effectively, states have not really lost their power. This observation provides a basis for optimism for potential responses to perceived corporate power and the apparent limitations of the corporate social responsibility campaign in controlling that power. In a globalized context states individually have seen an intrusion by corporations on their ability to constrain corporate actions but they have not necessarily lost the potential to act collectively to provide a countervailing force against the strength of corporations. Indeed, Schaap suggests that an individual only has power for as long as he is empowered by a collective: ‘the autonomy of the individual is revealed as dependent upon the co-operation of others’ (Schaap, 2000: 132). Similarly, it could be argued that companies derive their power from a collective willingness to permit them to act as they do. Thus by adopting a voluntary approach to CSR states and regulatory institutions are increasing corporate power and denying their own power. In turn they are denying – or avoiding – their own responsibility. Part of the three-dimensional view of power presented by Lukes is that it may involve inaction and that power may be exercised by collectivities (Lorenzi, 2006: 92). The existence of corporate power does not erase or reduce the power of other bodies such as states, institutions and corporate stakeholders. Political responsibility does not disappear with the provision of legal responsibility to an individual or a corporation (Young, 2004). Iris Marion Young describes this as a shared responsibility in relation to structural processes and conditions to contribute to achievement of desired results (Ibid.).

It is in this shared political responsibility of states, international institutions and corporate stakeholders, including workers and consumers, that optimism can be found since implicit in such responsibility is a shared power to act. It is possible to see hints of acceptance of shared responsibilities in some of the international level initiatives that have arisen. For example, the use of partnership techniques such as the Global Compact is intended to involve non-state actors and to mobilize resources (Redgwell, 2006: 104–5). The problem is that the Global Compact is an opt-in example of self-regulation. Redgwell
notes for example that the Global Compact contains no burden of implementa-
tion and compliance. It displays an appearance of change when it does not
change and it speaks of engagement opportunities rather than of implementa-
tion, nor of enforcement to compliance but of integrity measures (Redgwell,
2006: 105–7). It is important to regard the Global Compact as a starting point
that requires further development and a greater willingness to take it further.
Of most importance perhaps is the shared capacity to influence, and if neces-
sary to change, structural processes through international and domestic politi-
cal systems. Essentially, the objective is, as suggested by the United Nations
Human Rights Council, to realign economic forces and governance capacity

What practical steps might be taken to achieve this realignment and to elim-
ninate or reduce business-related abuses of the environment and human rights?
The plethora of CSR-related initiatives noted early in this chapter provides a
valuable base and the first step must be to coordinate and rationalize them so
that they can be utilized more easily by all parties. The United Nations Human
Rights Council has started this process already by mapping evolving stan-
dards, practices, gaps and trends at the international level. The Council has
identified five clusters of standards and practices governing corporate respon-
sibility and accountability: state duty to protect; corporate responsibility and
accountability for international crimes; corporate responsibility for other
human rights violations under international law; soft law mechanisms; and
Each such strand requires further coordination and streamlining in order to
reduce overlap and contradictions.

The United Nations Human Rights Council also suggests some further
measures that might strengthen capacity to improve responsibility and
accountability of corporations at the international level. First, there should be
an extension of extra-territorial provisions to provide for extraterritorial and
universal jurisdiction where corporate abuses occur outside the home state or
by subsidiaries of a parent company. This ought to be possible through nego-
tiations within international institutions such as the United Nations. Second,
states should be required to incorporate into their criminal and civil legal
systems universally accepted international standards and states should collec-
tively align their civil and criminal processes in order to bring proceedings
against corporations alleged to have committed harms. Third, a stronger
recognition of the concept of corporate complicity in criminal activity or other
wrongdoings of parties with whom they are connected such as within supply
chains. By developing and strengthening the concept of complicity corpora-
tions could less easily avoid legal or moral responsibilities when they have
been dealing with wrongdoers. Fourth, the broad array of soft law measures
and widely adopted voluntary or self-regulatory measures should be hardened
up into enforceable requirements. For example, more universal standardization of reporting measures and codes, together with a strengthening of requirements for assurance measures to verify reports published in accordance with such standards, would enhance their authority. More broadly, a firming up of the concept of accountability would increase the potential significance and value of such standards, whether through wider constraints on their actions or through more ready imposition of fines. In connection with a strengthening of accountability, Action Aid suggest new rights of redress for citizens and communities adversely affected by corporate activities, including: access for affected people anywhere in the world to pursue litigation where corporations are domiciled or listed; provision for legal challenge to company decisions by those with an interest; and a legal aid mechanism to provide public funds to support such challenges (Action Aid, 2006). Many of these measures might be achieved by treaty negotiation imposing a requirement on participating states to introduce such provisions into their legal systems.

Some potentially more radical measures to deal with identified specific problems would include legislation to remove the corporate veil barrier in litigation involving corporate groups in circumstances such as those involving involuntary victims of corporate negligence. Moreover, corporate responsibility and accountability depend on a company law perspective that recognizes the need for dialogue between managers and all the company’s stakeholders. Thus, according to Herrmann, ‘inherent in social responsibility of corporations is the understanding among corporate managers that their business decisions must be made with consideration of a wider range of constituents than shareholders, and thus they ought to consider the implications of their actions on employees, consumers, suppliers . . . the community and the environment . . . This stakeholder view of a corporation’s social responsibility requires a constant dialogue between corporate decision makers and the company’s various stakeholders. In the end a well-implemented and well-enforced CSR strategy that utilizes a constant dialogue with stakeholders’ (Herrmann, 2004: 218). Teubner, for example, advocates a proceduralization of the enterprise that involves legal representation of other groups within the corporation. This approach would necessitate a re-evaluation of fiduciary duties by means of a functional approach to CSR and might shift the focus from substantive norms to procedural mechanisms. However, it would also involve affirmative duties such as a duty to include all constituents in the discussion, for example, through the use of focus groups (Teubner, 1987: 149). More broadly, corporate lobbying should be more closely regulated.

Most importantly, this proceduralization will only work effectively if externally imposed substantive goals are also set alongside the existence of tangible threats for failure to achieve such goals. Indeed, if the CSR agenda is sincere there ought perhaps to exist the threat of closure for companies who
are identified as failing to act within the CSR boundaries. The recent introduction of a law in Norway to ensure gender parity on corporate boards with the threat of a company being wound up if it does not achieve that target highlights that such measures could be possible. It is from this point of view that the combination of external regulation and internal corporate initiatives is likely to work best. The challenge, then, is to establish clear, enforceable social responsibility goals through external processes and for states, institutions and individual citizens to utilize their political power and responsibility to ensure that companies fulfil their legal responsibilities.

CONCLUSION

In this chapter I have argued that the normative arguments for CSR are clear. I have also argued that an effective CSR regime has been hindered by the lack of an adequate definition of CSR, continued reliance upon voluntary responses to the problems identified with global business activities and the structure of most corporate law regimes. The problems are worsened in a global context in which corporate power appears to weaken the ability of states to constrain corporate actions. Yet I have also suggested that the appearance of corporate power should not obscure the fact that states retain their own responsibility in regard to human rights protection and that there exists a political responsibility to influence and even to change the structural relations that enable corporations to act as they do. Such political responsibility is shared by states, institutions and civil society with corporations to contribute towards improving structural processes in order to avoid or reduce injustice and to realign economic forces and governance capacity. Currently, according to the United Nations Human Rights Council, states do not ‘seem to be taking full advantage of the many legal and policy tools at their disposal to meet their treaty obligations’ to protect human rights from abuse (UN, 2007: 84). I have suggested a number of measures that may be taken to alter the structures in which corporations operate, nationally and globally. Overall, what must be recognized and acted upon is the fact that a corporate social responsibility agenda should not permit the denial of an internationally shared power and responsibility to eradicate the global structural inequalities that currently allow companies to commit abuses.

NOTES

1. Global Exchange is a membership-based international human rights organization dedicated to promoting social, economic and environmental justice around the world.
2. Global Watch provides descriptions of the actions of these companies (2005).
3. See also comment by Givens (1996, at footnote 108): ‘The concept that power implies responsibility is a deep one in human consciousness.’
4. Marks and Spencer Plc currently emphasizes its socially responsible actions throughout its stores and in advertisements.
5. See, for example, the Corporate Responsibility Reports of companies such as BP, Dow Chemical and Coca-Cola: http://www.bp.com/sectiongenericarticle.do?categoryId=9007565&contentId=7014468 http://www.dow.com/corporatereport/2005 http://citizen-ship.coca-cola.co.uk/corporate_responsibility/index.asp
6. Gas flaring is said to cause acid rain, thereby corroding roofs, polluting rivers and damaging vegetation: Macalister (2007).
7. Yet the term ‘beyond compliance’ is more generally viewed as action that goes further than meeting existing legal obligations in order to gain social licence. For a detailed examination see Gunningham et al. (2002).
9. See the landmark decision of the Court of Appeal in Adams v Cape Industries plc [1990] Ch 433.
11. The UN notes that where it received information about human rights abuses it could be assumed ‘that particularly egregious cases or firms already targeted for a campaign would have been selected as subjects’: see UN (2006) at p. 8.
13. For example Global Reporting Initiative Guidelines, available at www.globalreporting.org
14. For example EU Eco-label criteria, available at http://www.europa.eu.int/comm/environment/ecolabel
15. For example ECCR/ICCR Benchmarks for Global Corporate Responsibility available at www.web-net/-tccr/benchmarks
16. For discussion of these issues see Ward (2005).
20. However, note the difficulties and failures experienced in trying to tackle this problem in the UK, discussed in Boyle & Birds’ Company Law (2005) at pp. 64–6.

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6. Varieties of capitalism and the learning firm: corporate governance and labour in the context of contemporary developments in European and German company law*

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INTRODUCTION

The role of the employee in the corporation is manifold. Starting with their carrying out of various functions, determined by the superiors, employees often play a much more differentiated role in the functioning of an organization. It is obvious then that the form of the organization – a small, middlesized firm, or a large, publicly traded corporation with operations around the world – has a direct impact on the role of the employee. This first observation is important if we want to avoid pursuing the question ‘what role for employees in the corporation’ in a one-size-fits-all manner. The size, structure, and embeddedness1 of the corporation, as recently highlighted again by Sanford Jacoby (2004), are directly related to our assessment of the role and involvement of employees in the organization. In turn, the shape of the organization is driven by developments in the political economy, of which a corporate, labour law and industrial relations regime each forms a part. This regulatory framework is increasingly less a domestic affair. The increased liquidity of funds available for the financing of corporate operations worldwide has been undercutting, informing, and pushing domestic policy developments. It is thus no surprise that our view on who are the ‘leading political economies’ shifts with the particular regimes’ aptness and capacity to adapt to the changing structures of world markets. Two interim conclusions follow. First, corporate governance forms part of a larger regulatory framework which is constantly

under pressure of being adapted on the domestic and, increasingly, the transnational level to the capabilities of global investors and capital flows. Second, any assessment of the involvement and role of employees in the firm has to be made with this complex background and framework in mind.

The following observations provide a few examples in support of the two above statements. The first section will address the current state of research into employee involvement in the firm from a comparative perspective and argue how issues of employee involvement are being shaped by contemporary developments in corporate governance. The next section will study in more detail the case of German co-determination in order to show how a long-held misconception is applied to what is and what is not ‘bad’ co-determination in German companies. It will also place this discussion in the context of current EU law making in the area of corporate governance. The third section, then, will suggest an alternative perspective on employee involvement in the firm, one foremost informed by insights provided by management studies, organizational science and by scholars of historical political economy. These scholars suggest a differentiated understanding of the firm, where managerial success and economic performance depends on a set of institutional features inside and outside of the firm, encompassing communication and knowledge creation and dissemination between different levels of employees and between the firm and societal knowledge actors. Couched in a vivid culture of incentive structures and adaptation techniques, which enhance collaborative efforts, experimenting and learning, the corporation can thus be seen as an integral part of a highly differentiated knowledge society.

THE POLITICAL ECONOMY OF CORPORATE GOVERNANCE

Research into the role and involvement of employees in the contemporary business corporation, be it for a small scale, domestically or regionally operating enterprise, or for the large, multinational corporation, reflects the larger trends in corporate governance and business organization. We can differentiate between a human resources approach and a co-determination or control approach. The latter has been the much-discussed model of German corporate governance, about which we will speak later in more detail. The former can be found, expressed in a very strong form in Japanese corporate law, and in a weaker form, in the United States corporate form. Co-determination comprises different forms of employee involvement in the management of the company. In contrast, a model focusing on human resources, can unfold without granting workers substantive input into management issues of the firm. Japanese Corporate Governance was hailed throughout the 1980s as a model nurturing
stable employment, skills training and intra-firm mobility. The human resources (HR) manager would regularly be part of the firm’s managerial cohort, given that the well-being and sustaining of stable employment relations ranked high on the Japanese corporate governance agenda. By comparison, in the United States, HR has not been considered a crucial or vital element of corporate governance. HR managers regularly took second or third place after strategic and, more recently, financial management personnel. The US model can probably best be understood as a ‘market model’, while for the Japanese one the label ‘organizational model’ appears most suitable (Lazonick, 2002a: 11). There is certainly a whole host of elements and issues connected with such a characterization and this should already indicate that any such label hardly captures the complexity of how decisions are taken and for the business enterprise. Even less can such labels fully illustrate the wealth of elements conducive to sustained economic success. It is here that business historians, corporate law economics and corporate governance scholars (Williamson, 1981; O’Sullivan 2000a, 2000b; Lazonick, 2002b; Rebérioux, 2004) have much to say to all those who perhaps too quickly assume the triumph of a certain organizational paradigm (Hansmann and Kraakman, 2001).

As can be observed over the last 15 years, the German co-determination and the Japanese human resources model have come under pressure. Foremost, global financial liquidity and ever shorter periods for which a company’s economic performance is being assessed, seem to leave little room for the long-term orientation that both German (Hopt, 2003) and Japanese (Nottage, 2001) firms have long been endorsing. This development has been taken by many to reflect a fundamental convergence of corporate governance regimes. To explore the validity and the lessons from such a finding, we need to place these contentions in the context of comparative assessments of legal structures and their larger institutional, political, economic and cultural environment.

LE REGARD D’AUTRUI: COMPARATIVE PERSPECTIVES ON COMPANY LAW

The alleged convergence of corporate governance regimes around the world has been on the mind of investors, policy makers and scholars for some years now. In fact, whether such a convergence is actually taking place has at the same time been contested by many participants in the debate. The trickiness of such assessments of a moving target is certainly also felt by such a keen observer as The Economist, who in a recent survey on ‘European business’ swayed between dismissal of the European way of doing things on the one
hand and Europe’s promise to pull through on the other. Vice Chancellor Leo Strine, Jr., noted an abundance of ‘tired features’ in the ‘so-called’ corporate governance debate: ‘Exaggeration is the norm; conversation the exception’ (Strine Jr., 2007: 3).

At the outset of any assessment of converging regulatory regimes should lie an appreciation of what it is that is allegedly converging. In other words, we need to be clear on what we mean by corporate governance and which aspects of it we currently see changing. Second, we need to be mindful that identifying and evaluating current developments necessitates a comparison of not only the different systems’ formal rules and codifications, but also their customs and business practices. In other words, we need to compare the law on the books and the law in action. The latter, certainly in the area of corporate governance, constitutes a wide-ranging variety of informal rules, standards, codes of conduct and understandings of relevant business communities. While these form an integral part of a vibrant legal and economic environment, they are much harder to identify and ascertain by an outside observer.

In this light, I would like to suggest that we attempt our comparison of existing corporate governance regimes through a combination of traditional modes of comparative law, that is its instruments, norms and their functionality on the one hand (Michaels, 2006), and the political economy of corporate governance, that is the mix of formal and informal, of hard and soft laws, rules, standards and practices on the other (Zumbansen, 2006a). This combination will allow us to appreciate the real changes that are taking place in different corporate law regimes around the world. In addition, such a perspective will allow us to gain a deeper understanding of the currently unfolding trends of convergence and divergence among corporate governance regimes in regional markets and regulatory spaces such as the EU. Here, for example, the particular history of corporate law harmonization cannot be properly understood without such a ‘deeper reading’ of the hard-soft forms of corporate law development that are characterizing contemporary changes in the existing regulatory regimes (Zumbansen, 2006b; Deakin, 2007). The European scene for corporate law making, then, is a remarkable laboratory for the study of multilevel and multi-polar law making in a politically and culturally contested arena, where different historically grown and embedded political economies are colliding (Rhodes and van Apeldoorn, 1998; Edwards, 2003; Zumbansen, 2004).

What is Corporate Governance?

Confusion over the potential impact of the alleged convergence in different corporate governance regimes is what lies at the heart of what we mean by ‘corporate governance’. The law of corporate governance, commonly
conceived as ‘company law’, ‘corporate law’ or ‘business associations’, is embedded in a larger regulatory scene that also comprises fields such as securities regulation, labour law, industrial relations, and insolvency law. But, these legal fields are complemented by a set of institutions that structure the development and practice of corporate governance. Building on the work of Karl Polanyi in the 1940s (Polanyi, 1944), economic sociologists focus on the ‘embeddedness’ of economic action and have been providing a plethora of intriguing case studies and analysis of the ‘institutional, cultural and social contexts’ (Beckert, 2007: 16) in which commercial transactions are unfolding (Whitley, 2000; Berghoff, 2005; Lazonick, 2007). In order to trace the particular characteristics of distinct national systems of corporate governance, it is essential to cast light on the historical, socio-economic and legal developments that have contributed to national variation. While there is an important body of literature underlining the relevance of historical trajectories and associated competitive advantages to national differences (the so-called Varieties of Capitalism school (Dore et al., 1999; Soskice, 1999; Hall and Soskice, 2001; Allen, 2004; Boyer, 2005: 45–7), there is a wide agreement that these distinct national systems are under severe and growing pressure towards convergence. The privatization of public welfare systems and the increased tendency to base pension and retirement financing on the capital market (Kübler, 2001, 2003) have coincided with a worldwide competition for stock market investments (Baums, 2001b, 2003). As a consequence, the capacity of traditional stakeholder-oriented systems of corporate governance to provide the transparency and management control that is necessary for success in the global competition for investments is increasingly contested (Hansmann and Kraakman, 2002).

Beyond the disputes over the merits of ‘shareholder primacy’, however, lies the essential question: the nature of the business corporation itself (Deakin, 2003). Beyond the ongoing struggle between shareholder and stakeholder oriented concepts of corporate governance (Mitchell et al., 2005) lies a wide field of research concerning the organizational design of today’s corporation as a complex and innovative institution of social learning (Crozier, 1994; Ladeur, 1997; Pirovano, 1997; Post et al., 2002; Lynch Fannon, 2003; Zumbansen, 2006c; Lazonick, 2007). The involvement of workers within the firm is not an issue that can be solely understood against the background of established and hotly contested models of co-determination (Dammann, 2003; Strüve, 2007). Rather, the role of workers in the firm can itself be explained only with regard to the ways in which the firm is organized to generate, channel and process fragmented knowledge and innovative capacity (Whitley, 2000; Rebérioux, 2002, 2003). The association of workers’ involvement with a firm’s social (Jones et al., 2006), intellectual and innovative capital certainly differs from the hitherto held perception that workers’ involvement in corporate governance is merely an inefficient check on shareholder power. In fact,
switching from a conflict model, which opposes shareholders against employees, to one of cooperation and integration of viewpoints, capacities and processes, opens up a new perspective on workers’ involvement. This perspective is directed at the productive input of workers’ knowledge for a more efficient governance of the firm. The latter differs from the much-discussed and often not sufficiently understood form of co-determination, as it exists for example in German supervisory boards. In these, half of the board’s members are employee representatives. This has led many observers to a harsh dismissal of this powerful influence of workers. The fact remains, however, that the chairman of the supervisory board, regularly a shareholder representative, holds the deciding vote. The confusion about the parity of powers in the supervisory board is legendary. While the fact of the chairman’s deciding vote alone should put overly troubled minds to rest about the purportedly counter-productive effects of co-determined supervisory boards of large German enterprises, even recent empirical evidence from German companies indeed seems to suggest that many managers recognize the benefits of the still-existing system (Höpner, 2004).

In contrast, the other form of co-determination, which has always existed in the shadow of the internationally discussed and scrutinized board co-determination, concerns so-called ‘works councils’. These can be formed in all companies with at least five employees, if at least three have been with the firm for six months.

Works councils are constituted only by employees and are elected by secret ballot. They are understood as being a counterpart to management and play a crucial role in the firing process, seeking together with management to maintain socially justifiable criteria when selecting personnel to be laid off. This form of worker involvement, from an international perspective, has existed in a quiet, neglected corner of the otherwise heated corporate governance debate. While the law clearly attributes a relatively prominent role to works councils, their institutional success has been varied (Weiss, 2006: 311–12). Only recently, works councils have acquired a more positively regarded currency. One of the reasons for this development was the 1994 introduction of so-called European works councils (EWCs) (Marginson et al., 2004). Their success has been ambiguous at best, assessments ranging from doubts over unions pursuing their local interests through the newly established EWCs (Hancké, 2000), over critical evaluations of the less-empowered EWCs when compared to the German works councils (Betriebsräte) (Streeck, 1998), to a sceptical rejection of EWCs as yet another mosaic stone in an already losing battle for organized labour interests (Schulten, 1999). While these developments unfolded at the European level, domestically works councils became increasingly entangled in pressure systems created by firm management on the one hand and trade unions on the other. While the latter eventually conceded so-called opening
clauses which would allow variations to the collective agreement to be stipu-
lated at the firm level, management has taken this opportunity in recent years
to forcefully push employees to enter into unfavourable agreements in
exchange for, say, job security. Effectively, works councils can now often be
seen to accept agreements that contain standards well below the threshold
contained in collective agreements. Trade unions themselves find themselves
facing the dilemma that their protest would potentially drive more of their
already weakening members away (Weiss, 2006: 319).

Taking a step back, however, from this labour interests perspective, we can
identify a set of other considerations relating to the works councils. A further
reason for the mounting attention that is dedicated to works councils can be
seen in the overwhelming pressure on firms to improve their competitiveness
(inseparable from their organizational structure), the firms’ location and the
applicable laws governing salaries, production and social costs. In this context,
works councils are increasingly being recognized as essential fora for the
much-needed negotiation between management and employees in developing
and realizing the most cost-effective solutions for the firm’s future (Rogers
and Streeck, 1996). A crucial aspect, then, is that at the same time as the influence
of trade unions is diminishing, works councils might be seen as enforcing
their demise rather than working against it. In this light, they can be seen
to be entering a pact with the devil. Where agreements between management
and employees, which are pursued as part of industrial restructuring strategies
on the part of management in highly competitive industries, can be reached at
the level of the firm (Hancké, 2000: 39), the larger framework of workers’
representation in a coordinated market economy becomes questionable. In
reality, management can exercise a large degree of pressure on works councils
by connecting demands on lower wages, longer working hours and so on with
threats of relocation, plant closure and the like – all that in exchange for job
security, for the time being (Weiss, 2006: 319).

This problematic interaction between management and works council
certainly does not invite a very optimistic view on management–employee
relations. To be sure, not the fact that there is such interaction is problematic.
But it is the reduction of the works council to a transmission belt to commu-
nicate the management’s will to the employee constituency. In this scenario,
chances might remain unused for a resource-based, fruitful and sustained
collaboration between the different power levels within the corporation.

This last aspect is important. As indicated, there is a second reason for the
recent interest in works councils. In fact, this reason provides a much more
positive perspective on the interaction among the different powers within the
firm. Organizational science scholars and management theorists have been
emphasizing the economic gains that can result from a close cooperation
between management and the firm’s work force. The value of workers’ input
in refining, strengthening and consolidating the firm’s performance is increas-
ingly recognized, in traditionally organized firms and also to a certain degree
in more loosely organized, unbundled or networked firms. The latter has been
described by organization and labour scholars as the final deadly blow deliv-
ered to workers’ rights, given that organizing becomes more difficult as the
firm becomes more decentralized, as the organizational structure becomes
more opaque and as employment relations become more precarious. The
combination of corporate organization of the twenty-first-century firm and the
flexibilization of work constitutes the dark side of the culture of the New
Capitalism (Sennett, 2006). At the same time, the very volatility of corporate
organization in a networked economy must not necessarily only lead to a
further erosion of workers’ power within a firm. More sophisticated studies of
management and organization theorists show that management in many cases
relies on a healthy and functioning relationship with their employees, espe-
cially where high profile and fast-changing organizational patterns require
capacities of adaptation and of responsiveness (Jones et al., 2006).

In an interim observation, we can say that co-determination exists in two
forms, one concerning quasi-parity of shareholder and employee representa-
tives on the supervisory board of large stock corporations, and the other as
works councils in small to large firms. The first form has regularly been
attracting a lot of international attention and recently strong criticism as
constituting a so-called ‘competitive disadvantage’ in the global race for
investment. And yet, a closer look at the voting structures in the board,
together with the deliberation practices long followed by corporate actors in
Germany, reveals – as we saw above – the myth behind the much-discussed
German Social Model, of which co-determination has always been seen as a
central pillar (Streeck, 1997: 37). The latter model, located in works councils,
has only more recently stepped forward to play a remarkably differentiated
role. On the one hand, works councils have become the site for the imple-
mentation of management policy concerning restructuring, plant relocation
and closing. On the other, works councils could come to be seen as potentially
important players in tapping, structuring and realizing knowledge and capac-
ity pools that exist within the firm. The latter, more positive perspective on
workers’ involvement in the firm provides a friendly contrast to the before-
mentioned development.

THE GLOBAL AND THE LOCAL: SPACES AND PLACES
OF CONVERGENCE AND DIVERGENCE

The following section will place these observations into the context of the
contemporary corporate law-making environment in the EU and in Germany
(in particular with a view to the complementing of official rules with unofficial ones such as soft norms, recommendations and codes of conduct). But, before this it is necessary to briefly allude to the larger conceptual framework in which these developments have been taking place. Today, contemporary global developments demand the attention of domestic law reformers in the areas of corporate law or securities regulation. There are different ways in which national governments or, in the case of the EU, regional law makers, have been reacting to international developments. The post-Cold War opening of formerly closed markets along with the large-scale restructuring of publicly financed services and infrastructures and their replacement by privatization and deregulation have fundamentally altered the playing field for business corporations, investors, and interest groups as well as for domestic and transnational regulators. To trace how these global developments translate into a domestic and a regional context, the ensuing subsection will take a closer look both at the EU company law scene and at the corporate law reform process currently taking place in Germany.

Germany’s Company Law Reform and Changing Regulatory Landscapes

The 1980s and 1990s in Germany were a period of difficult bargaining between pro-shareholder government and deeply entrenched stakeholders, unions and lobby groups. With the end of Social-Democratic government in 1982, the Christian-Democratic/Liberal majority took power in 1983. In 1998 then, at the end of Christian-Democratic rule, finally, there occurs the first major corporate law reform Legislation since the 1960s. The Law on Corporate Control and Transparency (KonTraG) introduced a number of elements designed to improve German corporate governance, long criticized for its less developed disclosure rules and, importantly, for its already mentioned two-tier board, where worker representatives have half of the seats on the supervisory board but, as we saw, not half of the votes, as the chairman, a shareholder representative, has a deciding vote.

The KonTraG left this structure untouched. It also left untouched the high number of seats of the supervisory board, and thereby failed to satisfy long-standing demands to change the German system and to make the supervisory board more effective.12 The German debate concerning the reform of the supervisory board has not lost in intensity, and has indeed received renewed input from a combination of forces both on the domestic and the transnational and European level.

Domestic corporate law reform discussions such as that in Germany (e.g. Baums, 2003; Noack and Zetzsche, 2005; Seibert, 2005) or in other countries (Champaud and Danet, 2002; Ferran, 2005; Ferrarrini et al., 2005; Menjucq,
take place in light of a European and global debate over competition for mobile capital and how corporate law systems might accommodate companies’ needs to tap into these capital markets without boundaries. At the same time, the debate takes place against the background of a complex European integration process in which the political and cultural outcome remains unsettled (Weiler, 1991; Scharpf, 1999; Joerges, 2002; Möllers, 2006).

It is obvious that within the EU, the Varieties of Capitalism approach is of great significance, for it explicitly addresses the embedded, historically grown socio-political and cultural systems of the Member States (Hall and Soskice, 2001). How difficult it would be to achieve any harmonization of company law standards in Europe, given the high degree of diversity of existing company law regimes, was strongly evidenced by the decades-long struggle over the European Company, originally initiated in the 1970s, and adopted after many compromises in 2001 (Teichmann, 2003; Werlauff, 2003). Another example of the European Varieties of Capitalism in the field is the almost 15 year long fight over a European Takeover Directive. This was concluded only in 2004, resulting in a directive that contains so many opting out clauses that the question has been asked whether it has led to any harmonization at all (Kirchner and Painter, 2002; Zumbansen, 2004).

International attention is usually attracted by the noise surrounding the larger developments, such as European directives or the corporate governance standards promulgated by an international body such as the OECD (Organization of Economic Cooperation and Development) or by domestic legislators (such as the US Sarbanes Oxley Act in 2002). Yet, attention is less focused around the dramatically more complex forms of law reform that take place at other levels, which are not so obvious to the outside spectator. Examples of such reforms can be highlighted amongst the myriad of ways in which Member States implement European law into their domestic legal orders. While there are straightforward and easy ways to track reforms, as for example when a Member State passes a law that appears to translate a European Directive into its domestic legal framework, in reality such law-making processes take place very differently in hotly contested fields. They take place in many unofficial ways that are even harder to trace as the landscape of norm making in corporate law (as in many other areas) has been changing dramatically. The emergence of best practice guidelines, codes of conduct and corporate governance codes that are drafted by private parties, has led to a far-reaching change of the relevant regulatory landscape in which companies operate today (Pettet, 1998; Baums, 2001b; Zumbansen, 2002; Köndgen, 2006). But many of its features and elements are not and, arguably, cannot be truthfully represented and documented in the official legislation. The proliferation of private, semi- and quasi-public lawmakers in the field of corporate and securities law has altered the regulatory landscape so that it has
become much harder to develop a political critique of the processes as they unfold. This is, in corporate law, expressed by corporate governance codes and best practice recommendations; in labour law, it is expressed by codes of conduct that purport to provide for a comprehensive regulation of employment relationships.\textsuperscript{14} To be sure, the shift away from traditional forms of law making and the embrace of a myriad ways of norm creation (often summarized as ‘governance’) has had as one of its consequences a highly problematic removal of many of the regulatory changes from the political debate. In many cases, ‘demands’ of the market are offered as sufficient justifications for legal change, effectively moved outside of the political arena of deliberation and contestation.

Illustrating this point are the deep-reaching changes to that element of German corporate governance which seems to be at the core of the End of History critique of Germany’s need for reform on the one hand and of Mark Roe’s characterization of ‘social democratic’ corporate governance on the other (Roe, 1993, 1998, 2003). The depiction there of the allegedly social democratic origins, nature and preservation of workers’ co-determination on company boards may, however, blind our view on the much more nuanced, ambiguous and multi-directional lines along which corporate governance has been evolving.

So, indeed, one of the most discussed features of German company law – co-determination – has attracted scathing criticism from the press, both from lobbyists who fear the negative signal co-determination sends to prospective, and much needed, international investors and from scholars (Whitley, 2000; Berghoff, 2005; Lazonick, 2007). Even the national lawyers’ meeting in autumn 2006 put co-determination on the agenda and openly explored its possible demise (Strüve, 2007). These developments strongly suggest that even in Germany, one of the heartlands of Michel Albert’s Rhenish capitalism (Albert, 1991), there is a shift towards a more shareholder driven corporate governance regime (Cioffi, 2006).

However, what the bird’s eye view of the observer fails to capture is the altogether ambivalent process – both politically and institutionally – which characterizes German company law reform. The legal reform agenda is driven by an intricate and, for German traditions, seemingly unprecedented combination of official and unofficial law making.\textsuperscript{15} The current reform agenda is the result of federal law making and the work of an expert commission, which was initiated by the government in 2000 (Baums, 2001b; Zumbansen, 2002). That commission resulted in the issuance of detailed marching orders, recommendations and demands for the legislator as to how to adapt the German company law system to the ‘needs of global financial markets’ (Baums, 2001a). On the other hand, the commission also suggested the creation of a follow-on commission to draft a code of best practices, the so-called German Corporate
Governance Code (Cromme, 2002). An early discussion regarding the Code’s legal nature quietly subsided (Kirchhof, 2001; Wolf, 2002; Heintzen, 2004; Seidel, 2004; Ringleb et al., 2005: 27–30 (arguing that both the Baums-Commission and the legislator intended the core of the Code to consist of non-binding recommendations, for which no statutory authorization would be necessary). A comprehensive law reform in corporate law, initiated by the Social Democratic government at the time, seems to turn the dearly held cliché of Germany’s stakeholder capitalism company law regime on its head. The first and the second commissions, in preparing the legislative design and the collection of best practice guidelines, ingeniously managed to adopt allegedly universal models and terms through which they prepared the field for the major overhaul. But while everybody expected that this would mean the abolition of co-determination, change occurred in much more subtle, but clearly not less dramatic ways. The government did not openly attack co-determination while the semi-political, quasi-public expert body, the commission, silently and effectively worked towards its deconstruction. Certainly, the recommendations pertaining to the isolation of the inter-shareholder dialogue from that of the stakeholders (the employees and union representatives) must be seen within the context of the fallout post-Centros, Ueberseering and Inspire Art within the European company law scene (Kersting and Schindler, 2003). That scene, as regards the disembedded operationability of the incorporation theory for European companies seeing a dramatic mobility increase of companies, is still in search of the best legislative fix (Dammann, 2003).

This change in the German approach, which has led to a larger role for unofficial, indirect forms of law-making, has important lessons to offer for our current and future appreciation of the European company law scene. It is here where we could still harbour hopes as to the preservation not only of difference with regard to the long-standing legal and socio-economic cultures in the Member States, but also as to the preservation of an open eye for the forms in which law reform has been taking place in recent years, across the globe.

‘The European Company Law Scene’: Overcoming Diversity?

The current European company law scene is characterized by an interesting tension between different trends and dynamics. When European scholars assessed the prospects of company law in Europe a couple of decades ago, no one doubted its centrality in the making of a more integrated market, both economically and politically (Schmitthoff, 1973). A few decades down the road, the picture looks much different. What began with high hopes for harmonized and unified corporate law rules among the EC Member States, eventually resulted in a series of increasingly long and exhausting law-making initiatives, the success of which in many cases depended on or was prevented
by national politics of resistance. While in the area of company law the European legislator made very little progress (Villiers, 1998), this was not the case for capital markets law, where various regulations were indeed passed in Brussels. With regard to the diversity of company laws in Europe, this was for a long time and, indeed, until very recently, seen as a particular feature and characteristic aspect of the European company law scene. It made consensus-finding difficult in areas where change was seen as desirable. On the other hand, these obstacles made everyone sensitive to the existing variations in corporate law regimes and culture. The latter was, among Europeans, always taken with a pinch of salt. While it reflected on the diversity within Europe, it was also seen as a problem with regard to corporate mobility in Europe and the attractiveness of European firms for international investors.

This diversity has recently come to be seen in a different light. Reform attempts in recent years have regularly included eloquent references, and reverences, to the existing diversity. At the same time, a number of developments suggest that the time for diversity might have come. For one, the Commission has taken several steps towards reinvigorating law reform in this area. These have grown out of the lengthy adoption process for two recent company law directives, one concerning corporate takeovers, the other relating to the creation of a European Company Statute (Teichmann, 2003). Both were examples of drawn-out, tiresome and complex negotiation struggles, one of which occupied lawmakers for some 30 years, the other almost half of that. In gearing up for a safe adoption of the Takeover Directive, the Commission initiated an expert committee process, out of which grew, in quick succession, two of the first comprehensive reports on the law relating to takeovers and on the state of European company law in general. These reports did not remain alone for long. At both the European and at the Member State level, we are seeing a plethora of committee reports, expert findings, recommendations, and self-regulatory codes. For the Commission, this has led to a certain differentiation of its law making agenda and methodology. Realizing the political obstacles in the way of harmonization in specific core areas (for example board composition), the turn to soft law, benchmarking and self-regulation promises a viable alternative.

But, there is another development, which has a great impact on the shaping of the European company law scene. The already mentioned case law by the ECJ has dramatically altered the framework in which European managers are thinking about where to incorporate. The Court’s rejection of national governments’ attempts to prevent foreign European companies to form subsidiaries in another European state has also put Member State lawmakers under increased pressure to revisit their existing company law regimes. Hence, following the case law in Centros (1999), Ueberseering (2002) and Inspire Art (2003), national governments throughout Europe have begun to
make far-reaching changes to their applicable company law rules to render their legal framework attractive under incorporation considerations (Bälz and Baldwin, 2002).

It is against this two-fold background that we have to assess the current European company law scene. The debate concerning to what degree the ECJ’s jurisprudence might have initiated a US style process of regulatory competition, is still ongoing (Charny, 1991; Deakin, 1999; Heine and Kerber, 2002; Lombardo, 2002; Zumbansen, 2006a). At the same time, the shape and structure of company law in Europe seems to be driven largely by the myriad forms of soft law and indirect regulation, which are mentioned above, which have come to the fore in recent years. Suffice it to point to the multilevel nature of these processes at the EU and the Member State level to show how this levelled structure is eventually much more complicated by the fact that the relevant norms grow out of reports, codes and other forms of soft law. This makes a straightforward assessment of the changes in the law dependent on the changes on the ground. In other words, without a better view on how codes are implemented, how firms are actually responding to various suggestions of indirect and voluntary regulation, there can hardly be a satisfactory evaluation of the changing company law scene (e.g. Wymeersch, 2005). What really matters in this respect, however, is that without a proper assessment of the changes ‘on the ground’ we will fail to appreciate how these many soft and indirect forms of norm-making, the many ways in which companies have been marketing their commitment to specific corporate governance or corporate social responsibility standards, reflect an important shift in law making.

While the noted cases of national resistance to company law harmonization put the political nature of corporate law in the spotlight, the space is rather dimly lit when it comes to soft law and self-regulation. Ironically, these norms are regularly not presented as law at all, because they do not have their origin in the state nor are they equipped with the traditional enforcement instruments that we know from state-made laws. Given their apparent distance from the state – and their proximity to the market – soft laws are understood as private norms, without any real footing in the political sphere of the state’s law making arena (Caruso, 2006; di Robilant, 2006). It is this removal of indirect corporate law regulation from the political sphere, which provokes the question whose interests are really served in the long run in this scenario. Given that a certain lobbying group succeeds in dominating the market for ideas with a certain concept for a while, what happens if the market begins to shift? Not only does the formerly successful concept allegedly lose the support of other market actors, but meanwhile the effect on dependent personnel, employees, creditors and others involved with the firm, might suffer from a change in corporate organization. We
might just think this a natural effect of market actors’ self-regulation and accept them as collateral. We might also, however, consider whether self-regulation can adequately capture and channel all of the involved stakeholders’ concerns in the different features of the firm’s organization and governance. In other words, where we pursue corporate law reform and realize the need to overcome political deadlock that arises from path dependent, deeply embedded, politically, legally, culturally backed regulatory regimes, we would be well advised not to dismiss these features of embeddedness and the role of the law in this context.

What should be seen as the most pressing of challenges in this regard is how to reconnect our ongoing assessment of the fast changing and continuously evolving modes of transnational governance in the EU and generally (Scott and Wai, 2004; Buxbaum, 2006; Calliess and Zumbansen, forthcoming) with a critical inquiry into national law making trajectories and the justifications offered in their support. One of the institutions engaged in a complex, interwoven process of negotiation facilitation and promotion of best practices is the European Corporate Governance Forum, established in pursuance to a recommendation of the Winter II group in their November 2002 report on European company law (Winter, 2002). This expert commission made it clear that such a structure, while facilitating a process and eventually results which would themselves be ‘voluntary and non-binding’, would be necessary in order to effectively work towards an improvement of corporate governance regimes (Winter, 2002: 73). In fact, what we can observe to be arising from the European Corporate Governance Forum’s work in recent times are some far-reaching policy recommendations and law-making proposals, which are portrayed as resulting from a quasi-natural process of almost technical content. ‘Good corporate governance’ has emerged as the regularly used formula to express the plethora of considerations that have informed the deliberations among the Forum members. The alluded-to contestations of a convergence of corporate governance regimes and the ongoing explorations into the different elements of corporate governance create the need to further assess the merits of regulatory competition (Deakin, 2001; Heine and Kerber, 2002) and the apparent triumph of a finance perspective on the corporation (critically, Lazonick and O’Sullivan, 2002).

THE LEARNING FIRM

The Transnational Regulatory Challenges of Corporate Governance Reform

This chapter began by taking a perspective on the role of the employee in the
firm. This focus helped in illustrating the current regulatory framework for workers’ involvement in firm management. Moreover, a study of contemporary developments in corporate governance revealed that a discussion of co-determination forms but a part of a much larger reflection process on corporate governance rules. While there has been a long-standing debate as to the substantive goals of corporate law regulation (e.g. Bratton, 2001), this discussion has been rendered intricately more complex due to the fact that not only the perspectives on corporate law have been multiplied, enriched and widespread, making corporate law the ‘hottest game in town’ (Buxbaum, 1993: 868). Another reason why corporate law is increasingly recognized as a very promising field in terms of research and reform potential (Eidenmüller, 2007) has also to do with the field’s fascinating and challenging regulatory dimensions. The proliferation of law-making arenas in the area of corporate law on the domestic, transnational and international level constitutes a prime challenge to traditional understandings of domestic bodies of corporate law with an occasional comparative glance to the right or the left of one’s borders. Corporate law has advanced to being one of the most highly researched fields in terms of doctrinal, comparative, economic, organizational, historical and political approaches (Cheffins, 2004). The immense impact of these changes will before long become noticed and translated into core corporate law curricula as well. The changing forms of law making and the ensuing, multi-jurisdictional competition between official and un-official, soft and hard norms in corporate regulation constitute a formidably complex landscape, the exploration of which has only just begun.

The focus on management and employees, however, was taken to open the door to an analysis of the corporation, which would not limit its inquiry to traditional elements of monitoring management, even if that included occasional assessments of, for example, the German two-tier board and worker co-determination in supervisory boards (Vagts, 1966). Instead, the moving of employees into the present corporate governance spotlight aimed at eventually gaining a better picture of what constitutes ‘good’ corporate governance at the organizational level. It is this level which is often neglected in corporate law scholarship, which remains for the most part within a rights paradigm of the corporation (e.g. Kraakman et al., 2004).

While the combination of structural analysis of the assigned rights of those invested in the corporation with a particular view on the economic results of a particular regime has the advantage to illuminate the tensions among different economic interests within and around the corporation (Hansmann et al., 2006), it appears to fall short of capturing the processes and institutional dimensions of the firm in operation.23
Beyond the Shareholder versus Stakeholder Divide: the Strine-Bainbridge Debate of 2007

Without a better understanding of the processes within the firm that result from an institutional interaction within and outside the firm’s boundaries it is hard to imagine one would ever be in a position to make reasonable assessments about the connection between corporate governance and economic performance. The picture changes, however, if the concept of corporate governance is redefined by drawing on the wider institutional perspective alluded to before. Where Varieties of Capitalism scholars have importantly advanced our understanding of the market structures that are conducive to and interacting with particular governance strategies and structures, this perspective must be complemented in two ways. One is the integration of a regulatory theory approach to an understanding of corporate governance developments. Given the proliferation of norm producers, localities and spheres for corporate rule making, any assessment of corporate governance developments must take this regulatory dimension into account.

The second complementing perspective is directed at the structures of the corporation itself. The two models that we have learned to identify as being situated at opposite sides of the table are the nexus-of-contracts conception of the corporation on the other hand (Alchian and Demsetz, 1972; Fama and Jensen, 1983),24 and the corporation as social/political/organic entity on the other (Berle, 1954; Wheeler and Grayson, 2001; Cornelius and Kogut, 2003). A recent articulation of the corporation as a ‘social institution’ was provided by Vice Chancellor, Leo Strine, Jr, who argued that ‘both management and labour are likely to view a public corporation as something more than a nexus of contracts, as more akin to a social institution that, albeit having the ultimate goal of producing profits for stockholders, also durably serves and exemplifies other societal values. In particular, both management and labour recoil at the notion that a corporation’s worth can be summed entirely by the current price the equity markets place on its stock, much less that the immediate demands of the stock market should thwart the long-term pursuit of corporate growth’ (Strine Jr, 2007: 4). An intimate expert of US corporate governance politics with an ear close to the ground, Strine aptly identifies the blind spots in the reigning and raging ‘corporate governance industry’ made up of ‘public pension fund administrators, proxy advisory and corporate governance ratings organizations, corporate law scholars, and business journalists’ (Strine Jr, 2007: 8). Strine directs his critique at the heart of the dominant school of thought, which contends that the Berle and Means challenge of overcoming the separation of ownership and control still stands. In contrast, Strine argues that given the high concentration of stocks in institutional investors, the Berle and Means equation has been reversed, now in favour of...
stockholders. But, who are those? The reality of stock market based old-age pension makes, for one, of most employees, if ‘forced’, capitalists. Yet, they hardly ‘own’ anything directly. The owners are large institutional investors, intermediaries between employees and the firm (Strine Jr, 2007: 11). At the heart of Strine’s critique, then, is his concern with an unceasing flow of literature demanding shareholder empowerment against management, that stands in bizarre contrast to the disassociation of employees’ ownership from exercising long-term focused, pension-oriented rights vis-à-vis ‘their’ corporation. He finds it, thus, particularly troubling that much of the current corporate responsibility and corporate governance efforts are made without the awareness that they eventually serve to empower not those with long-term interests in the viability of the corporation, but rather intermediaries with not-so-often clearly demarcated interests, which might frequently be directed towards high short-term returns rather than long-term sustained performance. Immediately contested (Bainbridge, 2007), Strine’s suggestions focus on the appropriate means of shareholder empowerment precisely with the goal of identifying the long-term orientations of a firm’s strategic outfit, in order to disclose to stockholders in greater detail where a company stands, and where its dominating investors intend to take it (Strine Jr, 2007: 29). Instead of ‘feeding the market beast’ as before the market meltdown in Enron and Worldcom, efforts should be made at improving disclosure rules which would ‘enable managers to focus more on sustainable, long-term corporate growth and less on the market’s short-term expectations’ (Strine Jr, 2007: 30). Interestingly enough, Bainbridge, the critic of Strine’s common sense and shared interests approach, returns the analysis to an atomized interest pluralism model which allows him to purportedly dismiss Strine’s contentions of such shared interests. Claiming that the degree of diversity among the different corporate stakeholders effectively defeats any contention of shared values between the firm’s constituencies, Bainbridge evades the central challenge that Strine formulates, namely, to recognize that both management and employees share a basic interest in the sustained success of a business enterprise. Regrettably, for the time being, Bainbridge dismisses this claim, without pursuing the idea further what it would mean for our understanding of a firm’s constituencies and the firm itself, if we adopted a more wholesome approach to the firm and its stakeholders.

**Corporate Decision-making in the Knowledge Society**

In the following, I want to suggest an alternative perspective on the corporation. For that I put forward the thesis that neither the contractual nor the interest pluralism paradigms of the corporation can fully illuminate the internal workings of the firm. In particular, neither approach can adequately identify nor assess the processes by which knowledge is generated, disseminated and
executed within the corporation, in other words, which processes in fact precede and inform any decision made by corporate management. While the contract model of the corporation remains confined to explaining corporate decision-making with regard to agreements among the firm’s stakeholders even in cases of so-called ‘incomplete contracts’,26 the interest pluralist model of the corporation tends to one-sidedly focus on identifiable interests of specific stakeholders of the firm.27 This appears to be true also in the most recent Strine-Bainbridge dialogue. In contrast, a possibly more promising perspective on the firm’s institutional nature in making decisions possible could start with the premise that the elements shaping corporate decisions are never in a static, foreseeable or fully determinable state. Rather, corporate decision-making by necessity involves high-risk assessment of uncertain development trajectories, market strategies and product conceptualizations. The complexity of the field to be assessed by management must be reflected in the way in which we speak about the regulation of corporate activity. From this perspective, then, the firm itself moves into the centre of attention. In other words, corporate governance with the claim to effectively address the core challenges of governing a corporation must take the particular features of a firm’s decision-making processes into consideration.

Accordingly, it is this second complementary perspective that the remainder of the chapter will unfold in more detail. The key to understanding the contemporary corporation in the political economy of the de-territorialized knowledge economy is to focus on its capacity to remain innovative (O’Sullivan, 2000b). The firm’s capacity to engage in innovative production depends on its ability to constantly grow, adapt and learn. This it can do by letting go of traditional modes of command and control, and, instead, embracing an ironical, distancing, reflecting and post-heroic attitude to corporate governance and management (Baecker, 1994). Our urgently-sought definition of corporate responsibilities, its public duties and obligations to society at large, especially in an era of scandalous corporate crime, depends entirely on our understanding of the firm itself. It is here where we recognize the relevance for our theme of the fierce battle between shareholder-value oriented systems of corporate control and those that place a higher emphasis on workers’ voice, participation, industrial relations, and a wider consideration of the firm’s stakeholders (Hansmann and Kraakman, 2001 on the one hand; Bratton, 2002, on the other). Whether we emphasize the shareholder or the stakeholder dimension of the firm will have a significant impact on our assignment of duties and obligations to the firm (Deakin and Konzelmann 2004). This is particularly relevant with regard to disclosure (Merkt, 2001). Where corporate governance reform is predominantly concerned with shareholders, the emphasis is likely to remain placed – at least for the time being – on improvements in the financial auditing schemes. In contrast, were our focus on an improved
environmental accountability of the firm, we would indeed direct our initia-
tives at other areas in corporate organization. Environmental internal auditing,
in fact, constitutes a prime example of the latter developments in environ-
thus, the question of the firm’s responsibilities cannot be separated from a
more refined understanding of the firm in its various, highly differentiated and
specialized contexts.

From a perspective on the firm within a functionally differentiated knowl-
edge society, even the connection made between the political economy of the
firm and the firm’s environmental (or wider social) responsibilities, would still
provide only an insufficient account of the corporation itself. Today’s large,
publicly held and globally operating firms escape clear definitions, both with
regard to their core activities or ‘competences’ (Pralahad and Hamel, 1990)
and their organizational structure. Increasingly, firms have become
unbounded, borderless and virtual, with activities that span multiple areas of
industry, manufacture, products or services. Echoing many of the challenges
that we identified for the state today in a complex society, the firm constitutes
a highly complex organization that operates in a volatile regulatory and
competitive environment, which is at its heart characterized by a fast-evolving
set of specialized knowledge. We should thus reject both overly simplistic
categorizations of the firm as either shareholder or stakeholder oriented, for
the firm of the twenty-first century challenges our learned ways of organizing
social behaviour. Shifting the debate on corporate social responsibility away
from the control-oriented images of the corporation with its focus on the strug-
gle between shareholders and stakeholders is an essential first step in begin-
ing to rephrase the question of the firm’s social responsibilities. Questioning
the definitory clarity of the term ‘social’ as such, the firm must be viewed
within a complex web made up of socio-economic, political and cultural
factors, in which the corporation is embedded. The various functions that a
corporation is assuming have repercussions on the evolution of corporate
governance well beyond an oppositional model of shareholder versus stake-
holder interests. From the perspective on society as an ongoing communica-
tion process of different rationalities, corporate governance can adequately be
understood as an ongoing process of organizational experiments28 within a
constantly evolving business enterprise, operating in a polycontextual envi-
ronment. It is in this light that the ongoing discussion over the convergence or
divergence of corporate governance regimes must take into account the partic-
ular embeddedness of the firm within historically grown, and functionally
evolving socio-economic and political contexts. Today’s corporations are
placed within a constantly changing environment, which is functionally deter-
mined rather than territorially or politically. While specific local regulatory
influences on the operation of the firm are of importance, the firm’s corporate
governance regime is shaped by the functional elements of the firm’s operation. For example, with corporations’ increasingly important assumptions of formerly public functions such as welfare, pensions or medical care, it already becomes questionable whether a corporation can adequately be described as either private or public in nature. While such contestations of the nature of the business enterprise already go back a long time (Dewey, 1926), the functionalist critique of both the shareholder versus stakeholder paradigm of corporate governance and the public–private divide in determining the nature of the firm goes much further still. From the perspective of societal functional differentiation, it is a mere historical contingency that the discussion of corporate governance would be dominated – for some time – by such connotations as ‘shareholders’, ‘stakeholders’ on the one hand, public versus private nature of the corporation on the other. While Varieties of Capitalism scholarship succeeds in reiterating the contextuality of corporate governance development, it still has to be developed further to move away from contentions of path dependency and thus-upheld claims to persisting divergence, in order to recognize the complexity in which the business corporation is the collision site of different societal rationalities.

ACKNOWLEDGEMENTS

Thanks to Larry Beeferman of Harvard’s Labour and Worklife Program (www.law.harvard.edu/programs/lwp) for the invitation to the 2007 ‘Capital Matters V – Managing Labour’s Capital’ Conference and to William Lazonick, Cynthia Williams, David Soskice and Fenner Stewart for their valuable feedback. Research for this paper was conducted under the framework of the CLPE Comparative Research in Law & Political Economy Network at Osgoode Hall Law School, Toronto. Financial Support from the Social Sciences and Humanities Research Council of Canada (Grant # 410-2005-2421) is gratefully acknowledged.

NOTES

1. For an origin of this concept, see Polanyi (1944); it was subsequently further elaborated with a focus on networks by Granovetter (1985, 2005); critically hereto: Beckert (2007), who reads ‘The Great Transformation’ as ‘a social theory’ and argues that a focus on networks falls short, on the one hand, of appreciating the more complexly structured market as framework of economic activity and, on the other, fails to address Polanyi’s concern with the consequences for ‘social order and political freedom when economic exchange is organized chiefly through self-regulating markets’ (p. 17).
2. Granovetter (1985), p. 501: ‘When many employees have long tenures, the conditions are met for a dense and stable network of relations, shared understandings, and political conditions to be constructed.’
3. See, for example, Roe (1993); with a view to the changing dynamics of the political economy of such regulations: Nottage (2001, 2007); Lazonick (2002a).

4. See also Kübler (2005: 239–40): ‘But the complex rules and cumbersome and lengthy procedures are the result of political compromises, which are very much shaped by the ideas and assumptions of the past; they show specific features of “path-dependence” and the stickiness of well-established institutional arrangements.’

5. See, for example, the contributions in McCahery et al. (2002); Gordon and Roe (2004); a recent publication laudably takes a more contextual approach and features a comprehensive section on regulatory structures, bureaucracy and administrative law: see Hopt et al. (2005).

6. See, for example, Vitolis (2001); Wheeler (2002); Streeck (1997); Dore et al. (1999); see also the contributions to Streeck and Yamamura (2001) and Streeck and Yamamura (2003); Baum (2005) observes at p. 21 that a ‘gradual and partial de-bundling of the corporatist “Deutschland AG” appears to be somewhat probable.’; see also Kübler (2005: 239): ‘slow, piecemeal, cumbersome’ changes of corporate law structures in Europe.


8. Among the most eminent contributions in this regard is: Granovetter (1985); the Director of the Cologne Max Planck Institute for the Study of Societies, Jens Beckert, refers to that article as ‘the “founding manifesto” of the new economic sociology’: see Beckert (2007), p. 6.

9. From the ongoing, vivid German discussion, see – for a conciliatory viewpoint – Raiser (2006: 111–16); Bayer (2004, p. 537–8); in contrast: Adams (2006); Hennsler (2005); Schwark 2004; with a call not for abandonment, but reform from a particular focus on the organizational structures within the company on the one hand and the firm’s overall competitiveness based on business strategy and product quality on the other: von Werder (2004).

10. Amin and Cohendet (2004: 113): ‘The first and most obvious “management” step implicit in a model of learning by doing is clear recognition of the limits of management by design, of the top-down inculation of creativity.’

11. For a concise presentation of the model, see only Pistor (1999).

12. For an excellent discussion of these changes, see only Cioffi (2002, 2006).

13. See the contributions to Weber (2001).

14. For a critique, see Arthurs (2002); Blackett (2004); Zumbansen (2006b).

15. See the increasing number of scholarly assessments of this process: Hommelhoff and Schwab (2001); Berg and Stöcker (2002); Lutter (2002); Seibt (2002); Bachmann (2002); Borges (2003).


17. The Code’s recommendation in section 3.6., supra note 38, has already found followers. See, for example, the 2006 Corporate Governance Report from the METROGROUP, where it is stated explicitly, that the Group has endorsed the Code’s recommendation to prepare meetings of the supervisory board separately among the shareholder representatives: http://www.metrogroup.de/servlet/PB/show/1119290/GB2006-Corporate-Governance-Bericht-de.pdf


19. For an excellent analysis, see di Robilant (2006).

20. See the excellent analysis by Möllers (2006).


22. See the discussion and critique by Deakin (2007).

23. Lazonick (2007), highlighting the relevance of altogether three ‘social conditions’, namely strategic control, organizational integration and financial commitment as prerequisite for enhanced economic development; see also Whitley (2000: 871–4) (identifying different innovation form in correlation with particular types of firms).

24. For a most recent endorsement and interesting discussion of the relationship between contract and enabling corporate law, see Hansmann (2006: 1): ‘The conventional wisdom today is that the internal affairs of business corporations are, in fact, almost completely contractual.’
25. Strine calls this the ‘separation of ownership from ownership’.
26. For a critique, see Bratton and McCahery (2001).
27. For a critique, see Teubner (1988).

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7. Corporate social responsibility: do corporations have a responsibility to trade fairly? Can the Fairtrade movement deliver the duty?

Janet Dine and Kirsteen Shields

INTRODUCTION

The concept of corporate social responsibility cuts across the boundaries between commercial law and human rights laws and, in particular, in a globalized world the Law of International Trade and International Human Rights Law. These disciplines have developed entirely separate frameworks, to the extent that on a visit to the World Trade Organization in 2001, one of the authors was told by an official that there was genuine puzzlement as to what relevance human rights law has to the trading regime. Economic development was seen as entirely politically neutral and beneficial. Since then the impact of social movements and anti-globalization protestors has made a significant difference in the way in which trade issues are discussed. It has even had some impact on the International Financial Institutions (IFIs) although probably least on the IMF. However, dialogue between the two fields is still in the early stages of development and there is a danger that the more powerful system will ‘capture’ the less powerful. In this instance we see the WTO system as more powerful than the international human rights system. This is for three primary reasons; the full engagement of the United States in the WTO (it is not a signatory to the UN Covenant on Economic, Social and Cultural Rights), the existence of binding legal sanctions at the conclusion of the dispute resolution mechanism of the WTO, and the cavalier disregard of the UN by the USA as evidenced by the Iraq war.

Because of the risk of ‘capture’ the first question which needs consideration, if not necessarily an answer is ‘has the corporate social responsibility debate got real value?’ Debates on trade liberalization, human rights norms and corporate social responsibility have one significant thing in common, they are often conducted on the basis that there is no attempt to assess whether the whole movements are based on questionable values and assumptions. It is
right then to question whether the corporate social responsibility debate has not deflected a great deal of attention away from a harder underlying issue which is the design of our economic systems as a whole. In this respect it may be said to have provided a ‘moral deflection device’ (Pogge, 2002) allowing much hot air to be spoken while deflecting attention away from the real underlying and extremely difficult issues (Dine, 2005).

This chapter tries to unpack the role of international commercial law, to show that corporate social responsibility has evolved as complementary to international commercial law as a result of pressures brought to bear by two different but related understandings of human rights; legal and philosophical, as well as the theories of communicative justice. These are responsible for supporting the corporate social responsibility movement by providing answers to the difficult question; what should corporations be expected to do? They flesh out the practical content of the concession theory which argues that companies may only trade within limits imposed by general societal norms. The chapter also examines the role which the Fairtrade movement plays in the ongoing development of corporate social responsibility.

The authors debate whether the duty to trade fairly is enshrined in international law, or whether international human rights norms are ‘soft law’ that should be reflected in models of corporate social responsibility. It examines how the Fairtrade movement provides insights into how certain aspirations to responsibility can be achieved in practice.

THE ROLE OF COMMERCIAL INTERNATIONAL LAW AND MARKET MECHANISMS

Before the recent extensive liberalization of the world economy leading to the opening of markets and the abolition of many protectionist measures the way in which individual economies were run contained an element of planning and state control. With the emphasis on building an open world economy the control mechanisms operated by member states have been significantly reduced. This has many parallels with the opening of the markets of the Soviet Union and has similar social and legal consequences, including changing the way in which commercial law operates. In this case we are considering international commercial law but there are significant parallels with domestic commercial law. The role of commercial law in any market economy, including a global market is to allocate risk. Controlled economies attempted to eliminate the risks of commercial transactions to individuals, transferring the risk of failure to the whole community.

The move to a market economy from a controlled economy thus entails complex political questions about which market participants shall bear the risk
of market transactions. Two very simple examples illustrate this fundamental role: one is the law of contract. At first sight agreement between two individuals to buy and sell might seem a politically neutral transaction and the decision by the state to provide enforcement mechanisms to back such a transaction (such as sanctions for non-performance) might similarly appear to be politically uncontroversial. However, immediately any disparity of bargaining power is taken into consideration, a state decision to provide enforcement mechanisms will clearly benefit the party who started in the more powerful position since that bargaining power will have been used to gain a more beneficial bargain. Only if safeguards such as Unfair Contract Terms legislation are enacted to re-balance the equation can neutrality be regained. The same argument works in exactly the same way at an international level. An agreement between states with equal bargaining power may be considered to be politically neutral, when they are of disparate power the ‘contract’ is of profound political importance. One result of a political imbalance at international level has often proved to be a ‘squeezing’ of policy space in jurisdictions which have little bargaining power by agreements between states, including those which involve the interests of powerful companies. This chapter argues that commercial law functions at two levels; that of the background rules set (in international law) by the network of treaties and the obligations that arise from them) and at a transactional level, involving individual agreements and transactions such as the purchasing of commodities. If obligations such as those assumed by those in the Fairtrade movement were a widespread understanding of part of the corporate social responsibility of companies, it is arguable that imbalances of power which are evident in the background network of responsibilities could be at least partially offset by responsible actions in the way in which commercial law works at the transactional level. This is the Fairtrade movement’s practical contribution to corporate social responsibility. The Fairtrade movement operates on a number of principles. Space prevents a full discussion of them here but two of the most important are the pledge to provide a purchase price for commodities above the price of production at all times despite the fluctuations of the global market and the pledge to provide pre-finance for producers. In both cases these mechanisms are widely unavailable as a result of the liberalization of markets under international trade rules. They provide two examples of the ‘squeezing’ of policy space as a result of opening up markets to all comers thus pushing commodity prices down and opening markets to the giant multinational banks which makes micro credits unavailable. The Fairtrade movement seeks to redress the resultant difficulties for small producers. Facilities which are unavailable because of the framework provided by international law are redressed at transactional level by those adhering to the Fairtrades movement's philosophy.
Corporate social responsibility is a difficult concept. Dine argues elsewhere that it is based on ‘Vague principles and shaky foundations’ (Dine, 2005)

The vagueness and breadth of the formulations at international, regional and national levels gives some credence to the claim that there is only a hollow ‘presumption of agreement’ and that CSR is a concept which has no real definition. There are not only persistent squabbles as to what is meant by corporate social responsibility but also its basis and its relationship to that equally nebulous term ‘corporate governance’. (Dine, 2000: 230)

Addo writes:

There are practical and doctrinal uncertainties such as the precise scope of the various designations and the basis upon which social or moral responsibility can be imputed to an intangible entity such as a corporation which has no soul of its own to be damned, if necessary. There is a persistently unsatisfactory condition in which the various groups (NGOs, corporations, inter-governmental institutions etc.) attribute different meanings and explanations to designations of their choice. Good governance, good citizenship, or social responsibility can mean anything to anyone. (Addo, 1999: 13–14)

Addo identifies two bases and three underlying ‘principles’ for attributing social responsibility/ethical requirements to companies. The bases are an analogical extension of individual responsibility (Coleman, 1985) and attribution of responsibility to the company as ‘a responsible entity . . . capable of exercising control and able to make choices’ (Addo, 1999). In fact, the two approaches are very close since the extension of individual responsibility ‘by analogy’ usually accepts that ‘organizations have and maintain different persona from the people who constitute it’ (Addo, 1999: 16) and that even if all the individuals involved in a corporation are persons of good conscience:

having a conscience in the running of a large corporation does not translate automatically into running a conscientious corporation. The latter requires an ‘institutionalization’ of certain values, not simply the possession of those values in one part of the organization (even if that part is at the top of the hierarchy). (Goodpaster, 1983: p. 10)

In Companies, International Trade and Human Rights, Dine concluded that the best of suggested theoretical foundations was the concession theory, explained as follows.
Concession on the International Stage

Globalization means that we are living in a world market. What does concession theory tell us about the behaviour of corporations in a world market? What international norms are available to guide us to select the correct parameters on corporate behaviour?

The first step is to identify the source of the ‘concession’ under which TNCs operate in a global market. It is then necessary to attempt to identify agreed norms which should be applied and finally to identify an enforcement mechanism which might effectively deliver compliance. The original concession theories considered that the State, in the form of the monarch or Emperor was the concession granting source (Dine, 2000). While this retains some resonance because the mechanics of the concession come via the exercise of state power (the grant of corporate personality and limited liability), the concession can be seen (at least from the perspective of democratic societies) in a wider context as a grant from society as a whole to carry on business provided the expectations of that society are met. Thus the rules imposed on companies may spring from state apparatus but are a result of individual and collective expectations.

Corporations operate under the terms of two charters: a formal, written, legal charter; and an unwritten, but critically important, social charter . . . it is the unwritten charter of societal expectations that determines the values to which the corporation must adhere and sets the terms under which the public grants legitimacy to the corporation. (Wilson, 2000: 3)\(^5\)

This may mean that the shaping and enforcement of the rules comes from State machinery but reflects the wider expectations of society. Where to find those expectations? They must be found by developing jurisprudence which refines and makes precise the vague aspirational goals which we see at present in the CSR debate. That this can be done is evident from the development over the past 50 years of precise jurisprudence on Human Rights, perhaps even more inspirational is the rapid development currently taking place in the field of ‘economic, social and cultural rights’ (Dine, 2005: 232–3).

A Hierarchy of Foundations

This chapter argues that there is a hierarchy of foundations for corporate social responsibility from abstract philosophy to practical implementation. As argued above the fundamental foundation is concession theory. However, concession theory does not tell us what companies should do. Clues in terms of which direction to look are provided at the next level by concepts of human rights as informing institution building and by examining the role which social move-
ments, systems theories and ideas of communicative justice have in designing companies and corporate social responsibility. Next, international human rights law gives us developing jurisprudence on rights applicable to trading systems and finally, practical content is culled from the Fairtrade movement which seeks to put the theories into practice, helping to determine the content of corporate social responsibility in matters of trading ethics. The role of international human rights law is covered in some detail later. However, the strands of thought must not be seen as wholly separate (Craven, 2000: 489). Craven examines the special characteristic of human rights treaties as non-reciprocal and contends that the obligations secured by human rights treaties are independent to a certain extent of the bilateral reciprocal undertakings of States. Craven evokes a purposive conception of human rights treaties to claim that human rights treaties are concerned with the legal interests of individuals or groups rather than of states to the effect that states hold procedural rights in order to effectuate or protect the object of the treaties but not to pursue their own interests (Craven, 2000: 513–17). Craven supports this with a cognitive conception which posits that ‘human rights treaties [embody] certain collective values’ which both define and transcend individual states’ legal interests (Craven, 2000: 510–13). This has clear resonance with the search for content to flesh out the notion of concession.

Pogge and Human Rights as Institution Building

Instead of discussing the content of legal norms which seek to deliver human rights, for Pogge the focus of concepts of human rights is on institution building: ‘human rights are not supposed to regulate what government officials must do or refrain from doing, but are to govern how all of us together ought to design the basic rules of our common life’ (Pogge, 2002: 47). So far from the more traditional understanding which reads the rights agenda as imposing duties not to violate rights, Pogge sees a ‘responsibility [on governments and individuals] to work for an institutional order and public culture that ensures that all members of society have secure access to the objects of their human rights’ (Pogge, 2002: 65). Part of that institutional order must be a design of companies which are no longer structured to encourage them to seek for ‘profit maximization’, a design which pushes them towards exploitation of workers and environmental vandalism. It is therefore an insight which demands building human rights norms into our understanding of corporate social responsibility.

Communicative Discourse

Blecher has examined the global rise of civil society by examining the devel-
opment of the new global civil movements (Blecher, 2006). He points out that each social sphere such as law, politics and economics evolve as separate entities using core distinctions to define their preoccupations, for example, law uses legal/illegal, politics power/non-power. Social movements, including the new social movements which are visible at the European and World social fora put pressure on these traditional distinctions, requiring a redefinition of the values inherent within them and consequent changes in discourses and in the law.

Going beyond the distinctions to question their own validity (is the legal/illegal distinction itself legal or illegal) means that the way in which society may reorder itself becomes a matter of infinite complexity and possibilities. However, in all spheres the range of possibilities often leads to decisions being made which defeat the original object pursued. This paradox is present in all human activity. In the human rights context, because human beings are both individuals and part of society, full human rights can only be delivered by institutions established by societies. The paradox is that societies (now global) have a great capacity for human rights violations. This tension reflects the historic tensions apparent from the birth of the human rights movement as explained by Freeman (2006) who has analysed the tensions between the origin of human rights in the natural law philosophy of freedom and the free exercise of property rights and the evolution of the human rights discipline into the situation where it is opposed to the free exercise of property rights through capitalism.

Understanding these paradoxes is not necessarily negative, according to Blecher. It should lead to an aspiration to achieve the best possible result for all; in law to the achievement of justice. Realization of true justice will remain out of reach because the criteria used to make choices will always be flawed and ‘asymmetric’, therefore, law must seek to continuously improve in order to tend towards the delivery of justice, requiring ‘permanent political negotiation’. This requires continuous reconsideration of boundaries within law (such as the definition of ‘public’ and ‘private’ spheres) and between law and other ‘social spheres’, law must at all times be seen in its multi-disciplinary context.

The new social movements (which are broadly seen as ‘anti-capitalist and include strong pressures to trade ethically) reflect aspirations to provide the best possible solution for every individual. Democracy should respond to the pressures exerted by these movements by becoming ‘liquid democracy’ since every time a choice is made and an institution established it is immediately suspect since the choices which led to its establishment will benefit some over others. This vision of institution building reflects Thomas Pogge’s concept of creating institutions to maximize the delivery of human rights.

Companies and groups of companies are central to the current legal organization of capital. These legally established institutions cannot, as Teubner argues, be opposed by ‘free market forces’ since, just as human rights evolved
out of a property rights context and now sit in opposition to some property rights, so ‘free market forces’ have a paradoxical tendency to undermine freedom, creating a systematic bias in favour of the ‘property rights’ of shareholders, excluding responsibility to stakeholders. Although the addition of concepts of ‘corporate social responsibility’ cannot cure the fundamental error in the legal design of companies and the current model of companies needs to be opened to other influences to create a model which is likely to deliver common welfare, it can nevertheless go some way towards ameliorating the unjust international commercial law framework at a transactional level.

We are therefore looking to formulate CSR based on these foundations: Do corporations have a responsibility to trade fairly?

WHAT DOES IT MEAN TO TRADE FAIRLY? CAN THE ECONOMICS OF FREE TRADE DELIVER?

A huge question and one which we will be very selective in answering. Our argument is that trade is manifestly unfair if it prevents governments from the attainment of legitimate domestic human rights policy goals. Perhaps most significantly, the WTO has been criticized for its ability to limit governments’ ability to regulate or to take measures to promote or protect human rights at the national level.

Indeed in promoting ‘free trade’ the WTO seeks to do away with possible regulatory interferences with the free flow of goods and services, thus limiting governments’ ability to regulate in favour of development, environmental protection or to defend vulnerable groups. (Dommen, 2004: 5)

This has a number of consequences, it carries implications for state responsibility for corporate actions; their ability to regulate these corporations by implementing human rights or other social or environmental policies may be impeded by WTO agreements. Bearing in mind that human rights also entail obligations for intergovernmental organizations, it follows that the WTO as an international organization is failing to fulfil its obligations under international human rights law. We therefore have two powerful forces ranged against the corporate social responsibility movement; the WTO liberalization regime and the design of companies themselves.

Specifically in the case of Fairtrade WTO obligations inhibit the right to enable states to ensure an adequate standard of living for their people. Nicholls and Opal discuss the economic reasons why the economic theories on which the push to openness of markets has been based engender market failure when applied to poorer countries, especially those with geographical and historical
limitations, the latter often the result of colonial exploitation (Nicholls and Opal, 2005). The WTO system depends on the theory of comparative advantage developed by Adam Smith and David Ricardo: Nicholls and Opal offer a lucid and succinct description:

Under the theory of comparative advantage, countries export what they are relatively good at producing and they import what they cannot produce sufficiently. Mountainous Guatemala grows high-quality cloud-forest-grown coffee. Japan manufactures technologically advanced electronic products. Opening up countries to international trade allows Japanese electronics producers to import delicious coffee, and Guatemalan coffee farmers to access high-tech products. Under free trade, both parties are better off: international trade is thus a win-win situation in which everyone benefits.

Supporters of free trade insist that the unfettered movement of goods, services and finance between countries offers the most efficient model of transactional business. Inherent in this is the understanding that whilst some benefit, others will inevitably fail, but this still works ultimately for the general good, weeding out the weak and inefficient. (Nicholls and Opal, 2005: 17)

The problem with this theory (apart from its environmental impact) is that the macroeconomic conditions on which it is based are absent, especially from rural agricultural societies, especially those which were reduced to basic commodity trading as a result of colonization (Dine, 2005, chapter 3). In particular the following conditions on which the macroeconomic model are based are missing:10

• Lack of market access
• Imperfect information
• Lack of access to financial markets
• Lack of access to credit
• Inability to switch to other sources of income generation11
• Weak legal systems and enforcement of laws. (Nicholls and Opal, 2005: 18–19)

Probably the most fundamental of the difficulties identified by Nicholls and Opal is the inability to switch to other sources of income generation. The economic theory behind liberalization depends on an ability to change to a different source of income.

This is clearly not the case for the world’s poor. Even if isolated producers had access to price information, their ability to change their source of income is limited. The 1.2 billion people who live on less than $1 a day are extremely risk-averse. Switching from growing a crop that your grandfather grew to a higher-priced crop that no one in your village has ever grown before is an extremely risky activity. For families with no slack in their
income and little by way of savings, risk-taking is not an option (Nicholls and Opal, 2005: 19).

It is therefore the general liberalization under the WTO agreements and other trade agreements which may prevent the attainment of legitimate domestic human rights policy goals? International commercial law fails in a fair attribution of risk among peoples and would clearly fail the Rawlsian test of a policy designed from behind the veil (Rawls, 1999). What counterbalance can human rights law offer? What norms of social responsibility can counter the commercial law imbalance?

**IS THE DUTY TO TRADE FAIRLY ENSHRINED IN INTERNATIONAL LAW? OR ARE HUMAN RIGHTS NORMS ‘SOFT LAW’ THAT SHOULD BE REFLECTED IN MODELS OF CORPORATE SOCIAL RESPONSIBILITY?**

**Does the Human Rights Framework Imply Trade-related Obligations?**

And What is the Nature of these Obligations?

The catalogue of rights today commonly referred to as the international human rights framework finds its constitutional origins in the Universal Declaration of Human Rights in 1948. Although integrating civil, political, economic, and social human rights, the Universal Declaration of Human Rights does not protect economic freedoms (such as non-discriminatory conditions of labour, division of labour, efficient supply of goods, services and job opportunities) and makes no reference to trade-related human rights obligations. Instead, any such trade-related obligations have been considered to trickle down from general obligations on the role of the State to provide adequate social security conditions (in particular article 25 UDHR that everyone has a right to ‘a decent standard of living’). The only hint, in the Universal Declaration, of external or horizontal obligations of states in their international relations comes in the form of Article 28 which provides that: ‘Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized’.

Recently described as the seed of the globalization of human rights (de Feyter and Gomez Isa, 2005), Article 28 is the most aspirational and the least concise of the provisions contained in the Universal Declaration. The respective UN organs can be perceived as having avoided elaboration on the extent content of Article 28 and whilst other rights in the Universal Declaration were later embodied in the ICESCR and ICCPR, the content of Article 28 was not included in these Covenants, impeding the realization of the Article 28 right. Subsequently the Declaration on Social Progress and Development (1969) and
the Declaration on the Right to Development (1986) have been taken together to constitute the normative framework for the transformation of the right contained in article 28 UDHR to a realizable right to development (Alfredsson and Eide, 1999: 602). The Declaration on the Right to Development (1986) goes beyond the wording of Article 28 to stipulate a need for a new international economic order in ensuring development and eliminating obstacles to development. Article 3 of the Declaration on the Right to Development asserts that States have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development, but that States have the duty to cooperate with each other in ensuring development and eliminating obstacles to development. States should realize their rights and fulfill their duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest and co-operation among all States.18

From this base, the UN Commission on Human Rights has built a body of soft law supporting a right to development. In particular this includes the General Assembly resolution 48/141 of 20 December 1993, UN resolution 1998/72 of 22 April 1998, the conclusions and recommendations of the Working Group of the Right to development and the establishment of a high-level task force on the implementation of the right to development established within the framework of the Working Group. The Working Group has consistently stressed that trade plays an integral role in the realization of the right to development and consequently that the states’ human rights obligations extend to states’ trade relations. Most recently in its report of its seventh session of 22 February 2006, the Working Group held that:

Ensuring policy coherence between a State’s international human rights obligations and all its multilateral and bilateral trade and development engagements is, therefore, a central prerequisite of the right to development. In negotiating such engagements, Governments should comply with and ensure respect for their human rights obligations, by applying a coherent and coordinated approach. The Working Group also recognizes that States should implement the resolve to integrate the right to development into national policies, including development strategies, at the national and international levels.

Further attempts to capture trade within the human rights discourse include UN General Comments, UN General Assembly resolutions, and earlier Economic and Social Council Resolutions. In its General Comment No. 2, the UN Committee on Economic, Social and Cultural Rights (CESCR) addressed the issue of the adverse effects of structural adjustment programmes on the realization of human rights. In so doing the Committee stressed a duty on states to refrain from action that might impede the realization of economic,
social and cultural rights in other countries in the context of the work of international lending institutions.

Whilst these developments within the UN human rights framework both induce and represent a growing consensus on the existence of a trade related international obligation on the right to development, the extent to which their progression has influenced decision-making within international commercial law is unclear. Rising trends in corporate social responsibility or human rights monitoring within IFIs or MNCs are often explained away as a voluntary response to the demand of a better-informed civil society rather than as a fulfilment of legal obligations. The extent to which the key actors of international commercial law respond to and engage in the current dialogue on development is the focus of the next section.

To what Extent does International Trade Law Respond to and Incorporate the Human Rights Law Dialogue?

International financial institutions (IFIs)
Development has featured amongst the Bank’s objectives since its conception. In the aftermath of the First World War the World Bank emerged with a mandate which primarily entailed assisting in the reconstruction of Europe whilst also promoting the development of less developed countries. However (as it was before the conception of the Universal Declaration of Human Rights), human rights were not explicitly referred to in the World Bank’s constituent document, the International Bank for Reconstruction and Development Articles of Agreement. Despite clear objectives varying interpretations of ‘development’ have led to ambiguity regarding the Bank’s role and function regarding human rights and the Bank has modelled itself as a financial institution rather than a human rights institution. The only official policy statements which can be construed as expressing human rights obligations come from the World Bank’s Operational Directives. The World Bank has drafted three such Directives on involuntary resettlement, indigenous peoples and poverty reduction. Despite the use of human rights language in the Directives, the Bank has not elaborated on the implications of the incorporation of human rights obligations in the Directives.

Nonetheless, the Bank can be seen to have participated in the current dialogue regarding the relationship between human rights, development and trade and a clear evolution from the Bank’s traditional restrictive textual interpretation can be perceived in the Bank’s recent statements. In January 2006, in response to the Bank’s senior management’s demand for a statement on whether explicit work on human rights would be in compliance with the Bank’s Articles of Agreement, the General Counsel of the World Bank issued a note entitled Legal Opinion on Human Rights and the Work of the World
The statement concluded that ‘The Articles of Agreement permit, and in some cases require, the Bank to recognize the human rights dimensions of its development policies and activities, since it is now evident that human rights are an intrinsic part of the Bank’s mission’. Whilst this statement is easily criticized for not going far enough, the admission that human rights are an intrinsic part of the Bank’s mission represents a significant point of departure for future legal analysis of the Bank’s commitments. This latest venture goes further than previous gestures such as the Bank’s 1998 publication *Development and Human Rights: the Role of the World Bank* (World Bank, 1998) (in which it attempted to demonstrate that it has consistently taken measures to ensure that human rights are fully respected in connection with the projects it supports) and in 1999 the Bank’s placing of human rights conditions on loans to Indonesia (signifying the first time either bank had placed such conditions on loans) (Knox, 1999). In these previous gestures the Bank expressed its support for human rights in general but never committed itself to the emergence of any legal obligation ensuing from recognized human rights obligations.

Similar to the World Bank, human rights norms were not integrated into the constituent documents of the GATT nor the WTO; it is worth noting that apart from a few exceptions, notably in ILO, UNESCO and WHO rules, human rights were not effectively integrated into the law of most worldwide organizations which emerged around the same period. Commentators have suggested that this was due to a perception of the liberalization of welfare-reducing trade barriers and the promotion of the international rule of law as ‘obviously beneficial for all citizens’ (Petersmann, 2000: 19–25). Nonetheless, given that the WTO is considered a subject of public international law, it is to be assumed that its institutions will operate within the context of principles and norms of general international law. In 2001 the Doha Declaration on TRIPS and Public Health demonstrated the ability of the WTO institution to incorporate human rights concerns in its decision making on trade. The Doha Development Round itself may also be perceived as international trade law’s response to growing demands from the human rights framework. Furthermore the recent establishment of the Dispute Settlement Procedure holds the potential for the WTO to be seized of human rights concerns and may induce the WTO to clarify its position in regards to human rights.

**Multinational Corporations (MNCs)**

Whilst the universality of human rights norms entails that all states are considered bound by the human rights framework, the responsibilities of non-state international actors towards human rights remain undefined. As MNCs are not subject to the UN human rights framework any human rights obligations...
MNCs bear are considered socio-political rather than legal. This bears significant consequences in an era where states increasingly defer the management and distribution of essential services such as water and healthcare to non-state international actors.

In the 1970s, under the first wave of the new international economic order, the UN,\textsuperscript{36} the OECD\textsuperscript{37} and the ILO\textsuperscript{38} each attempted to respond to this imbalance by establishing their own principles on the conduct of MNCs in relation to development and human rights. However the inability of these mechanisms to establish effective regulation of multinational corporations led to their redundancy and a general perception of these mechanisms as ‘weak’ instruments of international law (de Schutter, 2006). The world’s ambitions for development-enriching trade were reignited in the 1990s, fuelled by a disillusioned civil society and combusting in the termination of negotiations on the MAI in the OECD in December 1998. Many of the original codes of conduct were revised. Most recently, institutional answers have come in the form of Kofi Annan’s Global Compact in 1999,\textsuperscript{39} and in 2003, the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights.\textsuperscript{40} Both the Global Compact and the UN Norms require that MNCs are not complicit in human rights abuses. However, again these codes provide no means of implementation nor enforcement and the more ‘visible’ forms of MNCs human rights commitments come in the form of self-imposed CSR codes of conduct, which are outside the scope of international law.

To What Extent Can a Duty to Trade Fairly be Derived from International Law? Constructing a Duty to Trade Fairly from States’ Obligations under International Law

IFIs
Regardless of their constitutional framework, IFIs are bound to respect human rights obligations by virtue of their composition of states. This construction of obligations gained widespread recognition following Skogly’s analysis of the human rights obligations of the World Bank and the IMF in 2001 (Skogly, 2001) and was recently codified in the Tilburg Guiding Principles on World Bank, IMF and Human Rights.\textsuperscript{41} Para 5 of the Tilburg Principles asserts:

The responsibility for implementing human rights is universal and concerns all – state and non-state – actors whose activities may affect people’s lives. The primary responsibilities and obligations in the field of domestic human rights enjoyment, however, remain with the State: States cannot ‘delegate’ human rights obligations to, for instance, international institutions and relieve themselves of these obligations. As international legal persons, the World Bank and the IMF have international legal obligations to take full responsibility for human rights respect in situations
where the institutions’ own projects, policies or programmes negatively impact or undermine the enjoyment of human rights.42

As such, in their negotiations with IFIs, States have a human rights duty to ensure that liberalization does not contravene human rights norms. In particular, liberalization risks inhibiting the State’s ability to implement the rights to ‘a decent standard of living’43 and to a ‘social and international order in which the rights and freedoms set forth in the Universal Declaration of Human Rights can be fully realized’.44 This extension of states’ human rights obligations throughout their roles in IFIs is considered to imply manifold duties: (a) A duty on poor states to use their human rights obligations as a defence against the more extreme demands of liberalization and conditionality; (b) A duty on rich states not to impose such extreme conditions through pressure in WTO negotiations or bilateral negotiations; (c) A duty to control the activities of MNCs whose economies of scale and sophistication create extreme contractual imbalances (Hunt et al., 2003). Therefore while there is no explicit obligation regarding human rights ensuing from the IFIs, developing jurisprudence implies that the human rights responsibilities of states should be reflected in the actions of the IFIs.

MNCs

To a large extent, jurisdictional ambiguity created by multi-nationality has been blamed for the accountability dilemma of MNCs: Where the company bears more than one nationality, host states may risk deterring foreign direct investment unnecessarily when ambiguity or varying interpretations or corporate nationality means that responsibility may be sourced back to the home state. However this analysis of the problem as a jurisdictional issue underestimates the facility and flexibility of international law. As in the case of IFIs, much of the ambiguity enshrouding the human rights obligations of MNCs can be dispersed by considering the State’s role in the functioning of the MNC. By perceiving the MNC as a ‘network of linked companies each of them incorporated under the legal system of the country in which they are operating’ it is possible to transform the jurisdictional issue of multinationality into a question of state responsibility over the acts of companies operating on its territory. Such a view unlocks the mystery of MNCs’ human rights obligations into bundles of human rights obligations flowing from each State. Responsibility for the actions of subsidiaries and affiliates would be seen as the concern of the home state of the parent where control over the whole operation resides there. This would be an implementation of the duty on states to co-operate in seeking to implement the right to development.

This view adheres to the human rights framework’s stance on the role of the State in relation to privatization. Under Eide’s tripartite obligation of states to
In practice, however, States may prefer the depiction of MNCs as a club of Frankensteins unaccountable and out of control in order to avoid their role as primary bearers of human rights obligations. This may be true of rich and poor states alike. It may also be true of corporations who may enjoy feeling that they are above the law. Underlying the false emphasis on the jurisdiction gap is a fear of imposing conditions on corporate practice because human rights obligations may deter foreign direct investment (Nam, 2006). The belief is that poorer states often regard the acceptance of foreign direct investment as essential in order to develop both economically and socially; that in order to provide the economic, social and cultural rights demanded by the human rights framework, they must first of all have the financial means to do so.

THE HUMAN RIGHTS IMPLICATIONS FOR TRADE

To summarize, the human rights framework is making inroads in establishing a consensus on the right to development with implications for trade. Meanwhile international trade actors set their own agenda, follow their own rules and have no internal legal obligations towards human rights, and human rights responsibilities (in the form of IFI’s declarations or MNC’s CSR codes) are often promoted as voluntary and altruistic, above and beyond the call of duty. Human rights awareness and civil society pressures are often cited as the driving force behind MNC’s CSR codes of conduct. Whilst human rights language is generally used in CSR documents there is often little clarity on the
conditions of implementation and the voluntary basis of these commitments has led to strong criticism and dissatisfaction at the absence of a robust regulation within international law. However derivation of the obligations of international trade actors from the role that the state plays within those actors (both IFIs and MNCs) leads to the conclusion that these human rights obligations are in fact a mere extension of their make up of state components and therefore mandatory. In practice however both the MNC and IFI provide scapegoats for States, collectively enabling states to diminish their respective human rights responsibilities.

Meanwhile, amid the spin of consumer society, developing countries and consumers alike have grown sceptical of corporate promises and have sought greater change involving a transformation of the operating principles of trade. Increased awareness of the unfairness of the old rules of the game has generated consumer demand for ‘ethical products’ which, in turn, has raised human rights accountability to a new platform within the operations of MNCs. In the second wave of corporate social responsibility of the 1990s, the Fair Trade movement emerged as a grass roots self-regulating alternative to profit driven organizations. On the back of a growing ‘ethical demand’, the Fair Trade movement has blossomed of its own accord. Organizations such as the Max Havelaar Foundation and Café Direct have re-embodied the cooperative development principles which predate capitalism and have developed on the basis of equitable trade. The Fair Trade movement seeks to avoid the developing state’s dilemma of accepting FDI that may impede human rights progress by promoting FDI that enables economic growth and the promotion of economic, social and cultural rights simultaneously. As such, the Fair Trade movement in theory at least, provides an insight into how the competing demands of the world’s economic order and the world’s social order may be satisfied in one system.

PUTTING RESPONSIBILITY INTO ACTION: TWO PRINCIPLES OF THE FAIRTRADE MOVEMENT

By no means the only principles adhered to by the Fairtrade movement, but perhaps two of the most important are the obligations embraced by the buyers of commodities to pay a price above the price of production, no matter what the market does and the obligation to pre-finance transactions. Both mean that security of income is ensured and the vagaries of free capitalism are avoided. Both of these are matters of corporate social responsibility but, perhaps the most important lesson that the Fairtrade movement has to offer the corporate social responsibility movement is the extent to which these actions are monitored and regulated. There are doubts about whether the system is robust
enough to withstand the adoption of Fairtrade labelling by mainstream retailers (Wills, 2006: 13–14). One possible solution to this is the more widespread adoption of similar methodology in mainstream corporate social responsibility models. At present ‘the quality of much corporate social reporting is poor and a great deal of it is inadequate as a means of assessing the extent to which companies have acted responsibly’ (Adams and Zutshi, 2005: 207).

**Fair Trade Certification**

The Alternative Trading Organizations and Fairtrade retailers came to realize in the 1980s that adopting a trademark would distinguish their goods from others and permit growth by allowing customers to give expression to the rise in the desire to shop ethically (Nicholls and Opal, 2005: 127; Fagan, 2006; Barnett et al., 2005). The introduction of the Fairtrade mark has had a dramatic effect.

More than one million producers are involved in the Fair Trade movement and millions more want to join and sell their products under fair terms . . . With total sales of around 1 billion in 2005, Fair Trade is still small compared to overall world trade. But thanks to increasing consumer demand, Fair Trade sales have been growing spectacularly all over the world; today there are about 200 Fair Trade importers and 3000 Worldshops in Europe alone. Market shares of typical Fair Trade products such as coffee, bananas and tea now reach 5% or more in some countries. In 2005, one in two bananas sold in Switzerland was fairly traded. (Kocken, 2006: 8)

The continuing growth of the sector relies on consumer trust that the goods are indeed ‘Fairtrade’ and, to some extent, this depends on the robustness of the inspection mechanisms.

If a coffee roaster wishes to expand his or her business beyond a small circle of trust . . . they will find that their word does not carry much weight with those customers they cannot meet personally . . . once the relationship becomes distant and impersonal, the brand must spend valuable equity ensuring trustworthiness rather than other brand claims like quality or uniqueness . . . Third party certification ensures consumers that the promises made by the company concerning its ethical dealings have been verified by an outside agency (Nicholls and Opal, 2005: 129).

In respect of the Fairtrade label, the major bulk of this work is now done by two organizations under the umbrella of the Fairtrade labeling organization (FLO). They are FLO e.V which develops and reviews standards and provides producer support and FLO certification GmbH which ensures that those standards are met. The FLO certification route covers the commodity; there is a separate system which applies to organizations. This is covered by the International Fair Trade Association (IFAT) which certifies organizations using a system of self-assessment, mutual review and random external verifi-
cation. The FLO system aspires to be more rigorous and it is that system which might provide a model for CSR initiatives. The standards approved by the FLO are supported by on-site inspections of the producers’ operations. The inspectors may spend up to two weeks on site depending on the size of the operation. The inspection covers all standards including employment practices and environmental records. The standards are readily available on the FLO website. After this the commodity enters the market with exporters, importers and manufacturers applying to participate in the Fairtrade system. The commodity is tracked until it is in its final form with the Fairtrade label fixed to it. Monitoring of the commodity passes to the separate foundations established in European or US jurisdictions once it has been imported into those jurisdictions. The Fairtrade Foundation is responsible for this auditing in the UK. The trail is incredibly complex. A simplified version is shown in Figure 7.1.

Note that the reports indicated by the lines joining the organizations require reports of the amount of pre-finance paid in the name of the importer/exporter, the shipping date, the container number and price paid for the shipment at each stage. The system also relies on complete co-operation between the local foundations (such as Fairtrade Foundation UK and the FLO. This amounts to a staggering amount of information and the system’s veracity depends on it. It is notable that the inspection process does not apply beyond the producers so

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**Figure 7.1  Simplified version of the Fairtrade auditing trail**
far as the conditions under which they operate. They are not obliged to permit unions or to pay a fair wage or act in an environmentally friendly way. This may well give rise to suspicions that some organizations are selling small amounts of Fairtrade label items in order to benefit from the ‘halo’ effect without themselves meeting the same standards as the producers who will often be the poorest link in the chain. Nevertheless, if it works well it is an impressive contrast to the poor reporting and audit which normally characterizes Corporate Social Responsibility reporting.

CONCLUSION

In our search for content to fill the concession ‘box’ we have considered the idea that institutions should be designed as far as possible to deliver human rights. This has fundamental consequences for the international trading system and for the design of companies. If implemented it would lead to a fairer and more balanced international trading system. However, the major quest of this chapter was to discover what companies should do in pursuit of corporate social responsibility. Although there is no clear imposition of a responsibility in human rights law on either states or companies to trade fairly, the jurisprudence seems to be developing in that direction. Human rights norms therefore have considerable value when answering our question. The development of these norms are themselves driven by the growing social movements and the pressure that they place on legal design. It seems that the Fairtrade movement has a valid claim to be in the forefront of a duty to trade fairly which may emerge as developed jurisprudence in future years. At present what it can do is seek to redress some of the market failures inherent in the liberalization of trade by acting at a transactional level to provide a decent standard of living for poor producers. If its monitoring system is robust it also has lessons for the corporate social responsibility movement as a whole in providing an independent and robust monitoring system.

ACKNOWLEDGEMENTS

This paper has been written as part of a research project funded by the AHRC into the Fairtrade movement. Enquiries are welcomed at Fairtrade-enquiries@CCLS.edu.

NOTES

1. See, for example, the discussion of E. Petersmann’s work in Janet Dine (2005) (ed.), *Companies, International Trade and Human Rights*, Cambridge: Cambridge University
Press. Petersmann’s argument is that there is a ‘human right to trade’ and that any government which sought to interfere with such a right should bear the burden of proving why this is ‘necessary’. Thus any ‘policy space’ which was exploited by governments in order to improve social or labour rights would be subject to a ‘necessity’ test if they interfered with (as they inevitably would) the right that he proposes which varies from a right to trade to a right to free trade.

2. D. Henderson Misguided Virtue, esp. ch. 3.


5. See also Scott, C., ‘Reflexive governance, meta-regulation and corporate social responsibility: the “Heineken Effect”’, chapter 8 in this volume.


7. For an opposing view on the non-reciprocal nature of human rights treaties see Simma, B. (1994), ‘From bilateralism to community interest’, Hague Recueil 369. Also see Roessler, R., ‘Environmental protection and the global trade order’, in Revesz, Sands and Stewart, Environmental Law, the Economy and Sustainable Development, on reciprocity in the WTO at p.112: ‘Reciprocity is achieved not through equal but through equivalent commitments and the schedules commitments of the different WTO Members therefore vary significantly. Moreover, the WTO Members are entitled to renegotiate their commitments. Both during the process of negotiating the commitments and after their acceptance, WTO Members thus have the possibility to modulate their trade obligations in accordance with their domestic political constraints. Reciprocity is an essential feature of the global trade order. If a unilateral right to withdraw market access commitments to take into account domestic political constraints in environmental policymaking were to be introduced, market access commitments that could be affected by this right would therefore no longer be exchanged.’


9. By virtue of article 28 UDHR.


11. See also Stiglitz and Charlton, Fair Trade for All, Chapter 13.


13. Universal Declaration of Human Rights adopted 10 December 1948, preceded by the UN Charter adopted 26 June 1945, San Francisco. Subsequently in 1966, the Universal Declaration was attached to the United Nations International Covenant on Civil and Political Rights and the United Nations International Covenant on Economic Social and Cultural Rights to create the International Bill of Human Rights. The universality of the norms contained within these provisions was upheld in the Vienna Declaration on Human Rights (Vienna Declaration and Programme of Action, UN GAOR, World Conference on Human Rights 48th Sess., 22nd plen. mtg., UN Doc. A/CONF. 157/24 (1993).) which referred to the
‘universal, indivisible and interdependent and interrelated’ nature of human rights and the obligations of the ‘international community’ towards ‘all human rights’. The Vienna Declaration and Programme of Action, recognized that democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing.

14. ‘Economic freedoms’ are mentioned only in Article 6 of the ICESCR on the right to work. However, more recent UN human rights treaties such as the 1979 Convention on the Elimination of all Forms of Discrimination Against Women, as well as the 1989 Convention on the Rights of the Child have begun to grant equal importance to economic, social and cultural rights as to civil and political rights in their realm of protection, see Merali, I. and Oosterveld V. (2001) (eds), Giving Meaning to Economic, Social and Cultural Rights, Philadelphia, PA: University of Pennsylvania Press.

15. The Universal Declaration’s predecessor, the UN Charter also pertained to an obligation on member states to cooperate internationally and to provide assistance in UN Charter Articles 55 and 56, which was later embodied in Article 2 (1) ICESCR.


17. Eide also lists the UN Charter, the ILO Constitution, the ICCESR and ICCPR as building blocks serving as pillars for the realization of article 28.


20. See for example working group report of February 2004, UN Commission on Human Rights, Working Group on the Right to Development, Geneva, 11–20 February 2004, Item 4 (b) of the provisional agenda E/CN.4/2004/WG.18/2 17 February 2004: ‘Development is regarded as a process of economic growth, with expanding output and employment, institutional transformation and technological progress of a country that steadily improves the well-being of all people’. The same working group also referred to an obligation on the members of the international community ‘to support effectively the efforts of those States that set for themselves the goal of realizing human rights, including the right to development, through trade, investment, financial assistance and technology transfer’.


22. Recently adopted UNGA resolutions concerning trade include the General Assembly Resolution on the International Financial System and Development, adopted 9 February 2006 (GA Res. 60/186, UN GAOR, 60th Session, Agenda Item 50 (b), UN Doc. A/60/486/Add.2.); General Assembly Resolution on International Trade and Development adopted 31 January 2006 (GA Res. 60/184, UN GAOR, 60th Session, Agenda Item 50(a), UN Doc. A/60/486/Add.1, draft res. 1.); General Assembly Resolution on Unilateral Economic Measures as a Means of Political and Economic Coercion against Developing Countries adopted 31 January 2006. (GA Res 60/185, UN GAOR, 60th Session, Agenda Item 50 (a), UN Doc. A/60/486/Add.1, draft res. II.)


24. IBRD Articles of Agreement as amended 1989. Contains provisions such as ‘the encouragement of the development of productive facilities and resources in less developed countries’ (Art 1(i)) and ‘by encouraging international investment for the development of the productive resources of members, thereby assisting in raising productivity, the standard of living and conditions of labour in their territories’(Art 1 (iii)).


30. Petersmann claims that this was in order ‘to facilitate functional international integration (such as liberalization of trade and payments), notwithstanding different views of governments on human rights and domestic policies (such as communism). The focus on enlarging equal liberties was in accordance with prevailing concepts of ‘justice’ in the United States whose government had elaborated the blueprints for the post-war international order’, Petersmann E-U. (2002), ‘Time for a United Nations ‘Global Compact’ for integrating human rights into the law of world-wide organizations: lessons from European integration’, *European Journal of International Law*, 13, 621–50.
31. ‘As in the EEC Treaty 1957, human rights were not mentioned in GATT and the WTO Agreement because the liberalization of welfare-reducing trade barriers, and the promotion of the international rule of law, were perceived as obviously beneficial for all citizens’. Petersmann identifies this as indicative of the previous ‘negative’ integration method of human rights and suggests that the WTO should move to a more ‘positive’ integration by invoking additional constitutional WTO safeguards limiting abuses of government powers, in a way similar to that of the EEC. See also Christine Breining-Kaufmann’s description of the common origins of international trade and human rights in Breining-Kaufmann, C., ‘The legal matrix of human rights and trade law,’ in Cottier, Pauwelyn, Burgi (eds) (2005), *Human Rights and International Trade*, Oxford: Oxford University Press, p. 96.
34. See, for example, Marceau, G. (2002), ‘WTO dispute settlement and human rights,’ *European Journal of International Law*, 13(4) 753–814. The author claims; ‘a good faith interpretation of the provisions of the WTO, including its exception provisions, should lead to a reading and application of WTO law consistent with human rights’.
38. ILO, November 1977, (revised November 2000), Tripartite Declaration of Principles concerning MNEs and Social Policy. The aim of the Tripartite Declaration of Principles, then, is to ‘encourage the positive contribution which multinational enterprises can make to economic and social progress and to minimize and resolve the difficulties to which their various operations may give rise, taking into account the UN resolutions advocating the Establishment of a New International Economic Order’, (para 2). Apart from specific references to fundamental workers’ rights as guaranteed under conventions and recom-
mendations adopted within the ILO – including the ILO Declaration on Fundamental Principles and Rights at Work, adopted in June 1998 by the International Labour Conference such as references to the principles of freedom of association and the right to collective bargaining, the prohibition of arbitrary dismissals or the protection of health and safety at work, the Tripartite Declaration contains a general provision relating to the obligations to respect human rights – Para 8 on General Policies.


41. Tilburg Guiding Principles on World Bank, IMF and Human Rights. (The Guiding Principles were drafted by a group of experts, meeting at Tilburg University, The Netherlands, in October 2001 and April 2002. Main editor: Prof. Willem van Genugten; co-editors: Prof. Kees Flinterman, Prof. Paul Hunt and Susan Mathews, LLM.)


44. Article 28, Universal Declaration of Human Rights, 1948.

45. The concept was originally developed by Eide A. (1989), Right to Adequate Food as a Human Right, Centre for Human Rights, Geneva and New York: Human Rights Study Series No 1. The concept was then adopted and further developed by the competent UN organs.


49. This view is supported by the International Council on Human Rights (2002), Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies, p. 159: ‘The principal conclusion of this report is that there is a clear basis in international law for extending international legal obligations to companies in relation to human rights.’ The report goes on to claim that such obligations can arise in two ways: (a) Through the state’s duty to protect human rights and in consequence ensure that private actors, including companies, do not abuse them; and (b) International law can place direct legal obligations on companies, which might be enforced internationally when states are unable or unwilling to take action themselves.

50. See for example International Council on Human Rights (2002), Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies, p. 8; ‘By definition, voluntary initiatives apply only to those who accept them. A company might accept a code of conduct because of genuine commitment to the principles or because its reputation is at stake. Even where there is genuine commitment, voluntary codes may not be respected if their principles clash with other, more powerful commercial interests. People sometimes argue that, if it makes good commercial sense to respect human rights, then market forces will ensure compliance. It is not self-evident however, that human rights norms are always ‘good for business’. Many companies have prospered under authoritarian regimes. In any case, the issues are often too complex for markets to understand and respond to. It would be difficult, for example, to insert into market mechanisms incentives and disincentives which would give competitive advantage to those companies that behave ethically’.
REFERENCES


8. Reflexive governance, meta-regulation and corporate social responsibility: the ‘Heineken effect’

Colin Scott

INTRODUCTION

The governance of corporations has become a central theme in the discussion of regulation and governance generally because of the recognition of the power of corporations in national and global governance regimes (Shamir, 2005: 92). The invention of ‘corporate social responsibility’ (CSR) as an alternative ethos and set of processes to the traditions associated with the joint stock company presents significant challenges. For some, CSR risks being little more than an invention of the PR people to enhance corporate reputation without affecting the substance of corporate behaviour (Christian Aid, n.d.; Frankental, 2001). For others, CSR is, by definition, something that requires firms to demonstrate that they are going ‘beyond’ what is required by law in terms of the pursuit of positive environmental and social goals (Shamir, 2005: 101). For example, European Community policy on CSR emphasizes the voluntary nature of corporate action (European Commission, 2006). Similarly the UN Global Compact encourages firms to sign up to a set of ten universal principles relating to human rights, labour standards, the environment and anti-corruption (United Nations Global Compact Office, 2005). A third position, associated with some NGOs, is that, in order for CSR to be effective, it must be supported by mandatory legal requirements on firms (Oxfam, 2005: 17). Claimed shortcomings in the effectiveness of the Global Compact are linked to its voluntary character. Supporters of the Compact might tend to overstate the potential of such networked governance mechanisms, while critics may seriously ‘underestimate its potential’ (Ruggie, 2002: 28). If we assume that the broad objectives of CSR are defensible then within each of these three perspectives it is clear that a central question is how to make the commitment to CSR effective.

This chapter juxtaposes some of the insights of regulatory theory (RT) with the issues facing the world of CSR. This is, of course, hardly a new linkage,
though I believe it is an important one. It is important because the worlds of regulation and CSR face fundamentally similar problems and there is considerable scope for mutual learning between the two fields. A central common problem is the recognition of the limits of law enforcement as a mechanism for changing behaviour. The search for ‘Heineken effect’ instruments (which, adapting the words of the old advertisement, ‘reach the parts other instruments cannot reach’) has multiple motivations and has generated a variety of solutions, both as a matter of practice and theory.

This chapter begins by contrasting research traditions involving regulation and CSR, and suggests that the differences in focus and approach, which are significant, might be overcome through conceiving of both using the concept of regimes. I then take two approaches to governance of regimes which seek to reconceptualize the role of law and apply them to the CSR case. These approaches are referred to as reflexive governance and meta-regulation. Reflexive governance to some extent mirrors the bottom-up concerns of the CSR movement, while meta-regulation is more attuned with the top-down approach traditional to RT. Whilst regulation traditionally emphasizes legal control, reflexive governance emphasizes the development of learning processes as the key to behavioural change.

DIFFERENTIATING REGULATION AND CSR RESEARCH

For CSR the central unit of analysis has been the firm. The approach encourages corporations to take responsibility for both the development and implementation of norms which look beyond the narrow and short term interests of shareholders towards responsibility for the impact of their corporate activities in the wider world and the potential to harness their energy and capacity for broader purposes. The development of CSR as a means to re-programme the goals and processes of firms is largely, though not exclusively, a bottom-up process geared to establishing the market position of businesses through developing their credentials as better corporate citizens. The norms which are established, often in the form of codes or standards, are commonly characterized as voluntary in character for the firms involved (though their adoption by a firm may make them mandatory for the firms’ employees and contractors), and taking firms to a position where they behave responsibly ‘beyond’ the requirements of the law.

Regulation scholarship largely retains a focus on government agencies and departments (though there is much internal criticism of this emphasis (Black, 2001)), the making and enforcing of legal rules and accountability for such processes (Baldwin and Cave, 1999). The development of regulatory governance to meet new challenges is largely (though not exclusively) conceived of
as a top-down exercise in steering behaviour variously through smarter or more responsive instruments (Ayres and Braithwaite, 1992; Gunningham and Grabosky, 1998). A key distinction between the study of CSR and research on regulation has been that the latter has frequently involved empirical research on the operation of regulatory regimes. This may be because access to public agencies for regulation researchers is more routinely given than would be the case with CSR researchers wishing to examine empirically what a commitment to CSR within a business organization involved in practice. Additionally it reflects a tendency in the CSR movement towards prioritizing a normative agenda at the expense of research which uses social science methods to seek to understand the effects of social processes such as regulation.

For CSR, of course, the focus on the firm risks neglecting those features of the wider economic and social environment which shape ideas within the firms as to which courses of action to take, whether such shaping is regarded as taking place at the level of cognition or incentives or through some other mechanism. An emergent neo-institutionalist literature directly tackles this problem (Crouch, 2006; Doh and Guay, 2006). For RT, perhaps even more critically, there is the risk of neglecting the rather obvious point that the capacity to deliver on the objectives of regulatory regimes (whether these are set within firms themselves or externally), within a system of business regulation, lies largely with those firms (Parker, 2002).

REGIMES

One way to link these two frames for analysis offered within CSR and RT is through an analysis of regimes in which the objective is to identify the variety of actors and ideas which bear on the actions, variously, of firms, government agencies and departments and others such as NGOs, unions, and other interest groups (Eisner, 2000). Approaches which are fundamentally concerned with the diffuse character of regimes, and the way in which interests, world-views, aptitudes and powers shape outcomes have variously deployed metaphors of ‘regulatory space’ (Hancher and Moran, 1989), ‘webs’ (Braithwaite and Drahos, 2000), ‘networks’ (Maher, 2002) and ‘nodal governance’ (Burris et al., 2005) to capture something of this move away from a narrow, single institution and often state-centric focus. From this analysis of regulatory networks or space it is possible to hypothesize upon the nature of the intricate webs of relations within such regimes and ask questions about which actions make a difference, which structures inhibit or promote particular kinds of actions and so on.

An analysis of regimes requires greater specification of the elements of an
effective regime. Here I find it helpful to draw on RT, in particular the application of cybernetic analysis associated with Christopher Hood (Hood, 1984: 2–4; Hood et al., 2001). A cybernetic analysis breaks down viable control systems into three components – directors, receptors and effectors. Within governance regimes, directors are the governing norms, principles, standards or rules which are geared to the goals or objectives (to the extent that these are defined). Receptors are the mechanisms through which feedback is collected as to the extent to which behaviour is compliant with the norms of the regime. Such feedback might be collected by monitoring or complaints-handling. Effectors are the mechanisms through which behaviour identified as deviating from the norms is realigned to them. This might be through mechanisms of formal enforcement. However, control within governance regimes is not restricted to the hierarchical institutions and processes of classical regulation. Thus ‘community-based’ and ‘competition-based’ control can also be described using the analytical frame of cybernetics.

Within community-based control, norms are set through interaction among members of the community, and only sometimes formalized into a code (as with a self-regulatory code for an association). Feedback is often informal, comprising the observations of the members of the community, and similarly sanctions of the disapproval and ostracization kind may be wholly informal, or more formalized within institutionalized community regimes (Bernstein, 1992).

Within competition-based control regimes such as markets, norms are set through the diffuse interaction of market players (Self, 1993). Norms will relate to such matters as price, quality, and sometimes other terms and conditions (for example the presence and quality of a guarantee). Similarly feedback occurs through these diffuse actions in searching for products and comparing price, quality, etc. Deviations from norms are punished through decisions not to purchase or to purchase elsewhere.

It is apparent that business activities linked to responsible corporate conduct can be linked to any one or more of these three bases of control in community, competition and hierarchy. The search for alternatives to law is premised on the ineffectiveness of legal regulation, but obviously begs the question of the effectiveness of alternatives based in community and/or competition. A central question for both RT and CSR is whether approaches to behavioural change based in instruments other than legal coercion can be both credible and effective, both with the businesses which are targeted and with the wider world. In the next section of this chapter I examine directly two contrasting approaches to questions of effectiveness of ‘governance beyond law’ before moving on to evaluate their relevance to the world of corporate social responsibility.
REFLEXIVE GOVERNANCE AND META-REGULATION

A key starting problem within both regulatory and CSR worlds is a lack of faith in law to steer behaviour. We find that well-run firms, particularly within the Anglo-American systems, are able to use the legal framework of the company or corporation effectively and legally to advance the interests of shareholders, with little apparent concern either for the negative externalities of their activities, or for the potential their activities might have to foster wider social and economic enhancements for the societies in which they operate. There is a dissatisfaction with the claim, associated with Adam Smith, that the pursuit of private interests within markets has the virtue of delivering wider benefits to society through the mechanism of the ‘invisible hand’, and particularly the benefits accruing from economic growth associated with the pursuit of production and exchange in markets.

Within the analysis of regulation, there is a scepticism about the capacity of government agencies and departments to set and enforce rules because, variously, of risks that such agency activities may be captured by the interests of regulatees (Bernstein, 1951), risks that firms, with the benefit of sophisticated professional advice, may find ways to comply with the letter but evade the spirit of the regime (McBarnet and Whelan, 1991), and risks that the external demands of regulation will either not be understood within the target organizations, or will place unsustainable demands on the legal system to adapt to the functional requirements of regulation (Teubner [1987] 1998). Each strand of thinking about these problems places considerable emphasis on the significance of the reflexive capacity of business organizations (and others) and asks questions about whether such capacities can be harnessed to resolving the dilemma of the limits of law through a form of meta-governance.

The thrust of the literature on reflexive governance is to suggest that governance mechanisms should be targeted at creating structures within which actors such as corporations can reflect both on how they see the world, in terms of the problems which their organization is supposed to be addressing, and their own position in that world in terms of what they might do and achieve and what the pay-offs might be. The approach encourages a willingness to revise not just views, but ways of thinking about these critical issues in light of the context in which the actors involved operate. Accordingly it is dependent upon the creation of spaces within which deliberation can occur in an experimental or tentative fashion. Reflexive governance thus exploits the capacity for interactive learning, inter-personally within organizations and between organizations (Voss and Kemp, 2005). Such reflexive processes are iterative and enable the consequences of decisions to be revisited and revised in light of experience. These processes are underpinned by more or less well defined procedures but outcomes which are open and undefined at the outset.
The vision has been well articulated, within a constitutional context, under the rubric of ‘democratic experimentalism’ (Dorf and Sabel, 1998). A critical question, from a public policy perspective, is whether such reflexive governance processes emerge spontaneously, and if not, what might stimulate them? Further questions relate not only to effectiveness, but how effectiveness should be measured, and the factors which shape the legitimacy of such processes.

The concept of meta-regulation has been deployed and developed in a number of different contexts. In Bronwen Morgan’s study of the Australian National Competition Policy the term was deployed to refer to the policies of government in regulating the regulatory activities of the state and territory governments, in a manner akin to better regulation and regulatory impact analysis programmes familiar with the OECD countries more generally (Morgan, 2003). These programmes for the regulation of regulation frequently involve both legal and soft law instruments for monitoring and seeking to reduce the burdens of regulation which are placed on businesses and others. Christine Parker deploys the term in a different way to refer to the steering by government agencies, through legal instruments, of the self-regulatory capacities and processes of firms (Parker, 2002). It is the latter sense of this concept which is most useful to a discussion of CSR. Indeed Parker has elaborated her analysis of meta-regulation directly to CSR issues (Parker, 2007). The focus of Parker’s analysis is on the deployment of legal instruments to steer self-regulatory capacity. Complementary to Parker’s discussion, I suggest in this chapter that the analysis of meta-regulation can be broadened to encompass stimuli which are external to firms, but other than law, to develop self-regulatory capacity towards CSR purposes.

In her analysis Parker suggests that the very idea of using law ‘to make businesses responsible for corporate social responsibility is paradoxical’ (Parker, 2007). Nevertheless this is the essence of the meta-regulation concept, that businesses should be required to take steps geared to acting with social responsibility, but without a detailed specification in the law as to what those steps should be. For Parker the central focus is not the power of law to direct firms, but rather the power within firms to direct their own actions. The central question, for her, is about the capacity of law to steer that self-regulating capacity. It need not, of course, be a comprehensive capacity, and thus I think it fair to see Parker’s ambitions for law within a meta-regulatory model as being rather less than would be the case in a command-and-control regulatory regime where the objective is to achieve, through legal requirements, specified behavioural compliance. On the other hand, Parker’s ambitions for law do, in some respects, go rather beyond the command-and-control model, in the sense that she thinks law capable of ‘constitut[ing] corporate consciences’ as a chief mechanism for harnessing their capacity towards socially responsible ends.
Thus law is a reason for acting, and not necessarily the only reason for acting, in particular ways, the detail of which is not specified. Parker sets out a way of thinking about the role and tasks of law in meta-regulating for CSR. Parker offers a number of examples of law exerting meta-regulatory effects on the responsibility of firms. Attachment of criminal liability to certain actions, with the possibility of defences where a defendant can demonstrate they exercise due diligence to avoid commission of the offence, creates incentives for firms to seek out and develop systems through which they can demonstrate diligence. The particular systems which will satisfy the legal defence are not specified by the law. A second possibility is that regulatory agencies use their powers to resolve enforcement actions short of prosecution in return for internal changes to the organization of a firm. A third possibility is to make the development of internal governance mechanisms a pre-condition to the issue of licences, authorizations of permissions (Parker, 2007). Other possibilities include granting exemption from regulatory requirements for firms that commit to developing more stringent internal norms and enforcement mechanisms. The facilitation of whistleblowers, as in the US Sarbanes-Oxley Act (2002), is offered as a more indirect method of stimulating internal change within firms (Parker, 2007).

Parker’s analysis of the various links between CSR and law has not only law but also the state as the initiator of law at its centre. Claims about the meta-regulatory capacity of law can be elaborated further where the capacity of non-state actors to invoke legal instruments is recognized. A key example of such non-state initiation is with contracts between businesses which might tightly specify codes to be followed, mechanisms for monitoring and penalties (Picciotto, 2002). A major international initiative is the adoption by many of the major banks of the ‘Equator Principles’ in 2003, which require lending institutions to evaluate and monitor adverse consequences of loans which are supplied within a contractual setting (Wright and Rwabizambuga, 2006). Governmental contracts have similarly been used to stimulate better corporate practices over a long period, and provide an incentives-based alternative to command-and-control regulation (McCrudden, 2007). Picciotto points also to the possibility of private enforcement of public instruments. For example, false claims by business to follow codes relating to fair trade, are liable to fall foul of fair trading legislation. The EC Directive of Unfair Commercial Practices (2005/29/EC, Art 11), for example, permits member states to create rights of action for competitors, representative groups and individuals for enforcement against business in breach of many of the requirements of the Directive. There is also considerable scope for transnational private litigation (Scott and Wai, 2004). Whatever we might think of the nature and potential initiators of legal processes, within each of these examples law provides a reason for change within the governance structures of the firm, without specifying directly what changes should be made.
Parker offers and addresses a substantial critique of her own position, along the lines that the risk associated with the meta-regulatory approach to CSR is that its emphasis on changing processes risks permitting firms to satisfy the law’s requirements without getting any closer to the substantive objective of enhancing the social responsibility of firms (Parker, 2007). She discusses Julia’s Black’s view that firms can never be relied upon to do other than adapt their systems to promote their profits and market share, and that external evaluation of public objectives will always be necessary. Parker follows this up by pointing to the risk that firms will engage in symbolic compliance, without changing their values. Parker’s response to her own critique is to downplay the procedural dimension to meta-regulation and argue that

the substantive goals at which internal processes are aimed must be adequately specified and enforced external to the company. Moreover, the standards for the companies’ internal processes must be specified sufficiently to make sure that those values are represented within internal decision making processes. (Parker, 2007)

My own critique is that this position does not leave much left that is truly meta-regulatory, because of the emphasis on specifying substantive goals external to the firm and seeking compliance with them. Rather it pulls us back to a position closer to that of the command-and-control approach which meta-regulation was supposed to displace. This dilution of the meta-regulation approach can be linked to the dependence upon law as the reason for acting with Parker’s approach. It is arguable that this over-emphasis on law results in law being placed in opposition to competition as a reason for acting within which, implicitly, acting to comply with the law is responsible, whilst acting to comply with the requirements of competition must, necessarily, be only about profit and market share and not social responsibility.

This sharp differentiation between law and competition is difficult to defend. Experience of CSR suggests that competition is frequently a reason for acting, however imperfectly, to develop programmes for greater social responsibility within firms (as Parker (2002) herself demonstrates in her earlier work), just as compliance with the law (for example directors’ duties to the firm) creates reasons for paying attention to profit and market share. We might further add that the position of actors within firms and firms themselves within communities and networks give further reasons to act in ways that deviate markedly from the stereotypical image of the firm focusing only on market share and profit.

Accordingly when we depend entirely on the law to nudge firms towards greater social responsibility we place expectations on the law that it, alone, is unlikely to be able to meet in many contexts, just as law in the classical command-and-control mode is frequently unable to deliver on objectives set. The lessons of the reconceptualization of pluralized and fragmented governance
processes should steer us precisely towards recognizing that alongside diffuse capacity, changes in behaviour are likely to be engaged by diffuse modes of steering and not law alone. The ideas of reflexive governance recognize the embeddeness of social processes within legal, competitive and community structures. This insight encourages us to conceive of meta-regulation as defining the reasons for action more broadly than legal compliance, and to include also the reasons for acting which derive from participation in competitive markets and in communities.

Both meta-regulation and reflexive governance approaches focus on processes at one stage removed from the action through which behavioural norms are set and implemented, and consider the potential for developing frameworks or processes within which the development of ‘capacities for learning’ (reflexive governance) and ‘the regulation of self-regulation’ (meta-regulation) are suggested as a means to stimulate, but not direct, behaviour within businesses and, potentially, other kinds of organization.

CORPORATE SOCIAL RESPONSIBILITY

Addressing the problem of CSR, we can see that from both theoretical perspectives the achievement of CSR amongst businesses is likely to involve some form of engagement between firms and others from government and/or civil society. But such engagement is unlikely to succeed if it is direct and directive.

A reflexive governance approach looks to the establishment of fora which enable and promote reflection by key actors. Of a set of 246 codes dealing with CSR issues collected by the OECD in 2000 around half were issued by individual firms, while 40 per cent originated with associations (Picciotto, 2002). What factors trigger firms and groups of firms to develop commitments to greater social responsibility and then institutionalize those in codes? For individual firms it has frequently been external pressures, whether from law, competition or community. In the UK a short-lived aspect of the company law regime required quoted firms to produce an operating and financial review (OFR) each year. Guidance on the completion of the OFR required firms to address issues relating to environment, employment and community (Parker, 2007). A weakness in such a legal trigger is that it does not, of itself, involve the generation of reflexive processes and may appear to firms to be just another reporting requirement. By contrast, a response to market and or community pressures, may involve a firm in a more fundamental evaluation of what they do and why they do it. A number of firms were caught up in scandals relating to environmental protection and employment rights in the 1990s which caused them to develop codes through which they might both facilitate
and demonstrate changes in their operating practices (Picciotto, 2001). This begs the question whether some form of crisis affecting market positioning is a pre-requisite to effective change.

Where firms have a shared purpose and interest in working together, codes may be developed collectively. Whilst it is possible to think of sinister examples of such shared interests, as where firms create a cartel to retain artificially high prices, other documented examples seek to tackle common problems of reputation affecting the firms, without which all would lose. The development of advertising self-regulation in the UK was an initiative of the Advertising Association in 1962, and at least a partial response to the damage to the reputation of the industry caused by the publication of Vance Packard’s 1957 book *The Hidden Persuaders* (Baggott and Harrison, 1986). The attack on the ethics and integrity of the advertising industry threatened to undermine their market position if producers were to feel that advertising was not trusted by its target audience, and therefore not a worthwhile investment for them. The response of the industry was the establishment of an industry code and mechanisms for reception of complaints and enforcement (see www.asa.org.uk). A critical feature of the Advertising Standards Authority scheme was the negligible involvement of government in its establishment, though it has subsequently been engaged in dialogue with government concerning such issues as the enhancement of standards and increasing lay representation in its decision making (Baggott and Harrison, 1986).

A second example is found in the US nuclear industry, which faced a major collective threat as a result of the Three Mile Island accident in 1979. The position of the firms involved, threatened with the shutting down of the entire industry due to weaknesses in the capacity of one firm to follow the mandated standards, was well captured in the title of Joe Rees’s book *Hostages of Each Other* (1994). In that study Rees documents the development of norms and processes for monitoring and enforcing them which the industry developed for itself (Rees, 1994).

The existence of a risk or threat was a key factor in calling forth a response from the UK advertising industry and from the US nuclear industry. These risks were created by the publication of a book and by an industrial accident. It appears first that the emergence of such risks can be exploited for the purpose of establishing mechanisms to re-programme corporate behaviour in particular sectors and this begs the question can such risks be created? The answer here must, I think, be yes. Campaigning activities of various kinds by NGOs, and discussion of legislative reforms by government both appear capable of creating risks which change the incentives for firms. The widespread adoption by the logging industry of the norms and certification processes of the Forest Stewardship Council was a product of concerted efforts of NGOs to persuade major retailers of wood products to require FSC compliance as part
of their contractual compliance for suppliers, an example of ‘non-state market-driven governance’ (Cashore, 2002).

Discussion of these examples does not deny a role for law in supporting changes in corporate behaviour. In the case of the Institute of Nuclear Power Operations the capacity of the Institute to self-regulate effectively was predicated on its ability to call in a government agency (‘the gorilla in the closet’) to impose legal sanctions in cases where INPO’s own approach failed. In a comparison between the INPO regime and the chemical industry self-regulatory regime, Responsible Care, Rees attributes the greater success in achieving compliance for the INPO regime to this factor (Rees, 1997). Similarly, where NGOs fail to persuade firms to adopt better practices there has been a role for litigation, initiated by non-governmental actors (Shamir, 2005: 98–9).

But NGOs recognize that recourse to law, alone, is unlikely to be effective and activists around the globe have launched numerous campaigns of corporate public shaming, using non-legal measures such as consumer boycotts, divestment programs, and popular protest in order to pressure [multinational corporations] to adopt responsible business practices. (Shamir, 2005: 99)

As Shamir (2005: 100) points out, the rush to adopt CSR among a number of firms has been as a result of the adverse publicity associated with various ‘production scandals’ involving such items as clothes and footballs. Such scandals are important triggers given that the research on the link between take-up of CSR and profitability generally is ‘inconclusive’ as to the benefits (Vogel, 2005: 29ff). The potential for market-based controls over corporate behaviour in consumer markets is recognized in the observation that consumers are increasingly exhibiting ‘preferences for processes’, referring to the way in which products are produced, over the inherent price/quality ratio in the product (Kysar, 2004). Experimental research suggest that consumers will pay higher prices for products backed by effective CSR processes, and suggests that a key challenge is to maintain confidence in the information available to consumers about the significance of participating in CSR programmes (Mohr and Webb, 2005). However, limited evidence suggests that the proportion of consumers willing to pay higher prices in practice for goods produced in compliance with human rights or environmental standards may be as little as 5 to 10 per cent (Vogel, 2005: 48). NGOs have a key role in distributing information about corporate practices and in persuading firms of the positive market effects associated with adopting CSR programmes (Cashore, 2002).

More generally, businesses may be so embedded within the communities within which they operate that some form of implicit approval is required for their practices. This idea is captured within the concept of the ‘social license to operate’, which originates with firms which operate intensively within
particular communities and create environmental risks. Key examples are mining and logging. Within these industries, it is argued, corporations are constrained to follow certain practices and inhibited from engaging in others, whether or not such norms are contained within legal requirements (Gunningham et al., 2004). In these examples the reasons for acting responsibly are to receive or maintain the approval of the community.

These examples provide more substance to the idea that meta-regulatory conceptions of CSR should not be regarded as dependent on law alone and, indeed, that meta-regulatory effects are witnessed within regimes within which law has a limited or negligible role. In a study of the Equator Principles by banks it was found that voluntary adoption of the standards, which go beyond legal requirements in their scrutiny of adverse social consequences of loan finance projects, was ‘largely concentrated in institutional environments shaped by targeted advocacy campaigns organized by civil society groups and strong regulatory systems’ (Wright and Rwabizambuga, 2006: 110). Thus while the ultimate reasons for acting might have been to enhance market reputation, it may be hypothesized that the context in which market position could be enhanced was shaped by both community activity and legal regime.

Under what conditions are credible CSR processes likely to emerge and be sustained? Taking us back to the analysis of regimes, a critical factor is the development of instruments for monitoring and promoting compliance (Picciotto, 2002). As with CSR processes generally, mechanisms for monitoring are diffuse. The rejection within the policy literature of a single model for CSR promotes the role of intermediaries such as accounting and law firms in offering audits which provide independent evaluation of compliance with required norms and processes. Whilst one line of critique suggests that this has simply created a market for accounting firms in processes of ‘social auditing’ (Shamir, 2005: 103), it may conversely be pointed out that much of the running in the field is being made by NGOs which are devising processes for assuring compliance with certification schemes relating to such matters as environmental and fair trade labeling and labour rights (Courville, 2003). The development of such processes of auditing is a response to the damage to the credibility of CSR arising from the exposure of token rather than sustained commitments to responsible governance within firms. A significant degree of reflexivity, including the development of learning processes, has been detected within social auditing initiatives which involve an array of stakeholders in piloting and developing evaluation mechanisms (Courville, 2003: 291–3).

As to compliance, as we have noted, the reasons for compliance may sometimes be linked to legal obligations. However, pressures for compliance frequently derive from the kind of economic and social pressures associated with participation in markets and communities. The point being that even where compliance is not legally required, it may nevertheless be ‘required’ for
other reasons. Commitments to comply with CSR which appear voluntary from the perspective of law, need not be merely ‘aspirational’ (Picciotto, 2002).

CONCLUSIONS

A key preoccupation within discussion of CSR is its relationship to law. On one side of the debate there is a view that CSR, by definition, involves conduct going beyond legal requirements. On the other side is a view that CSR can only be effective and trusted where it is backed by mandatory legal requirements. We may refer to these contrasting perspectives as the irrelevance view and the necessity view of law in CSR. The analysis offered in this chapter transcends these two competing views. It accords with the irrelevance view, to the extent that it offers an expectation that behaviour which is compliant with CSR norms may well go beyond legal requirements. It accords with the necessity view in recognizing the role of law in facilitating (though not necessarily mandating) the elaboration of CSR programmes. The necessity view is challenged to the extent that it views law as necessary in all contexts to underpin CSR and sees law as the main reason for acting. It goes beyond both views in seeing the role of law as part of the normative framework within which responsible forms of conduct are defined and effected, and attempting to relate that role to other parts of the normative framework.

The challenge set out by the reflexive governance approach is to develop the capacity for learning within firms so that they may more effectively address the question of social responsibility and put into place mechanisms for achieving CSR-related objectives. To see that firms are located within networks of firms, governmental and non-governmental actors, and that there are mechanisms for steering behaviour associated with each (markets for firms, law for government, and community for NGOs) suggests that we place too much emphasis on individual firms’ capacity for the development of CSR. Learning processes are likely to involve dialogue between firms, between firms and NGOs, between firms and governmental actors and between NGOs and governmental actors. Meta-regulation is fundamentally concerned with the reasons for acting in particular contexts, and it is clear that compliance with legal requirements is not the only reason to act. The reasons for acting will sometimes be because of law, but often in combination with requirements of competition and membership of communities. Sometimes there will be reasons to act in the absence of any legal requirement.
ACKNOWLEDGEMENTS

I am grateful to Blanaide Clarke and Christine Parker for comments on an earlier draft of this chapter.

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9. Locating the ‘environment’ within corporate social responsibility: continuing problems of legal definition and representation

David M. Ong

INTRODUCTION: DOES CORPORATE SOCIAL RESPONSIBILITY INCLUDE CORPORATE ‘ENVIRONMENTAL’ RESPONSIBILITY?

Corporate Social Responsibility (CSR) is now a well-known term of art in the public policy, business, and civil society/activist (NGO) worlds. However, like the even more well-known concept of ‘sustainable development’ (Lowe, 2005; Victor, 2006), it is now in danger of becoming ‘all things to all people’. In this chapter, I would like to lay bare a specific but arguably very significant problem within the CSR concept. Simply put: Are the twin attributes of CSR, namely, its popularity and all–encompassing nature in fact detrimental from an overtly environmental perspective? Specifically, by in effect subsuming ‘environmental protection’ as simply another, or further, aspect of ‘social’ responsibility, encompassed by the term: ‘Corporate Social Responsibility’, I would suggest that the current emphasis on CSR tends to assume the inclusion of corporate ‘environmental’ responsibility and thereby disregard the comparative lack of legal accountability for the continuing degradation of the ‘natural’ environment by corporate activities.

These notions of corporate environmental and social responsibility are increasingly linked and even overlap in their development within the wider debate on corporate accountability to stakeholders. Indeed, in their recent contribution to this debate, Elkington et al. describe the corporate embrace of transparency, ethical behaviour, respect for diverse stakeholders, and a commitment to add economic, social and environmental value simply as ‘corporate responsibility’, rather than corporate ‘social’ or ‘environmental’ responsibility, thereby disdaining the controversy surrounding these terms (Beloe et al., 2006: 271). However, few of the variety of definitions suggested
to describe corporate social responsibility (CSR) have proved definitive in fact. As Gray et al. point out when observing the lack of a universal definition of corporate social responsibility, ‘there is little about CSR which is not contestable – and contested’ (Gray et al., 1995: 47).

It may be argued that the difference between notions of corporate social, as opposed to environmental, responsibility relate only to the different types of stakeholders embraced by these two concepts. That is to say that in reality both concepts merely aim to widen the scope of constituencies whose interests arguably give them a stakeholding in the relevant company. Hopkins, for example, asks the question: ‘Is the notion of a socially responsible enterprise just another side of stakeholder theory?’ (Hopkins, 1999). More recently, Freeman and Velamuri have proposed that Corporate Social Responsibility should be replaced by the notion of ‘Corporate Stakeholder Responsibility’, in order to convey the fact that the main goal of any organizational or institutional form (not just corporations) is to fulfil its responsibilities to all its key stakeholders (Freeman and Velamuri, 2006: 11, 21), whether these are profit-seeking investors, worker employees, local communities and the ‘environment’. Although this proposed approach is eminently laudable, it still leaves the question of whether there is a stakeholder hierarchy, in terms of which stakeholding constituencies hold sway over others during occasions of resource constraints.

Werther and Chandler’s approach to this question is both instructive and disconcerting from an environmental perspective. They hold that: ‘A firm has three kinds of stakeholders: organizational stakeholders (internal to the firm) and economic and societal stakeholders (external to the firm)’, with the ‘environment’ being within the ‘societal’ group of stakeholders, pictorially represented as the outermost of three concentric circles around the company’s core (Werther and Chandler, 2006: 4). They also describe these different stakeholder groups as ranging from ‘clearly defined’ to ‘amorphous’, with the ‘environment’ perhaps unsurprisingly placed within the latter category, alongside ‘local communities’ (Werther and Chandler, 2006: 7). Wheeler and Sillanpää’s categorization of stakeholders on the other hand, includes customers, employees and investors, together with local communities, suppliers and other business partners, as ‘primary social stakeholders’; civil society, business at large and various interest groups as ‘secondary social stakeholders’, and finally, ‘non-social stakeholders’, including the natural environment, non-human species, future generations and their defenders in pressure groups (Wheeler and Sillanpää, 1998: 205).

Juxtaposing these various attempts at the inclusion of ‘natural’ environmental concerns within the scope of ‘corporate responsibility’ leaves us with a palpable sense of its marginalization. Moreover, even when the ‘environment’ per se is designated as a relevant corporate stakeholder, this still leaves
us with the question of how this environmental stakeholding can hold sway in the face of competing claims for corporate responsibility from more powerful (shareholders) or more vociferous (workers) shareholding groups. In other words, what legal mechanisms or remedies are available to environmental champions such as civil society groups for holding businesses accountable and responsible for their environmental impacts?

An important element of more recent definitions of the CSR concept is its combination of social concerns, such as individual and collective employee rights; local community rights; and environmental concerns, within the ‘sustainable development’ theme. According to Hopkins, ‘(t)he strongest social movement to insist on responsibility from business has been the environmental lobby’ (Hopkins, 1999: 46). Whether this notion of corporate accountability to both social and environmental stakeholders is compatible within the CSR umbrella is uncertain. Welford, for example, questions whether the rise of the CSR concept might in fact lead to the dilution and eventual marginalization of traditional corporate environmental management and responsibility concerns first aired by the environmental movement (Welford, 2002). He therefore argues that corporate social responsibility must be defined within the sustainable development context and not the other way around (Welford, 2002).

The potential dissonance between notions of corporate ‘social’ and ‘environmental’ responsibilities, leading to the subsumption and ultimately the marginalization of environmental protection within the wider objective of ‘social’ responsibility echoes the debate taking place about the role of environmental protection within the ‘sustainable development’ concept itself, especially when it is translated into a government policy objective. For example, the UK Government’s ‘sustainable development’ strategy advocates a three-pronged approach, whereby economic, social and environmental objectives are to be achieved simultaneously (UK Government White Paper, 1999, para. 1.9). Ross-Robinson however notes that when interpreting and applying this ‘sustainable development’ strategy, social concerns appear to be favoured over environmental ones (Ross-Robinson, 2003: 256). Crucially, while the former concerns have been given their own institutional bodies within the heart of government policy decision-making and application, the environmental body – the Sustainable Development Unit (SDU) – is sidelined within the Department of the Environment, Fisheries and Rural Affairs (DEFRA), from where it is struggling to play the cross-cutting role that was originally intended for it (Ross-Robinson, 2003: 253–7).

The confusing signals sent out by such uncertainty at the heart of UK government policy-making and implementation perhaps unsurprisingly resonate within corporate decision-making on these issues. Examining the efforts of a UK public utilities company to link and hopefully integrate envi-
ronmental and social responsibility issues within company policy and manage-
ment, Schaefer notes that ‘the role of government and the industry regulator
were described as quite ambiguous and often hindering social policy actions
rather than demanding or supporting them’ (Schaefer, 2004: 185).

From an environmental law perspective, the apparent inclusion of ‘envi-
ronmental’ responsibility into corporate ‘social’ responsibility (CSR) also
tends to disregard the continuing conceptual and structural problems that beset
this legal sub-discipline. The conceptual difficulty alluded to here relates to
the continuing problem of defining what the ‘environment’ means for the
purposes of its protection from human pollution and degradation. The struc-
tural issue, on the other hand, relates to the inadequacy of anthropocentrically-
based legal mechanisms and tools that are oriented towards dealing with
polluting or other environmentally degrading activities, apart from their
threats to human health. These instruments are therefore ill-equipped to
address the problem of ‘natural’ or ‘pure’ environmental, or ecological,
damage. Moreover, they highlight an abiding representational difficulty
within environmental law which is most simply put as follows: who should be
allowed to represent the ‘natural’, as opposed to the ‘human’ elements of the
environment? This dual nature of the definitional and representational issues
within environmental law, as a separate sub-discipline of the overall legal
system, translates accordingly into the confusion surrounding attempts to
insinuate notions of corporate ‘environmental’ responsibility into the CSR
agenda. As Thayer Robbins notes presciently in *Greening the Corporation*,
‘(i)n cases where there is confusion about what constitutes an ‘environmental
problem’ and where there is a lack of regulation or enforcement, corpora-
tions seem to be environmentally inactive and even destructive’ (Thayer Robbins,

**DEFINITIONAL, CONSTITUENCY, AND
REPRESENTATIONAL PROBLEMS FOR
ENVIRONMENTAL LAW: IMPLICATIONS FOR
CORPORATE ‘ENVIRONMENTAL’ RESPONSIBILITY**

**Problems with the Definition of the ‘Environment’: What is the
Environmental Constituency?**

It is difficult to find a more all-embracing notion than the ‘environment’. Yet
from a legal perspective, it is precisely the all-encompassing nature of this
concept that gives rise to difficulties, both definitional and structural. From a
definitional perspective, questions continue to arise as to what exactly it is
about the ‘environment’ that environmental law seeks to protect. Simply put:
Is it the ‘human’ environment? Or the ‘natural’ environment? Or both? Thus, from the outset, environmental law faced a daunting task in providing protection for this potentially overwhelming yet somehow also amorphous concept. It is therefore perhaps unsurprising to note that despite the rise to prominence of environmental law generally, and international environmental law specifically – in the form of a burgeoning number of international environmental instruments; in fact, very few of these environmental treaties, declarations, codes of conduct, guidelines or similar instruments have even attempted to define the term ‘environment’. As Romano notes, ‘this is because . . . it is difficult to both identify and restrict the scope of such an ambiguous word’ (Romano, 2000: 21).

Moreover, the legal uncertainty arising from the lack of a generally accepted definition of the ‘environment’ has major implications for the status of environmental law as a prominent sub-discipline of international, EC and domestic law. It is important to acknowledge the philosophical, ethical and policy significance of the existence of a legal sub-discipline of environmental law that has as its main aim, the legal protection of the environment; notwithstanding its definitional and other problems (see Gillespie, 2000). The presence of environmental law as a viable legal sub-discipline for environmental protection fulfils the need to translate what is now an increasingly ingrained sense of environmental consciousness within most societies. Yet, it simultaneously presents the legal discipline as a whole with perhaps its greatest challenge: the need to provide for the protection of the earth’s natural ecosystems, as well as human health and safety. Even though most definitions of the ‘environment’ for the purpose of environmental law encompass notions of both the ‘natural’ and ‘human’ environment(s), it may be argued that environmental law has only recently taken up protection of the explicitly ‘natural’ aspects of the environment.

This continuing ambiguity relating to the nature and essence of what is the ‘environment’, that is to be protected by environmental law, has at least two detrimental effects for the progressive development of this branch of law. First, it creates an illusion that ‘environmental law’ now applies to protect every aspect of the ‘environment’, thereby glossing over important but marginalized environmental sectors that do not necessarily benefit from the progressive development of environmental law. This observation is especially pertinent in respect of the legal protection (or lack thereof) of the ‘natural’ environment, broadly defined here as including all wildlife in their natural habitats, as well as encompassing the quality of environmental media such air, water and soil, not necessarily for the sole benefit of humans.

Following on from this, a second detrimental effect is the disillusionment that then accompanies every news item highlighting continuing deficiencies in the legal protection of the ‘natural’ environment. This sense of disappointment
that we feel because we appear to be utterly failing in our efforts to protect the natural world from human depredations fixates upon the perceived deficiencies in the implementation and effectiveness of environmental law. Almost inevitably, this leads to calls for more and better environmental regulation and enforcement. However, in doing so these calls thereby miss what is perhaps an even more significant and intrinsic reason as to why environmental law has so far proved to be ineffective in protecting the natural components of the environment. This is because current notions of the ‘environment’ protected by environmental law are misleading in that they give the impression that all aspects of the ‘environment’ have legal remedies attached to their protection, when in fact it is mainly the ‘human’-oriented or ‘human’-related aspects of this ‘environment’ that are protected, if at all. This human or anthropocentric approach underlying environmental law, as seen in its emphasis on ‘human’, rather than ‘natural’ environmental protection, is arguably manifest in at least two types of situations, as follows.

First, while pollution is often defined in terms of the introduction of substances and energy forms that contaminate and therefore harm or otherwise degrade the ‘environment’, including its ability to repair itself; the actual standards or thresholds for polluting substances and energy are often determined by reference to their direct and detrimental effects on human health rather than their indirect, but perhaps even more harmful, effects on representative elements of wildlife species, or natural ecosystems. Thus, polluting activities are often circumscribed primarily by the extent to which they are deemed to cause harm to human health, often on the assumption that is coincident with harm to natural ecosystems. In other words, environmental harm thresholds are established by reference to the damage, or threat of damage, that would be sustained by humans rather than damage suffered by wildlife, or the diminution of air, water and soil quality.

Moreover, even when environmental law focuses upon intrinsically ‘natural’ elements, for example, in respect of threats to the biological diversity of species, it is noticeable that the policy and legal agenda becomes dominated by human socio-economic concerns. This is exemplified when we consider how the negotiations to the 1992 Convention on Biological Diversity were in a sense hijacked by North–South tensions over the intellectual property rights and attendant technological transfer issues raised by the possible application of mainly Northern biotechnology to the genetic variation of species’ biodiversity found mainly in the South to produce potentially life-saving pharmaceutical products.9

Second, where the victims of polluting or otherwise environmentally harmful activities are mainly non-human, natural aspects or elements of the environment, then humankind’s response is often limited, if not totally non-existent. An example of this latter deficiency of environmental law can be
seen in the relative paucity of efforts to regulate the mitigation of submarine and other sea-borne vessel sonar systems, despite increasing evidence of the devastating effects such ultra-sound techniques have on cetacean (whale and dolphin) health (Scott, 2004; Dotinga and Elferink, 2000).

Given the problems of ‘natural’ environmental protection, the development of environmental ‘rights’ has also been mooted. However, this in turn raises the conceptual dilemma that the provision of such ‘environmental’ rights, while ostensibly empowering human beings to be able to assert their interest in living and working within a healthy or clean environment in legal terms, nevertheless still leaves the ‘natural’ or wildlife elements of the environment without legally enforceable rights. Moreover, such environmental ‘rights’, especially when considered within jurisprudence of international human rights instruments such as the European Court of Human Rights (ECHR) are limited to addressing the question of environmental interferences to existing human rights, such as the rights to privacy and a family life under Article 8 of the 1950 European Convention on Human Rights (ECHR) (Loucaides, 2004), rather than recognizing an intrinsic human right to a healthy, healthful or clean environment, let alone any extended or additional right to ensure the protection of the natural environment. One of the most recent cases in this line of ECHR judgements involving alleged breaches of Article 8 rights is Fadeyeva v. Russia, where the Court accepted the applicant’s claim that her prolonged exposure to excessive pollution levels from a nearby steel plant had ‘adversely affected the quality of life at her home’ and therefore, that ‘the actual detriment to the applicant’s health and well-being reached a level sufficient to bring it within the scope of Article 8 of the Convention’. While this ECHR judgement is to be welcomed, it is significant to note that the Court had this to say about the scope of application of this provision: ‘Article 8 has been invoked in various cases involving environmental concern, yet it is not violated every time that environmental deterioration occurs: no right to nature preservation is as such included among the rights and freedoms guaranteed by the Convention’ (emphasis added).

Moreover, cases involving what are essentially human ‘environmental’ health issues are instead described in simple and arguably misleading all-encompassing terms as ‘environmental’ lawsuits, implying that the environmental law sub-discipline as a whole is thriving. This confusion between apparently successful ‘human’, as opposed to ‘natural’, environmental claims perhaps unwittingly succeeds in marginalising and thus negating the intrinsic and continuing legal difficulties faced by efforts to secure the legal protection of the ‘natural’ environment. This criticism in no way seeks to undermine the legitimacy of such ‘environmental health’-type lawsuits. It merely observes that such suits are in reality no more than valid extensions of prevailing tort law principles in recognizing and establishing a new head of liability for
pursues of compensation, namely, damage to human health from environmental factors.

Representational Problems for the Environmental Constituency in Environmental Law Enforcement

The ‘representational’ problem within the legal sub-discipline of environmental law relates to the difficulties encountered when properly defining the stakeholding constituency that environmental law seeks to protect. In a nutshell, this concerns not only the question of who can speak up and act for the ‘environment’, but also, how can they hold companies accountable for their environmental degradation? Whether environmental law is seen as a viable legal sub-discipline in itself is dependent on whether it is perceived to serve only the narrower constituency of the protection of the ‘human’ environment, or whether in fact it has a wider, and therefore more complex agenda aimed at the protection of the overall, ‘natural’ environment, including aspects that may not have a direct impact on anthropocentric well-being per se, such as wildlife conservation and the maintenance of natural ecosystems balance. Macrory encapsulates this difficulty succinctly when he observes that ‘one of the constant dilemmas of the language of rights in relation to the environment [is] to what extent can they be conceived of only in anthropocentric terms and thus largely confined to human health and welfare contexts, or can they extend to all areas of the environment whether or not individuals are affected – in which case who should be entitled to ensure their protection?’ (Macrory, 1996: 220).

The current trend within management and social sciences in identifying a wider range and variety of persons and other entities called ‘stakeholders’ that are negatively affected by a company’s environmental activities thus serves to highlight the problems, without actually resolving any of the underlying legal lacunae in the provision of possible legal remedies for such negative effects. In other words, at the corporate level, the constituency issue within environmental law becomes a ‘stakeholder’ problem for corporate governance, with the critical question being how these ‘new’ stakeholders are to be incorporated within the corporate control and accountability agenda (Thomsen, 2006). The lack of a corresponding legal framework of rights that can be attached to identified stakeholders makes the task of enforcing their ‘stakeholdings’ against the company concerned supremely difficult. As Parker observes, ‘(i)t may be necessary for government regulation to directly or indirectly put stakeholders in a position where they have rights or entitlements that make it strategic for corporate management to adopt these principles’ (Parker, 2002: 216). Among the regulatory instrumentalities she advocates to achieve this goal is reporting or information disclosure requirements (Parker, 2002: 216).
Standing Issues for Environmental NGOs and Other Interested Parties

The ‘command and control’ nature of early domestic environmental regulation was predicated on public controls, in the form of inspections, fines for non-compliance and ultimately backed-up by the threat of criminal prosecution. However, the nature of environmental law enforcement has changed. The relevant public authority regulations and strict plant emission and discharge standards have been at least in part replaced by a process of negotiations between the relevant department or agency and its industrial counterparts aimed at setting industry-wide environmental quality targets to be achieved mainly through self-regulatory mechanisms (Hawkins, 1984). Thus, the threat of liability, both civil and especially criminal, is now regarded very much as a weapon of last resort by environmental law enforcement agencies.

The effective withdrawal of the State, especially through the denuding of resources to relevant public authorities in order to perform their traditional role of exerting controls over private business actors has highlighted the need for special interest groups such as environmental NGOs to step up and assert the case for environmental quality protection and wildlife conservation on behalf of the ‘natural’ aspects or elements of the environment. Access to justice is therefore a vital aspect, *sine qua non*, of the NGOs’ armory to represent the ‘environment’ in legal terms. The importance of access to justice in environmental law has now been reinforced by the 1998 Aarhus Convention. As Lee observes, among the most significant elements of this Convention is its clear ‘valuing’ of environmental interest groups as bearers of the public interest; its corresponding assumption that these groups are able to take advantage of the ‘access principles’; and their express inclusion in the definition of the ‘public’ or the ‘public concerned’ (Lee, 2005: 126, fn. 60). Davies however cautions that the provision relating to access to justice under Article 9(3) of the Convention are in fact somewhat disappointing as they ‘would seem to allow State parties to restrict access to justice by means of their own criteria on standing’ (Davies, 2004: 96, fn. 130).

As a preliminary step for NGOs to perform this role on behalf of the ‘natural’ environment, their legal standing before the courts to do so must be accepted. As Lee notes in this context, ‘(s)tanding in the environmental sphere has required considerable thought in all jurisdictions, mainly because traditional approaches allow recourse to the law only if individual interests or rights are harmed. This rarely captures the collective and diffuse nature of harm to environmental interests’ (Lee, 2005: 139). The European Commission, for example, recognizing that non-governmental organizations should have better access to the courts, has recommended that such organizations should be given standing to bring judicial review actions against public authorities in Member States (European Commission, 1996, para. 40). A
broader proposal to give, ‘environmental associations’ access before domestic courts to secure a wide range of remedies in respect of ‘harmful environmental activities’, including damages has been suggested elsewhere. However, it has not been included within the Community legislative programme. Despite the fact that the Commission has proposed the application of the Convention to EC institutions and bodies through a Regulation (European Commission, 2007; Lee, 2005:126, fn. 59), ‘the EC judiciary has said very little on public interest litigation, that is the standing of an environmental interest group in representation of the public interest. As such, environmental interest groups have to claim access on the same grounds as individuals, with very apparent limitations’ (Lee, 2005: 140, fn. 148, citing Harlow, 2003: 213).

In fact, as the European Commission had previously recognized (European Commission, 1996) it is an important characteristic of environmental law that private interests frequently do not exist to drive its enforcement. The environment is often characterized as being our ‘common heritage’, but the Commission noted that it is often the case that deterioration of the environment does not cause immediate reaction, and even if a problem does arise, there is no means by which individuals can use the law to remedy the problem, or there are no appropriate legal remedies available. Even for Community environmental law, it can be the case that important general principles cannot be enforced by individuals (for example, polluter pays, preventive and precautionary principles) (European Commission, 1996, para.38).

Partly because private interests are so frequently absent, environmental litigation often involves the use of public law procedures, such as judicial review to challenge decisions of the various public authorities which have responsibilities for environmental matters. Much of this litigation has been spearheaded by groups such as World-wide Fund for Nature (WWF), Friends of the Earth and Greenpeace which have seen litigation as being a useful vehicle for their own campaigning strategies. In this context, it is notable that practice within the EU has been mixed. In particular, we can contrast the negative judicial approach to the legal standing of the well-known environmental interest group – in the Greenpeace International case – before the European Court of Justice (ECJ), with the more positive approach taken by the English courts, where in recent years, NGOs’ access to justice has been encouraged by the liberalization of rules on standing evident in decisions such as the Greenpeace (No.2) and World Development Movement cases (see below).

Standing of environmental NGOs before the ECJ
The Greenpeace (International) case raised the question whether environmental interest groups have locus standi before the Court of First Instance and the European Court of Justice in Article 173 (now Art 230) proceedings. The Court of First Instance (CFI) dismissed the argument that the existing ECJ
case law on *locus standi* was too restrictive when the case was brought to protect environment interests rather than economic interests. In so doing, the CFI stressed that the ‘direct and individual concern’ requirement in Article 173 would deny standing to individuals who might satisfy the requirements of national law, where it might only be necessary to show ‘sufficient’ interest.

Greenpeace International appealed against the order of the Court of First Instance (CFI), maintaining that the application of existing case law on *locus standi* was inappropriate in cases involving environmental issues. The opinion of Advocate General Cosmas in this case is instructive. While agreeing with the existing case law followed by the CFI, he did express support for recognizing *locus standi* in Article 173 (now Art. 230) proceedings for some private individuals, thereby easing the strict requirements imposed by the ECJ case law. However, in his view, Greenpeace International had not met the above criteria. Nor did he feel that the express wording of Art. 173 (now Art. 230) would permit the award of *locus standi* to an environmental association concerned about the impact on the environment of a contested measure. The ECJ held that the CFI had not erred in law by denying the applicant’s *locus standi* and interestingly made no reference to the suggestion made by the Advocate General to relax the *locus standi* rules (for a critique of this decision see Ward, 2000: 150). The ECJ judgement in this case confirms the narrow approach taken in regard to standing and in this regard may be contrasted with the far more liberal attitude of UK national courts (see below).

The ECJ has retained its strict approach to the standing issue in the *UPA v Council* case,19 denying standing to an agricultural association seeking to challenge a regulation on the common organization of the market in oils and fats, despite support for this application expressed by the (then) Advocate-General, Francis Jacobs in his Opinion for this case. Possibly influenced by the A-G’s Opinion in the *UPA* case, the CFI has shown greater awareness of how the effective denial of access to justice through lack of standing before the European courts can negatively impact on the goal of ensuring legal protection for concerned individuals or groups. In *Jégo-Quéré & Cie SA v Commission*,20 the CFI relaxed the hitherto strict interpretation of standing requirements in favour of a directly affected but not necessarily individually concerned fishing company. However, neither of these cases involved further elaboration of the standing of environmental interest groups *per se*, with their particular concern for the general state of the ‘natural’ environment so it should not be assumed that any relaxation in EC standing law will necessarily benefit such environmental associations.

**Standing of environmental NGOs before English courts**

In English law, applicants will have standing to seek judicial review,21 if they have a ‘sufficient interest in the matter to which the application relates’.
What constitutes a sufficient interest is essentially a matter for judicial discretion. The most straightforward situation is where applicants can show that they have been personally adversely affected by the action being challenged. Likewise, problems ought not to arise where the applicant is a group or an organization which can show that its own interests have been directly adversely affected by official action. For example, in *R v Poole BC ex p Beebee and others*, the British Herpetological Society and the World-wide Fund for Nature (WWF) sought to challenge a grant of planning permission for development on land designated as a Site of Special Scientific Interest (SSSI). The court held that the British Herpetological Society had standing because it had been closely associated with the particular site, but would have denied standing to the WWF to litigate on its own because it had failed to show a close connection and its interest was too general. Thus, in this case, the first applicant (British Herpetological Society) successfully claimed standing on the basis that their own interests were at stake.

Applicants, whether individual or more usually organizations, may also seek judicial review on behalf of others, a section of the community or the public in general. Generally speaking, the courts will allow a representative application if those being represented would have standing had they litigated. The most difficult cases are those in which the applicant seeks to represent, not individuals or the interests of identifiable groups, but wider public interests. In the past the courts have adopted a restrictive approach in such cases. *R v Secretary of State for the Environment ex p Rose Theatre Trust Co Ltd*, is an example. Construction work in London had revealed the remains of the Elizabethan Rose Theatre. A number of people interested in protecting these remains and in securing public access to them requested the Secretary of State to list the remains under the Ancient Monuments and Archaeological Areas Act 1979. The Secretary of State accepted that the remains were of national importance but refused to list them. The objectors then formed a company which applied for judicial review challenging this refusal. Schiemann J decided that the Secretary of State had acted within his powers but that, in any case, the company lacked standing. He accepted that this could mean that unlawful decisions made by the Secretary of State might be unchallengeable.

More recently this narrow approach has not been followed. Two decisions are of particular importance. The first is Otton J’s judgment in the *Greenpeace (No. 2)* case. Greenpeace (UK) challenged the decision of Her Majesty’s Inspector of Pollution (HMIP) and the Minister of Agriculture, Fisheries and Food (MAFF) to allow British Nuclear Fuels to test its new thermal oxide reprocessing plant (THORP) in Cumbria. In making the application Greenpeace claimed to represent 2500 of its members who live in the Cumbrian region where THORP is situated and who are concerned about the health risks associated with radioactive pollution. They also sought to represent the wider
public interest in preventing such pollution. Greenpeace was granted leave to seek judicial review. However, British Nuclear Fuels (BNFL) (who were to operate the plant but were not respondents in the case) were permitted to join the litigation and argue that leave should be set aside because Greenpeace had failed to establish a sufficient interest. Otton J rejected this argument. After applauding the integrity of Greenpeace and its genuine concern for the environment he went on to say that he would be ignoring the blindingly obvious if he were to disregard the genuine concern of its 2500 members who lived near the site. He also had no doubt that the issues raised by the application were serious and worthy of determination and that if he were to deny standing to Greenpeace ‘those they represent might not have an effective way to bring the issues before the court’. He was, moreover, particularly impressed by the competence and expertise of Greenpeace in presenting its case on environmental and local community interest grounds.

The second, even more far-reaching, case is *R v Secretary of State for Foreign Affairs, ex p World Development Movement Ltd* (also known as The Pergau Dam case). Here the World Development Movement (WDM), a pressure group which campaigns to improve the quality of British aid to the Third World, challenged the Foreign Secretary’s decision to help fund the Pergau Dam project in Malaysia. Significantly, unlike Greenpeace, the WDM did not claim to represent members who were directly adversely affected by the decision, but based its application on wider public interests and in particular on the public interest in ensuring that ministers comply with the law. The court nevertheless held both that the Foreign Secretary had exceeded his powers and that the WDM had standing. As in the Greenpeace (No. 2) case, Rose LJ acknowledged the reputation, status and expertise of the applicants. He also emphasized the importance of vindicating the rule of law; the importance of the issue raised; the likely absence of any other responsible challenger; the nature of the breach of duty against which relief is sought; and the prominent role of the WDM in giving advice, guidance and assistance with regard to aid issues. All of these factors, he said, pointed to the conclusion that the WDM had a sufficient interest in the matter.

Sedley J then re-affirmed what he called ‘the clear decision in the World Development Movement case, affirming as it does a strong line of modern authority’ supporting the adoption of a liberal approach to standing in *R v Somerset County Council and ARC Southern Ltd, ex p Dixon*. Although Sedley J dismissed the application on its merits, he held that the plaintiff (Dixon) was plainly neither a busybody nor a mere troublemaker and was perfectly entitled as a citizen to draw the attention of the Court to what he argued was an unlawful granting of planning permission that was bound to have an impact on the natural environment. It should also be noted that the (UK) Law Commission has recommended that there should be a ‘two-track’
approach to standing. Those who are personally adversely affected should normally be given standing as a matter of course. Other applicants, including public interest litigants, should be granted standing as a matter of discretion (Law Commission No. 226, 1994, para 5.20).

Corporate Liability for ‘Natural’ Environmental Damage?

A further problem that highlights both the definitional and representational difficulties raised above relates to whether environmental liability includes compensation for ‘natural’ or ‘pure’ environmental, or ecological, damage, as well as how such compensation might be claimed and by whom, on behalf of the ‘environment’. These issues arose during the long drawn-out passage into force of the EC’s 2004 Environmental Liability Directive from its initial 1993 Green Paper, through the 2000 White Paper on Environmental Liability (European Commission, 2000), to the adoption of the European Commission’s 2002 proposal for a directive on environmental liability addressing both the prevention and restoration of environmental damage (European Commission, 2002). The Directive itself entered into force on 30 April, 2004, although Member States had until 30 April 2007 to transpose this directive into national law. This directive implements an EC-wide strict liability regime seeking to ensure that polluters pay for the costs of remedying the environmental damage that they have caused. The directive thereby arguably applies one of the main principles of environmental law, namely, the polluter-pays principle, enshrined in Article 174(2) of the EC Treaty, to corporations for their ‘pure’ environmental or ecological damage.

The key proposal on definitional issues was the expansion of liability from ‘traditional damage’ (to persons or property) to ‘environmental damage’. By ‘environmental damage’, the White Paper meant ‘damage to biodiversity’. This reference to ‘biodiversity’ called for liability in respect of living phenomena incapable of being owned and therefore beyond existing liability regimes. Thus, ‘biodiversity’ was confined to the bird, plant, and animal species and habitats mentioned in the 1979 Wild Birds, and 1992 Habitats, Directives (White Paper, 2000, para. 4.2.1). It is now defined in Article 2(1) of the Environmental Liability Directive as ‘environmental damage’ to include protected species and natural habitats, as well as water and land. However, the level of damage potentially triggering liability must be ‘significant’.

The White Paper also proposed a strict liability standard, in that there would be no necessity to prove fault in respect of such environmental damage. This was incorporated in Article 3(1)(a) of the Directive. One reason for this strict liability standard is that it is very difficult for plaintiffs to establish the fault of the defendant in environmental liability cases. Another reason is the view that someone who is carrying out an inherently hazardous activity should...
bear the risk if damage is caused by it, rather than the victim or society at large (European Commission, 2000, para. 4.3). The strict liability standard is therefore imposed only against environmental damage resulting from listed categories of ‘occupational activity’.\(^{35}\) As the vulnerability of these protected species and natural habitat sites was nevertheless considered to be deserving of special protection, the White Paper proposed that liability be imposed even for damage caused by unlisted activities, which are not inherently dangerous (White Paper, 2000, para. 4.2). In this context, however, the White Paper proposed that liability should be fault-based, rather than strict. Thus, under Article 3(1)(b) of the Directive, any protected species and habitat damage caused by unlisted occupational/economic activities will only be subject to the normal fault liability standard, with the burden of proof resting upon the national (Member State) regulatory agency concerned.

However, dispensing with the requirement of fault only goes some way to overcoming liability problems. Even with strict liability, causation must still be established. This requirement may also constitute a very significant hurdle to attaching liability. The White Paper recognized this, albeit rather vaguely, by suggesting that because it may be harder for the plaintiff than the defendant to establish facts concerning a causal link, the traditional rules concerning the burden of proof may require a ‘form of alleviation’. This could mean imposing a lower burden of proof upon the plaintiff or, it could indicate that the White Paper envisaged that the burden of proof should pass to the defendant in some circumstances. The White Paper stated that this must be precisely defined at a later stage (European Commission, 2000, para. 4.3.), but this issue does not appear to have been taken up within the resulting Directive. Indeed, as Wijnants notes, 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’ (Wijnants, 2005: 337, citing Article 4(5) of the Directive).

Moving to the required remedial action in the event of environmental damage occurring, the 2000 White Paper proposed that (in the context of biodiversity) the aim is to restore the natural resource to its original state. But given the difficulty and the likely costs of full restoration, it recommended that account be taken of such factors as ‘the function and the presumed future use of the damaged resources’. If restoration of the site is impossible, the solution should be to establish natural resources equivalent to the destroyed natural resources (White Paper, 2000, para. 4.5.1). This emphasis on physical restoration, rather than compensation based on a monetary valuation of the damaged resources, is now included within Annex II of the 2004 Directive. Although the objective is to return natural habitats to their ‘baseline condition’, nevertheless ‘complementary’ and/or ‘compensatory’ remediation, including the possibility of alternative sites is allowed.
In the context of enforcement, the White Paper had also emphasized the importance of access to justice, particularly in relation to ‘environmental damage’ that does not fall within ‘traditional’ categories of damage that would normally allow legal and natural individuals to make claims under domestic, non-contractual or tort law. The EC built upon its own earlier Communication on Implementing Community Environmental Law (European Commission, 1996), and stressed the significance of the 1998 Aarhus Convention (discussed above) in this context. A two tier approach was called for. Because the protection of the environment is a public interest, the (EC) Member State should have a primary duty to protect the environment. However, if the State did not act, or did not act properly, then ‘public interests’ groups should be able to take action on a subsidiary basis. It was envisaged that such action could be taken against public bodies or the actual polluter. In this context, only those groups complying with ‘objective qualitative criteria’ would have qualified. In urgent cases, special provisions were proposed for such interest groups to take immediate rather than subsidiary action in order to prevent significant damage or avoid further damage to the environment. The White Paper even suggested that these ‘public interests’ groups be allowed to seek injunctive relief against the alleged polluter without going to the State first. In such circumstances the interest groups would have the right to claim reimbursement of reasonable costs incurred, although the White Paper did not say against whom this claim is to be made (White Paper, 2000, para 4.7). It merely proposed that liability should be imposed on the ‘operator’, namely the person who ‘exercises control over the activity’. Where companies are involved, liability will rest on the company as a legal person and not on individual managers or employees. This also meant that no lender liability would arise against those who finance the operations in the absence of their having operational control (White Paper, 2000, para 4.4).

Unfortunately, these innovative and potentially far-reaching proposals did not find their way into the resulting 2004 Environmental Liability Directive. Instead, the scope of enforcement is limited to the relevant Member State regulatory bodies. As Lee observes, the final outcome of this EC environmental liability scheme is modest compared to the possibilities raised during its negotiation, especially in the White Paper: ‘In particular, the final scheme is available purely in administrative law, as a tool for regulators, rather than as an element of private law; . . . [that] would have empowered third parties to bring claims, either by making claims brought under ordinary non-contractual liability in the Member States (for example for personal or property damage) easier, or even by providing a claim for environmental interest groups in respect of environmental damage’ (Lee, 2005: 204).
ENVIRONMENTAL LAW AND CORPORATE ‘ENVIRONMENTAL’ RESPONSIBILITY?

These continuing definitional, constituency and representational uncertainties at the heart of environmental law itself clearly do not translate well into the corporate ‘environmental’ responsibility debate. In this context, Kakabadse et al. formulate the relevant questions on (corporate) environmental responsibility, as follows:

To be able to address the issue of environmental degradation in a comprehensive and objective manner, we first need to understand our relationship to our environment. That is we need to understand and articulate what we expect from it what we have already done to it, and to explore the mechanisms by which we damage the natural world as well as the factors that may exacerbate that phenomenon. Second, we need to explain why environmental damages [sic] have happened and establish who bears a responsibility for such consequences. Third, we need to define the most appropriate and potentially successful solutions to the problem. Last and most importantly, we need to make serious and wholehearted commitment to implementing these solutions. (Kakabadse et al., 2006: 56)

It is noticeable, however, that even this structured and facilitative approach to the issue of environmental responsibility for corporations and indeed all other organizational or institutional entities, views this issue as an essentially anthropocentrically-oriented problem, encapsulated here by the question: ‘What we expect from it (the environment)?’, which can apparently only be resolved by the application of prescribed man-made solutions.

In any case, environmental law has responded to public perceptions of increasing corporate environmental misdemeanours. It has done so in the following ways:

1. By legislating more (external) corporate environmental regulation; through both *a priori* controls (for example, the 1985 EIA (as amended), and 1996 IPPC, Directives) and *ex post facto* recycling requirements (2006 WEED Directive) and liability (2004 Environmental (Civil) Liability Directive).
2. By requiring (internal) corporate environmental management systems (for example, through the EC EMAS Regulation).

However, the difficulty with greater external and internal corporate environmental regulation is the burden it places upon retreating or diminishing public authority controls to ensure their implementation by the companies concerned.

A further response to these legal and policy regulatory failures would be to widen the scope for legal challenge of company directors’ decisions, where these clearly impinge on the interests of the affected individuals or groups.
concerned. However, to the extent that this proposed legal remedy would also be reliant upon the (in)efficiency of an increasingly antiquated judicial system, there is no reason to suppose that its provision will prove to be any more successful than the other measures mentioned above. More recently, corporate environmental reporting has arguably become a further legal requirement (albeit still of unknown utility) in ensuring corporate environmental restraint, particularly in the company boardroom.

What is needed is the provision of systems of accountability within the corporate governance structure by which the company can inform itself of its environmental (and other) responsibilities, with the possibility of legal challenge adopted as a last resort. These accountability systems must be included at significant decision-making levels of the company, beginning at the ultimate corporate decision-making level in the form of representation at the board of directors and extending to the operational decision-making levels at factory/plant level, possibly through the appointment of environmental compliance officers.36

A recent example of how discrepancies between corporate policy-making and implementation can result in disaster; that is to say, when environmental/social responsible policy formulated at company board level does not necessarily translate into operational decisions at the plant/factory floor level, was highlighted in the Baker Report into the BP corporate safety culture in the aftermath of the BP Texas City oil refinery explosion and fire incident on 23 March 2005, that killed 15 people and injured more than 180.37 Under the ‘corporate oversight’ heading, the Report found a significant disjuncture between the company’s bottom-up reporting system for assuring process safety performance within each business unit such as a refinery plant, and the top-down approach to the managerial evaluation of, and response to, identified safety and integrity risks, resulting in such risks within individual plants being unattended. The Report therefore concludes that ‘BP’s process safety management system was not effective in evaluating whether the steps that BP took were actually improving the company’s process safety performance. . . . (N)either BP’s executive management nor its refining line management has ensured the implementation of an integrated, comprehensive and effective process safety management system’ (Baker Report, 2007, Executive Summary, p. xv, emphasis added).

Thus, a consistent theme of the Baker Report was the ‘lack of connection between the high ideals of the BP board and day-to-day practice of its operations’ (Crooks and McNulty, 2007: 19, citing Baker Report). ‘While BP has an aspirational goal of “no accidents, no harm to people”, BP had not provided effective leadership in making certain its management and US refining workforce understand what is expected of them regarding process safety performance’ (Crooks and McNulty, 2007: 19). In fact, although BP places great
stress on making its managers accountable, the Baker Report found that ‘BP has not demonstrated that it has effectively held executive management and refining line managers and supervisors, both at the corporate level and the refinery level, accountable for process safety performance at its five US refineries’ (Crooks and McNulty, 2007: 19). These Baker Report findings have been confirmed, and its Recommendations, inter alia, for ‘strengthening management accountability’ endorsed, by the subsequent official report of the US Chemical Safety and Hazard Investigation Board (CSB) into the Texas City refinery explosion itself (US Chemical Safety and Hazard Investigation Board, 2007, para 1.7.2.1). Among the CSB Report’s own findings, the following is pertinent to the corporate governance and accountability issues raised above: ‘The BP Board of Directors did not provide effective oversight of BP’s safety culture and major accident prevention programs. The Board did not have a member responsible for assessing and verifying the performance of BP’s major accident and the health of the safety culture’ (US Chemical Safety and Hazard Investigation Board, 2007, para 1.6.2).

More generally, the call for greater corporate accountability to legitimate stakeholders, from the boardroom to the factory/shop floor level echoes the view of Barney Frank, the Democrat Congressman from Massachusetts who chairs the US House Financial Services Committee in that he aims to empower corporate stakeholding interest groups beyond the traditional shareholders’ constituency. This new so-called ‘corporate democracy’ would include mutual fund or unit trust and equity fund managers who invest in companies but are not necessarily shareholders. While certain of these identified stakeholders may also be concerned with environmental protection, it is significant to note that the ‘environment’ itself is not included as a potential corporate stakeholder within this context. This proposed legal empowerment of a wider range of corporate stakeholders is also envisaged to take place against a backdrop of reduced government regulation.

In order to ensure that the representatives of the interest groups concerned, whether they be in favour of environmental protection, employee rights or local community amenities, only receive intervention rights when their legitimate concerns are implicated by corporate decisions, whether they be at the boardroom or factory floor level; certain thresholds/criteria must be deemed to have been reached/fulfilled. It is to be expected that the thresholds/criteria will be different, depending upon the interest group concerned, that is whether these are environmental, employee or local community-oriented in nature. Should their legitimate concerns be justified, they must arguably be given a veto power over any boardroom/factory floor decision that is deemed detrimental to their interests. However, this still leaves the question as to who shall decide when the threshold/criteria is reached/fulfilled to enable the veto power to be utilized by the representative of the interest group concerned.
In this context, comprehensive, stringent and regular corporate environmental reporting requirements can arguably play a significant part in ensuring such accountability, both of the directors to internal corporate stakeholders, and more generally, of the corporation to external stakeholders, such as NGOs and the general public. On the other hand, the difficulty highlighted previously regarding the need to mediate between different and even opposing stakeholder interests persists. As Villiers notes, ‘[a] major problem for the stakeholder vision is that it fails to explain how to accommodate and balance all the potential interests that may arise in connection with a company’s activities. With regard to disclosure (in the form of corporate reporting), this problem is particularly acute since the requirement to meet the needs of all potential information interests gives rise to significant cost implications for the company’ (Villiers, 2006: 96). The role and emphasis on corporate environmental reporting will be examined below in order to see how far the evolution of this arguably procedural requirement can assist in the substantive accountability of the corporate directorial board on this issue.

THE EVOLUTION OF CORPORATE ENVIRONMENTAL REPORTING REQUIREMENTS: FROM ‘SOFT’ TO ‘HARD’ LAW?

To begin with, a short discussion of what is meant by the term ‘corporate environmental reporting requirement’ is appropriate. It is defined here as a positive or affirmative duty to report on corporate environmental issues, as opposed to the merely passive requirement for the provision of environmental information, for example, the types and quantities of toxins discharged by a factory. While this requirement for the provision of environmental information can justifiably be included within the notion of ‘corporate environmental reporting’ (see for example Gouldson, 2002), it will not be examined here in favour of a more strategic conceptualization of this requirement as a positive duty on the part of the company to elaborate on the environmental impact of its activities. In this respect, the ‘corporate environmental reporting requirement’ denotes the disclosure of corporate environmental policies, principles, systems and procedures and how companies implement these agreed environmental principles and standards, rather than the notion of corporate environmental accounting and/or audit procedures (see, for example Owen, 1992; Gray et al., 1996; Crowther, 2002).

The reasons why firms increasingly adopt corporate environmental reporting are as varied as its criteria, content, audit and verification procedures (Cerin, 2002: 47). According to Elkington, the first corporate environmental reports were published in 1990 and their number has subsequently mushroomed but
they were mainly prepared on a voluntary basis using different criteria, baselines and indicators, thus rendering direct corporate environmental performance comparisons almost impossible (Elkington, 1998: 47). Of late however efforts have been made by several corporate environmental standard-setting organizations to harmonize their environmental reporting requirements.40

Although the use of corporate disclosure requirements as an instrument of corporate control is now well-known and indeed legally established in many jurisdictions nowadays (Wallace, 1983), it has been limited hitherto in terms of its subject matter (mainly corporate financial information) and the constituencies it serves (shareholders, creditors, potential investors, corporate regulatory agencies, and only lately, employees). Wallace, for example, denotes several types of corporate disclosure namely, by a company to its relevant market, by the company to a regulatory authority, and by a company under a court discovery order (Wallace, 1983: 141). But, as Villiers observes on disclosure procedures generally and CSR reporting specifically, ‘the (disclosure) process lacks overall a conceptual framework to guide the development and implementation of accounting and reporting standards and principles. . . . Increasingly, information relevant to CSR is requested but currently this remains underdeveloped as an aspect of the disclosure system’ (Villiers, 2006: 36). In particular, she notes that:

A number of barriers have obstructed the development of social and environmental reporting. For example, a clear definition of social and environmental reporting has not been established. Nor have the required contents of social and environmental reports been made clear. The voluntary nature of such reporting has arguably slowed down its development. Without uniform or standardised requirements, reports are not easily comparable. (Villiers, 2006: 228–9).

Within this context, the following discussion of several legislative initiatives arguably identifies a trend towards the progressive legalization and integration of corporate environmental reporting, as opposed to other more well-known fields of corporate disclosure. Although corporate environmental reporting or disclosure requirements are now well-established in certain domestic laws,41 it is their potential inclusion in national corporate laws, loosely defined here as the laws governing or regulating the behaviour of companies and their directors that concerns us most in this chapter.42 As Munkelien et al. note, the volume and ‘maturity’ of CSR reporting varies widely between countries but its evolution is enhanced by government regulations or laws requiring CSR reporting (Munkelien et al., 2005: 183).

A good example of the potential for corporate disclosure requirements to ensure corporate governance accountability for environmental and other social concerns is the disclosure requirements of the (Federal) Securities and
Exchange Commission (SEC) in the United States (Williams, 1999). Williams argues that it is fully consistent with the language, purpose and legislative history of US securities laws for the SEC to require expanded corporate social and environmental disclosure on the basis of its power to require disclosure for the public interest. This is notwithstanding whether the beneficiary of this disclosure is a ‘social’ investor, who is in fact concerned with the company’s social and environmental conduct, or even an ‘economic’ investor, who is interested primarily in the financial returns from her investment (Williams, 1999: 1273–305).

Thus, after briefly assessing recent Australian, UK (Private Member’s Bill), French, and European Community efforts in this field, the new 2006 UK company law will also be examined. Despite their mixed success individually; collectively, these legislative initiatives can be seen as heralding a trend towards an acceptance of a corporate environmental and social reporting requirement that is being increasingly expected by discerning members of the general public. Moreover, these efforts highlight the increasingly active role of environmental NGOs in both their formulation and promotion.43

The Australian Corporate Code of Conduct Bill, 2000 and 2004

A significant development in this regard has been the promulgation of national legislation requiring such reports to be undertaken. For example, corporate environmental reporting requirements were included within a revision of Australia’s company law. According to Zerk, the Corporations Act 2001 now requires companies to report on their compliance with Australian Federal/Commonwealth and State environmental laws (Zerk, 2006: 173). Following on from this successful attempt at codifying corporate environmental reporting requirements, much more far-reaching versions of a ‘Corporate Code of Conduct’ Bill were tabled by the (opposition) Australian Democrats Party, in September 2000, and again in June 2004 (Zerk, 2006: 165–7; See http://www.democrats.org.au). These legislative proposals provide, inter alia, for the application of Australian social and environmental standards to companies operating abroad, including the following requirement: ‘[t]o take all reasonable measures to prevent any material adverse effect on the environment in and around the place of [its] activity’.44

Unfortunately, this Bill was not deemed appropriate for promulgation by the Australian (Federal) Parliamentary Joint Statutory Committee on Corporations and Securities (JSCCS) (Parliament of the Commonwealth of Australia, 2001). The reasons why this Bill ultimately failed to see the light of day include, inter alia, the following: (a) concerns over its extra-territorial scope, in terms of possibly applying also to foreign businesses related to Australian companies, and therefore its legality under international law; (b)
the vagueness and ambiguity of the standards and obligations intended to be applicable to such foreign entities; (c) the potential negative effect on investment into, and out of, Australian companies (Parliament of the Commonwealth of Australia, 2001; cited in Zerk, 2006: 166, fn. 97).

The 2001 French Law Requiring Corporate Environmental and Social Responsibility Reporting

Corporate environmental reporting requirements have been promulgated in France, through the passage in 2001 of a comprehensive law governing enterprises known as the nouvelles régulation économiques (NRE). The NRE provisions require the disclosure of all listed companies on the French Stock Exchange to report on their social and environmental performance, as part of a triple-bottom-line corporate performance indicator. The NRE divides social reporting into three categories, namely, human resource issues (including employment indicators, wages, equity and diversity); community concerns (including the impact of corporate activities on, and the firm’s engagement with, local populations as well as other stakeholders); and labour standards (including respect for; and promotion of, International Labour Organization (ILO) Conventions. The corporate environmental reporting requirement includes the following issues: emissions into the air, water and soil, as well as energy, water and raw materials consumption (Baue, 2002). Significantly, like the abortive Australian Bill discussed above, the NRE also requires disclosures concerning the environmental impacts of foreign subsidiaries and to a much more limited extent, their social impacts. The compulsory nature of these requirements has been applauded, although continuing uncertainties exist as to the extent of this legal requirement to report or disclose key elements of a firm’s social and environmental impacts. For example, ARESE, a leading French social and environmental rating agency has criticized specific aspects of the corporate social and environmental reporting requirements. These include, inter alia, the lack of a clear definition and performance indicators of the key issues that must be addressed by the corporate social and environmental reports; failure to specify that the report should report on the environmental impact of its goods and services throughout their ‘life-cycle’ and whether the company should report also on its overseas operations; and finally, lack of sanctions for non-compliance with the new reporting requirements (ARESE Report).

The EC Commission’s Communication on Corporate Social Responsibility, 2002

The European Community has also stepped into the breach, initially targeting
environmental reporting, but of late taking on the wider conceptual ambit of corporate social responsibility. In May 2001, the European Commission issued a Recommendation on the recognition, measurement and disclosure of environmental issues in corporate annual reports and accounts (European Commission, 2001: 33; Villiers, 2006: 238–40). Following this up, on 2 July 2002, the EC Commission published a Communication entitled ‘Corporate Social Responsibility: A Business Contribution to Sustainable Development’ (European Commission, July 2002). This in turn was in response to a European Parliament (EP) Resolution. The Commission’s Communication was also follow-up to its own Green Paper on ‘Promoting a European Framework for Corporate Social Responsibility’, issued the previous summer (European Commission, July 2001). The key proposal of both the Commission’s Communication and the EP Resolution was the establishment of a multi-stakeholder Forum on CSR to develop definitive criteria on substantive issues such as competitiveness and sustainable development, as well as guidelines for procedural issues such as social and environmental impact reporting, and codes of conduct (Werther and Chandler, 2006: 244; Villiers, 2006: 240–1). The target date for the development of these substantive criteria and procedural guidelines was mid-2004. While this process is therefore still evolving, its potential for instituting European-wide standards for corporate social and environmental reporting is immense.

UK Private Member’s Bill on Corporate Responsibility, 2002 and 2004

On either side of the end of the second millennium, the UK was in the midst of a company law reform process (described below). The civil society forces gathering behind the drive to require corporate environmental and social reporting in the UK decided not to wait and see what the UK Government’s Department of Trade and Industry (DTI) would propose in this field as a result of the consultations it undertook during the company law review exercise. Instead, they banded together in the form of the Corporate Responsibility Coalition (CORE) to sponsor a Private Member’s Bill that was tabled on 12 June, 2002 by the Labour MP for Ilford North, the Rt. Hon. Linda Perham. It provides, *inter alia*, for corporate economic, environmental, and social impact, consultation and reporting requirements to a widely defined stakeholder group; clearly defined company directors’ duties to these stakeholders; and even the creation of a Corporate Responsibility/Standards (enforcement) Board to set standards, monitor and ensure the effective implementation of these corporate reporting requirements and directorial duties (Werther and Chandler, 2006: 241–2). The Bill was prepared by CORE, with the involvement and support of several leading NGOs, including the World Wide Fund for Nature (WWF), Friends of the Earth, Amnesty International, Christian Aid,
and Save the Children. This Corporate Responsibility Bill was rejected by both the UK Government and Parliament, at least in part due to the overwhelmingly negative response from powerful corporate-based vested interest groups.48 According to Werther and Chandler, many business groups opposed the Perham/CORE Bill on the basis that it would merely create a further bureaucratic requirement and thereby hinder efficiency (Werther and Chandler, 2006: 242). CORE redrafted and re-submitted the Bill, again as a Private Member’s Bill by Labour MP, Andy King on 7 January, 2004 but this initiative also failed.

The UK Companies Act, 2006

From 1998 to 2001, the UK Department of Trade and Industry (DTI) undertook a review of the whole system of core UK company law. This review has been held to be the most comprehensive ever undertaken in the UK. Moreover, it arrived on the back of similar company law reviews undertaken by the English and Scottish Law Commissions, respectively (Worthington, 2001, citing: DTI, 1998; Law Commission, 1998; Law Commission, 1999; CLRSG, 1999; CLRSG, 2000b). The DTI’s company law review was initiated with the aim of creating a more effective company law framework to improve competitiveness of UK companies (DTI, 1998, para 3.1). This rather narrowly defined objective effectively negated consideration from the onset of this exercise of the arguably imperative question as to whether company law (as opposed to the company itself) should in fact serve a wider constituency of interests, going beyond the usual shareholder constituency, to encompass employees, creditors, the local community, and even the natural environment. Corporate internal control mechanisms and reporting requirements were certainly highlighted in the UK DTI’s review, although without specific reference to environmental reporting per se. Worthington observes that the inherently conservative approach of the current UK company law reform project merely reflected the fundamentally compromised nature of this project from its very inception (Worthington, 2001: 441). Without wishing to appear trite, it is suggested that this limited approach to the scope of company law is evident from the very title of the DTI’s legal reform exercise, namely Modern Company Law for a Competitive Economy (DTI, 1998), that is, not society as a whole, or even any notion of a wider public interest. Indeed, the goal of ‘company law for a competitive economy’ was explicitly held to be the ‘predominant objective’ of the DTI’s company law reform process (CLRSG, 1999, paras 2.4, 8). In this way the law reform project positively eschewed the need to examine the function of a company within the wider context of the UK’s public interest, including environmental protection.

It remains unclear why this should necessarily have been the case. Foster,
for example, cites globalization as a possible justification for this implicit preemption of any wider considerations within the corporate governance structure, arguing that, ‘[g]lobalization has led to international competition among company law regimes, producing an urgent need to have an attractive and efficient company law in order to compete with other jurisdictions, both from the point of view of allowing domestic companies to function effectively in the world market and from the point of view of attracting foreign investment’ (Foster, 2000: 575). The initial DTI consultation document confirms this perspective in that it requires the new UK corporate legal framework to compare favourably with other developed countries’ company law (DTI, 1998, para 4.4). This justification in turn reflects a wider competition between different national legal systems generally (Ogus, 1999: 405), and even regional economic regulatory systems world-wide (Esty and Geradin, 2001), to attract business enterprise, innovation and capital investment into their respective economies.

The DTI’s Company Law Review Steering Group (CLRSG) therefore felt constrained to choose between the so-called ‘enlightened shareholder value’ approach, or the wider, pluralist approach (CLRSG, 1999, paras 5.1.8–5.1.33, pp. 36–46). Although maintaining that its objectives are pluralist in that companies should be run in a way which maximizes competitiveness, wealth and welfare for all ‘stakeholders’ concerned (CLRSG, 2000, para. 2.21), the CLRSG nevertheless arrived at the conclusion that this can only be achieved by requiring directors to maximize shareholder value in the first instance, albeit in an inclusive manner taking into account other social and ethical constraints (CLRSG, 1999, para 5.1.51; CLRSG, 2000, para 3.5). The CLRSG proposed to enhance shareholder value through the imposition on directors of a statutory duty of compliance and loyalty to the company (CLRSG, 2000, para 3.40; CLRSG, November 2000, para 3.11–3.24).

Thus, the CLRSG did not envisage the specific inclusion of wider considerations of the role of companies in society as a whole within its proposed legal reform of the UK corporate governance regime. In fact the CLRSG eschewed taking a wider, ‘pluralist’ approach to corporate governance issues as a legal basis for reform proposals. Instead, the preferred *modus operandi* for ensuring an effective company was to provide shareholder-oriented duties of loyalty, care and skill for company directors, as well as mandatory requirements on corporate disclosure (CLRSG, March 2000, para 3.22). It should be noted that when the company director sets about achieving the preferred objective of maximising shareholder value, the duty of care and skill of the director is held to require consideration of their company’s impact on the local community and the environment (CLRSG, 2000, para 3.40). However, this does not take us very much further down the path towards the inclusion of wider interests within the company law reform process to ensure corporate
accountability for their protection as the duty of loyalty to the company asserted by the CLRSG is nothing if not shareholder-oriented. Throughout the DTT’s consultation process, the Steering Group did not stray too far from the principle that the company’s paramount duty is to serve its shareholders in an efficient way. The proposed mechanisms for corporate control in the new, 2006 UK Companies Act appear to rely solidly on previous proposals to empower shareholders with the possibility of better court access (Law Commission, 1997), and more corporate disclosure (Law Commission, 1999).

How far did this corporate reform agenda actually consider environmental protection as an aspect of corporate governance? Here, we must highlight the highly influential earlier work of the Hampel Committee, which along with the Cadbury and Greenbury Committees, examined various controversial aspects of corporate governance throughout the 1990s (see respectively, Cadbury Committee, 1992; Hampel Committee on Corporate Governance, 1998). It is important to note that these Committees were initiated by the Financial Reporting Council, The London Stock Exchange and the accountancy profession in the case of Cadbury and Hampel, and the Confederation of British Industries (CBI) in the case of Greenbury. In other words, it was not a government initiative (Finch, 1994; Dine and Brennan, 1994). According to the Hampel Committee, ‘[g]ood [corporate] governance ensures that constituencies [that is stakeholders] with a relevant interest in the company’s business are fully taken into account’ (Hampel Committee, 1998, para 1.3). Moreover, it saw the need for principles of corporate governance as well as the more detailed rules contained in the Code of Practice. Whether these corporate governance principles will ever be effective however is doubtful as they are framed in very broad terms, for example, ‘Every listed company should be headed by an effective board which should lead and control the company.’

On the other hand, the Hampel Committee reviewed the work of both its predecessors and attempted to lessen the drive for accountability by stating that concentration on this aspect had obscured a board’s principal responsibility, which was to enhance the prosperity of the business over time (Hampel Committee, 1998, paras 1.1 and 1.16). While the Hampel Committee’s recognition of the need for an expansion of the interest groups that corporate directors are required to take into account can be reconciled with its emphasis on the need to ensure longer term corporate profitability, if one were taking a very progressive view of the benefits to be derived from a pluralist, inclusive approach to corporate governance, this was unfortunately not the underlying reason for the Committee’s stance on this issue.

In fact, the Hampel Committee’s approach followed that adopted by the Confederation of British Industries (CBI) when distinguishing between the directors’ relationship with the shareholders, and their (the directors’) relationship with other stakeholder interests. According to them, while company
directors are responsible for corporate relations with stakeholders, they are ultimately accountable only to the shareholders (Hampel Committee, 1998, para 1.17). This emphasis on directors’ pre-eminent accountability to shareholders is not merely a technical point. In the Hampel Committee’s view, attempts to redefine company directors’ responsibilities in terms of all identified corporate stakeholders would be impracticable as it would mean a redefinition of our understanding of the nature of corporate governance itself (Hampel Committee, 1998). First, it would require the development of suitable criteria for the identification of the various stakeholder groups within a company. Second, it would mean deciding upon the nature and extent of the directors’ responsibility to each identified stakeholder group. According to Hampel, ‘[t]he result would be that directors were not effectively accountable to anyone since there would be no clear yardstick for judging their performance’ (Hampel Committee, 1998). However, this need not necessarily be inevitable. Indeed, it is possible to envisage a hierarchical set of directorial duties towards different identified stakeholder groups, with each set of duties dependent upon the relative importance of the identified groups to the company, and commensurate with the particular needs of each identified interest group.

Such a matrix of directorial duties and responsibilities towards different sets of stakeholders is arguably already in place, according to Maw et al. (1994: 3). They consider that there is a complex web of inter-relationships with the board of directors at its epicentre. This web consists of duties owed by directors under general company law, along with more implicit responsibilities owed to certain identified groups such as a company’s customers and suppliers. However, these implicit responsibilities are not generally identified as giving rise to legally enforceable obligations in the absence of a specific agreement, or conduct to the contrary. Maw et al. nevertheless believe that the notion of corporate governance encompasses all of these legal duties and implicit responsibilities (Maw et al., 1994: 3).

In fact, even if company directors were to accept a duty to consider the ‘environment’ per se as a further corporate stakeholder, this newly identified stakeholder suffers from a number of handicaps. Chief among these is its lack of a direct voice to speak on its behalf, as noted above in our discussion on the continuing constituency and representational deficiencies of environmental law itself. While environmental non-governmental organizations (NGOs) can fulfil a useful role in articulating environmental interests, they are not necessarily always accepted as representing the ‘natural’ environment as such in strict legal terms. Therefore, requiring the corporate governance regime to include the consideration of environmental interests, alongside more traditional constituencies such as shareholders, and even workers, would make for a very fine balancing act indeed.
In this respect, the Hampel Committee implicitly accepts the complexity of directors’ duties in a modern company when it acknowledges that even if the directors are predisposed towards catering to shareholders’ interests alone, they cannot act solely for the benefit of the short term interests of these shareholders. The directors’ duty is to enhance shareholders’ interests, both in the present and into the future. As regards other identified stakeholders, different types of company will have different relationships (with their stakeholders). Directors can only meet their primary legal duties to shareholders and pursue the objective of long term shareholder value successfully by developing and sustaining these stakeholder relationships (Hampel Committee, 1998, para 1.18). Moreover, shareholders recognize that it is in their own interests for companies to develop these relationships and have regard to the broader public acceptability of corporate conduct (Hampel Committee, 1998, para 1.18).

Within this context, the DTI’s Company Law Review Steering Group (CLRSG)’s proposed elaboration of the corporate disclosure requirement had significant implications for the possible inclusion of environmental considerations within the company board decision-making process. The proposed mandatory new Operating and Financial Review (OFR) requirement was to be one of the main pillars of the reformed UK corporate governance regime (CLRSG, March 2000, paras 5.74–5.92, pp. 180–6; CLRSG, November 2000, para 3.2, p. 33), alongside the proposed Statutory Statement of Directors’ Duties. Certainly, its potential for enhancing corporate directors’ accountability to non-traditional stakeholders in a company is undeniable. The CLRSG stated that the aim of the OFR is to ‘account for and demonstrate stewardship of a wide range of relationships and resources which are of vital significance to the success of modern business, but often do not register effectively, or at all, in financial accounts’ (CLRSG, November 2000, para 3.4). One of its proposed areas included ‘environmental policies and performance, including compliance with the relevant laws and regulations’ (CLRSG, March 2000, para 5.88, p. 185).

This dovetailed neatly with the duty of compliance and loyalty enunciated by the CLRSG in their proposed Statutory Statement of Directors’ Duties, namely that ‘a director must exercise his powers honestly . . . and in accordance with the company’s constitution and decisions taken lawfully under it [or under the general law]’ (CLRSG, March 2000, para. 3.40). Whether the coupling of both these requirements is sufficient to stimulate companies to achieve the ‘beyond compliance’ stage, envisaged by corporate environmental management theorists to be the ultimate goal of full inclusion of environmental considerations within corporate governance (see for example, Prakash, 2000, Chapter 5), remains to be seen with its enactment and future implementation. The CLRSG accepted that more detailed requirements should pertain to the disclosure of corporate risk-taking in areas such as the natural
environment. The Group has therefore suggested that specific requirements on risk disclosure in these areas should be the subject of delegated mandatory disclosure standards laid down by the proposed new Companies Commission (CLSRG, 2000, para 3.35, p. 47; Chapter 12, paras 12.59–12.66, at pp. 267–70). The effect of this would be to make certain risk disclosure matters mandatory where previously they were only recommendatory as part of the Combined Code on corporate governance noted above.

However, the eventual result of the extensive consideration of these issues by the CLRSG within the 2006 UK Companies Act, arguably leaves much to be desired. Under Chapter 2 providing for the ‘General Duties of Directors’, within Part 10 regarding ‘A Company’s Directors’ of this Act, Article 172 (entitled: Duty to promote the success of the company) provides under para.(1) that: ‘A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to – (d) the impact of the company’s operations on the community and the environment.’ Thus, the inclusion of corporate environmental impacts within the scope of directorial concerns is balanced by the fact that any duties these might entail are still owed only to the shareholders, a clear example of the ‘enlightened shareholder’ model embraced by the CLRSG in its deliberations on the new law. This substantive provision is followed-up by a procedural obligation within Part 15 on ‘Accounts and reports’, whereby under Section 415, company directors are under a director’s report for each financial year of the company. Moreover, under Section 417 the contents of the director’s report must contain a business review, which in the case of a quoted company must include information about, inter alia, environmental matters (including the impact of the company’s business on the environment) (Companies Act 2006, s. 417(5)(b)(i)).

By not explicitly including environmental considerations within the scope of company directors’ duties within the UK Companies Act, a golden opportunity to place UK company law at the forefront of policy efforts to inculcate environmental values within the corporate decision-making machinery has been lost. While the overall effect of the new corporate disclosure requirements, inter alia, on environmental issues may increase company directors’ accountability generally, there were no corresponding provisions for new stakeholding interests, such as local communities or the ‘environment’, to be included within the UK corporate governance regime. Only shareholders, who form the traditional constituency of companies, may be able to call directors to account over their failure to consider the negative environmental implications of their corporate decisions. Even the proposed ‘inclusive’ interpretation of company directors’ duties will not necessarily provide other identified stakeholders with adequate means for redress against the negative environmental impact of a company’s activities.
CONCLUSIONS

Relying on examples from various jurisdictions, we can conclude that the results of recent attempts to include environmental considerations within the corporate decision-making process have been mixed. Conceptually tainted by its inclusion, and thence by its marginalization within the CSR concept; environmental issues struggle to achieve separate corporate directorial recognition and accountability. While the new French law and EC Commission CSR proposals contain much that should be lauded, the discrepancy between theory and practice on progress towards the legal requirement of corporate environmental reporting continues in Australia and the UK. Overall, it may be concluded that locating and perhaps more importantly, ‘empowering’ environmental stakeholder interests within the corporate governance regime, either substantively, through the proposed expansion of traditional notions of corporate stakeholders, or procedurally, by improving the disclosure/reporting requirements of corporate environmental impacts, has not yet borne fruit. Efforts so far have been piecemeal. Rather than evincing an orderly progress towards effectuating corporate ‘environmental’ responsibility, these efforts merely serve to highlight the conceptual discrepancies and regulatory deficiencies of the corporate social, as opposed to environmental responsibility concept.

NOTES


2. The focus in this paper on problems arising from the environmental aspects of CSR should not detract from an appreciation of other equally problematic issues in the conceptualization and application of CSR. In the former, conceptual debate, the limited liability nature of the corporation has been questioned, from both individual ‘equality before the law’ and ‘property rights’ perspectives. See Plesch, D. (2005), ‘Corporate Social Responsibility: questions of equality before the law, property rights and de-regulation’, Accountancy, Business and the Public Interest, 4(2). Problems also continue to arise in the application of CSR. For example, a recent report by Corporate Watch highlights examples of the abuse of this concept by businesses, primarily through the co-option of civil society groups and the general public into the CSR notion using beautifully designed and well-phrased corporate literature (also known as ‘greenwash’), while maintaining an ultimately ‘business as usual’ approach to their activities. See Fauset, C. (2006), Corporate Watch Report 2006, What’s Wrong With


5. In this context, it is also important to consider the ambiguous character of the corporate entity itself as the ostensibly responsible actor in this relationship. See, for example, Foster, N. H. D., ‘The theoretical background: the nature of the actors in corporate social responsibility’, in Tully, S. (ed.) (2005) Research Handbook on Corporate Legal Responsibility, Cheltenham: Edward Elgar, 3–19.

6. It should be noted that the workers’ rights aspects of corporate social concerns such as slavery, child labour and poor or even dangerous working conditions has a longer history than environmental concerns but since the early 1970s, the environmental agenda has dominated (Elkington, 1998: 44).


8. Such ‘natural’, ‘pure’ environmental, or ecological, damage can be defined in simple terms for the purposes of this paper as damage caused to natural resources such as air, water and soil, as well as all the constituent elements of natural ecosystems, including all wildlife and species biological diversity beyond that which is deemed useful to humankind.


14. See, for example, Tebo, R. G. (2001), ‘Environmental Law: Fertile Waters’, American Bar Association (ABA) Journal, Vol. 87, at 36–42, which mainly relates to civil litigation possibilities against pollution and other environmental threats to human health. This article is prefaced by the following statement: ‘Conditions are good for environmental lawsuits. Plaintiffs benefit from favourable law, new studies and tactics that brought down Big Tobacco’ (emphasis added).


18. Article 230(4) of the EC Treaty, 1957 (as amended) states that: ‘(a)ny natural or legal person may . . . institute proceedings . . . against a decision which, although in the form of a regu-
lation or a decision addressed to another person, is of direct and individual concern to the former;’


22. Section 31(2) of the Supreme Court Act 1981 and RSC Ord 53, r 3(7).


33. The implications of these developments, along with related EC environmental legislation for CSR within the EU are considered by Wijnants, C. (2005), ‘Corporate environmental liability within the European Union’, in Tully (ed.), pp. 334–48.

34. See Articles 2(1)(a), 2(1)(b) and 2(1)(c) of the Environmental Liability Directive 2004/35.

35. Defined in Articles 2(7) and 3(1)(a), with reference to Annex III of the Liability Directive.

36. For a discussion of the possible inclusion of environmental protection as a goal/objective of corporate accountability systems at different levels of the company, see Ong, D. M. (2001),

37. Following this incident – one of the most serious US workplace disasters of the past two decades – several other incidents, some involving fatalities occurred at the same site. Therefore, in addition to its own investigation into the actual 23 March 2005 incident, the US Chemical Safety and Hazard Investigation Board (CSB) issued an urgent safety recommendation on 17 August 2005 – a week after the latest serious incident at the plant, to the BP Global Executive Board of Directors that it commission an independent panel to assess and report on the effectiveness of BP’s North America’s corporate oversight of safety management systems at its refineries and its corporate safety culture. BP acted on this recommendation by forming the BP US Refineries Independent Safety Review Panel, an independent panel chaired by James Baker (former White House Chief of Staff to the first Bush Presidential Administration). This resulted in the publication of the ‘Report of the BP US Refineries Independent Safety Review Panel’, also known as the ‘Baker Report’, on 16 January, 2007. Accessible at: http://www.csb.gov

38. Ref. to Sheldon Leader’s work on the need to be able to distinguish between the relative merits of different corporate stakeholders or constituencies and therefore their different thresholds of intervention.


40. See, for example, the co-option of the Global Reporting Initiative (GRI) Guidelines on Sustainable Reporting by the Coalition of Environmentally Responsible Economies (CERES) in place of their own indigenous guidelines.

41. Kolk identifies at least two countries, namely the Netherlands and Denmark that have specifically regulated for corporate environmental reporting, with several other jurisdictions requiring it through one type of means or another. See Kolk, A. (1999), ‘Evaluating corporate environmental reporting’, Business Strategy and the Environment, 8(4), 225–37.

42. According to Zerk, the first EU Member State to legally require the corporate social/environmental reporting was Denmark, with its 1995 ‘Green Accounting Law’. See Zerk (2006), 172, fn. 130.

43. For example, the UK CORE Corporate Responsibility Bill was at least in part the fruit of efforts by several environmental and human rights NGOs. (See below)


46. For a critique of these latter, social impact reporting requirements, see Dhooge, L. (2004), ‘Beyond voluntarism: social disclosure and France’s Nouvelles Regulations Economiques’, Arizona Journal of International and Comparative Law, 41, 441, at 476.

47. The full text of this Bill is accessible at: http://www.foe.co.uk/campaigns/corporates/core/about/bill.html. It was prepared by a campaigning organization called CORE, with the involvement and support of several leading NGOs, including the World Wide Fund for Nature (WWF), Friends of the Earth, Amnesty International and Save the Children. CORE is a coalition organization composed of these NGOs that was specifically established to push for the adoption of this legislation. Information about CORE is accessible at: http://www.foe.co.uk/campaigns/corporates/core

48. The UK Confederation of Business and Industry (CBI) came out against it almost immediately upon publication. See The Guardian, UK newspaper, Thursday, 13 June 2002.

49. As Worthington notes, this does not go as far as the American Law Institute proposal which allows directors to subordinate shareholder interests to wider ethical considerations which may reasonably be regarded as appropriate to the responsible conduct of business. See: Worthington (2001), 445, fn. 39, citing the American Law Institute, Principles of Corporate Governance (1994) at para. 2.01 b(2).

50. In written evidence to the Hampel Committee.
51. For example, S.309(1) of the Companies Act, 1985 provides that ‘the matters to which the directors of a company are to have regard in the performance of their functions include the interests of the company’s employees in general, as well as the interests of its members’. But as Dine notes, ‘the only possible mechanism for enforcing this duty to take account of such interests are the shareholders whose interests may be diametrically opposed to those of employees in certain circumstances’. See Dine, J. (1999), ‘Human Rights and Company Law’, in M. Addo (ed.), Human Rights and the Responsibility of Transnational Corporations, The Hague: Martinus Nijoff, pp. 209–37, at 231.

52. The General Duties of a Director of a Company, 1. Compliance and Loyalty, a., at 29.


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INTRODUCTION

In this chapter I want to consider the relationship of the individual citizen to CSR initiatives and NGO activism. My starting point is the popular disenchantment with traditional political structures that is evident in many national democracies. In that disenchantment I see an opportunity, if not an obligation, for the individual to adopt a position of political and ethical responsibility towards those who find themselves less advantaged and to give effect to that opportunity or obligation, with some caveats, through an interaction with and a subsequent shaping of CSR and NGO activities. The chapter falls into four sections. In the first section I examine the decline of traditional political participation and speculate as to why this might be. In the second I look at ways of inspiring personal political and ethical responsibility. I draw on the work of Iris Marion Young, Paulo Freire and Emmanuel Levinas to construct these ideas of political and ethical obligation. I see it as essential that individual citizens engage and determine the nature of CSR and NGO activity and I explore the reasons for this in the third and fourth sections. There my concern is with the democratic deficit that occurs in both CSR policy and NGO activity if there is mere passive endorsement of these activities and not positive citizen engagement. My theme throughout this chapter is that despite their apparent power, corporations are merely instruments of the will of the wider public in which they are situated. Political commitment at the level of the individual has the potential to change corporate behaviour in respect of human rights and social inequality. Calling time on corporate profits and cheap products does not end the march of development nor will it end all the pain of development but it might make it slightly more palatable.

THE DECLINE OF POLITICAL PARTICIPATION

Voting Patterns

The study of electoral participation and voting patterns at national and local
level is obviously a well established field of study in its own right.¹ My intention here is not to offer any new analysis of this material but rather to draw a basic picture of the state of electoral democracies in terms of their voter participation rates and then offer some reasons as to why this might be. Voter participation in the UK in national elections has, with the occasional blip, been declining steadily since 1950. Participation in local elections has also dropped to a figure below 40 per cent of the electorate (Rallings and Thrasher, 2003). In the same time frame membership of political parties has also declined (Lawson and Merkl, 1988). There is broad agreement² that the pattern evident in the UK is reflected across Western Europe, Japan and North America (Dalton, 1999: 57; Dalton, 2004: 18–20) while in the rest of the world the decline is most marked in the 1990s. Theorists of voting patterns posit a connection between first time eligibility to vote, participation and non-participation; a voter who votes on the first occasion that they are eligible to do so is likely to continue participating, conversely non-participation at this stage is likely to signal a lifetime of disaffection with electoral politics. In the UK there appears to be significant non-participation among the cohort most recently eligible to vote (Franklin, 2004). This would suggest that electoral participation is unlikely to rise in the near future (O’Toole et al., 2003). Pateman opined that participation is key to the existence of a democratic polity (Pateman, 1970: 43). It is a touchstone of legitimacy for democratic governance and also an indicator of the degree of connection and responsibility individuals feel towards their political representation. While there are those who would assert that voting is not as important as we may think it is in terms of individuals expressing their preferences (Morison and Newman, 2001: 177; Morison, 1998), it is the case that a failure to take part in the most accessible form of participation available expresses disenchantment with all the choices available and a rejection of ownership of and responsibility for policies pursued. It is an expression of frustration with the notion of taking collective action to determine the solution to collective problems.

Explanations for Non-Participation

According to Hay there are three ‘core explanations’ offered for the decline of traditional political engagement (Hay, 2007: 39–54). The first is the decline of social capital or the ‘bowling alone’ thesis put forward by Putnam (Putman, 2000).³ In very simple terms Putnam sees a breakdown of traditional ideas of civic engagement. Social bonds have disintegrated and along with them any sense of community giving rise to essentially selfish citizens who fail to recognize the importance of collective action through political participation. Citizens are in this position because they have chosen to move away from the collective pastimes and community values of their forebears. Solitary habits
such as television watching are considered preferable pursuits as compared to ten pin bowling. Putnam’s work has generated an intense debate around whether in fact there is a loosening of associational relationships in older democracies (see, for example Hall, 1999; Norris, 1996, Pattie et al., 2003) and at a more macro level whether his thesis is not creating a sense of loss for a community spirit that was only so warm, welcoming and supportive in remembrance (Sennett, 1998: 143; Delanty, 1998: 33). Of more lasting interest to the argument that I advance in the text that follows is Putnam’s later refinement of his thesis that forms of association are narrower in focus than before rather than simply not existing at all and that social capital is not evenly distributed across society (Putman, 2004). New forms of association around gender, single issue politics and minority religion leave behind those who were previously part of vibrant local churches and trade unions and those left behind are the citizens most in need of social capital.4

In contrast to the bleakness of Putnam’s thesis there is the more optimistic notion of the ‘critical citizen’ advanced by Norris (1999). In common with Putnam, Norris’s critical citizens have also chosen their destiny. They are better educated and more knowledgeable than previous generations of citizens and the form of representational democracy on offer is not sufficiently attractive to engage them. These citizens are economically secure and certain of their position in the world and as a consequence of this they defer less to authority and strong leaders and see more value in self-expression (Inglehart and Abramson, 1994). Of interest here to the position that I present below is the importance given to socio-economic factors in determining the reconception of politics as an individual act of self-expression. It is also the case, in support of Norris’s contention, that there has been an increase in individual pursuit of single issue politics, although there is no evidence to link this rise directly to her proposition. Many NGOs report a rise in membership and the ESRC-funded Citizen Audit findings demonstrate an increasing commitment on behalf of individuals to engage in informal and extra-parliamentary political behaviour around a banner of commodities and consumption practices (Pattie and Syed, 2003). The opportunities for this type of individualized political expression to engage with CSR and NGO activity are something that I examine in the third and fourth sections of this chapter. The difficulty with Norris’s position beyond this is that there are arguably many more citizens finding themselves in a position of insecurity as a result of socio-economic factors such as flexible work practices and the globalization of commodity production.

The third explanation, like Putnam’s, has its roots in social capital but also engages with rational choice theory. According to Franklin the decline in voter participation can be correlated against the lowering of the age of enfranchisement to 18 (Franklin, 2004). The reason for this is that social capital acquired
through network participation is at its lowest in this age group. A habit of non-participation is formed and not broken. The intersection with rational choice theory\(^5\) lies in the assertion that the decision not to vote comes from a perception that as individuals they are not likely to be part of a coalition of voters with similar views. Franklin is concerned not with individual action as rational choice theorists are but with the social context in which an individual exists. Social context is very important to the explanation I offer below for atomized individuals. What is more difficult for Franklin’s position is that by translating social context specifically into recognition of the potential offered by membership of a winning coalition he is moving from rational choice theory to the problems of collective action (Olson, 1965).\(^6\) If the rise in individual participation in informal political expression is to be explained by anything other than a rise in a commitment to individuality then the issue of collective action also has a relevance in that context.

**The Era of the Abandoned Citizen**

A variant on the critical citizens theory is offered by some theorists of modernity, in particular Giddens (Giddens, 1998; Giddens, 1999; Giddens, 2000), and has also proved popular in political explanations of the changing relationship between state and citizen (Blair, 1998). In the Giddensian theory of modernity the structural changes to social and economic life that have followed on from post-Fordism have thrust the individual into the spotlight in a way that is different from the market individualism of the New Right. Access to information through the Internet and greater opportunities for travel have assisted in the breakdown of identity based upon geographical location and tradition.\(^7\) In a globalized market events far from an individual’s actual physical location can have an effect on economic and social existence. As Giddens describes it, these changes go to the root of the ‘constitution of personal identities. The self becomes a reflexive project – individuals cannot rest content with an identity that is simply handed down, inherited, or built on a traditional status. A person’s identity has in large part to be discovered, constructed, and actively sustained’ (Giddens, 1995: 82; see also Beck, 1994: 14). Empowerment strategies produced by government, such as civil and human rights legislation, have produced more active and reflexive citizens than before who seek an individual identity and reject top down systems of power and ideas of collective identity. The world has gone through an age of detraditionalization, societies have become more ethnically diverse and as a result individuals are selecting different moral choices from a menu of choices (Bentley and Halpern, 2003: 82–3). It can no longer be assumed, as the traditional political party structures would, that a particular attitude to private health care would also signal a particular predictable attitude to free trade or crime and
justice issues. As part of this individuation thesis the individual has become, through personal choice, a consumer of services and commodities empowered to embark upon political activities and strategies of their own.

Giddens offers an optimistic reading of the situation that individuals find themselves in. This is not shared by others. Bauman, in particular, offers an account of the depoliticizing effect that the move from a production-based society to a consumer-based society has had (Bauman, 1998: 90). Those who had been outside the enfranchising effect of the work ethic had been previously connected to society through welfarist policies (Clarke, J. et al., 2007: 15). A move from production led society to consumer society leaves those individuals outside traditional political structures. Welfare state institutions that provide opportunities for greater social citizenship produce parliamentary democracies with greater voter turn out. This explains why democracies such as Sweden have not suffered the decline in voter participation that the UK has for example. Greater social citizenship through welfare produces a more positive experience of government (Lister, 2007). The significance of the analysis offered by the more sceptical accounts of the consequences of modernity is that it is not an issue of individual choice as to whether to participate or not, but an issue of fate. As Bauman expresses it ‘individualization is a fate, not a choice . . . to refuse to participate in the individualizing game is emphatically not on the agenda (Bauman, 2001: 46–7). Bauman looks at the creation of global market places and sees market pressures replacing political legislation. Power has been separated from politics and capital has been separated from geographical location (Bauman, 1999: 72–8, 122–3). This last point is, of course, not dissimilar to the one made by Giddens. The difference is that Bauman explicitly recognizes that globalization has both winners and losers. For Bauman an individual can now see their life as a succession of self-contained and self-sustained units.

The power of individual states has no purchase in the world that Bauman describes and its decline is represented by political apathy and a rejection of traditional opportunities for political participation (Bauman, 2004: 51–2). Citizens are abandoned by those structures that validated them as consumers of politics. What is required now are mechanisms that will help to reconstitute us as political consumers of market place activity. Corporate CSR policies and NGO activities are centre stage in any notion of political consumerism. It seems that national governments are prepared to facilitate a transfer into this type of political activity. An unwillingness to develop a regulatory regime at national level that calls corporations to account for environmental degradation and poor employment practices for example and instead encourages all parties to act in a responsible and engaged manner by choosing products that reflect good practice, both masks the futility of regulation and still allows the collection of taxation revenue from corporate profits (Hay, 2007: 85). While
there is nothing particularly new in noting the existence of political consumerism and the possibilities that stem from it (see literature provided by Mitchelletti and Stolle, 2007), there is a certain novelty in seeing it as the response of a disenfranchised polity rather than as the choice of critical citizens. If it is to be the route to re-engagement then it is important to look at models for engagement that might underpin it, because political consumerism that lacks a foundation in some form of considered conviction is simply an act of market citizenship or egoism (Clarke, N. et al., 2007: 242).

For Bauman the slough in which the individual finds her/himself positioned is both a threat and an opportunity (Bauman, 1993: 1–13). At this point the individual is in a position of choice. The individual has the opportunity to be moral in the sense of exercising the choice between good and evil but the difficulty is that the individual will struggle with both the enormity of the responsibility and the consequences of the choice made. While on one level this generates a certain amount of excitement for the individual, on another it causes a good deal of pain and consternation. It places the individual in a position of making choices and decisions in a world in which flexibility and uncertainty are rife. Bauman uses the idea of ‘morality’ rather than ethics. This has significance for my discussion of ethical responsibility below where I use the work of Levinas. Levinas, as I explain below, sounds his life system in terms of ethical responses to the ‘other’ rather than moral responses. For Levinas it is morality that governs (Levinas and Kearney, 1986: 29) and ethics – ‘the extreme sensitivity of one subjectivity to another’ that governs morality (Campbell, 1999: 41). However there is no lack of synergy between Bauman and Levinas based upon their apparent use of different terminology as Bauman’s construction of the ‘moral drive’ or ‘moral impulse’ (Bauman, 1991: 143) is a wholly Levinasian call to move beyond codification of behaviour into an arena in which the ‘other’ is recognized as different to me but existing in a relation to me and demanding that I take responsibility for that relation (Jones, 2003: 227).

For Bauman ethics belongs to modernity, morality is the language of postmodernity (Letiche, 1988: 135). It is clear from the opening forays of Postmodern Ethics that Bauman does not mean that there are no ethical issues to be resolved. Rather what he is seeking to do is to put out the limits of ethics as laws/truths which society/authority has created for the individual to follow and to substitute this for a life in which ‘the other’ rather than ‘the self’ is at the centre and ‘the humanity of man [comes from] responsibility for the other’ (Bauman, 1995: 85). Bauman in using the concept of ‘the other’ in this way is claiming an intellectual heritage from Levinas (Bauman and Tester, 2001: 128–34). Bauman’s ideas of individual responsibility and morality which centre not on rights but on recognition of the ‘other’ feed directly into the models of ethical and political regeneration for the individual that I describe in the next section below.
MODELS FOR ETHICAL AND POLITICAL RESPONSIBILITY

In this section I want to look at how the individual can be energized into engagement with political issues and overcome the state of moral neutrality. I focus on two models of personal action – one essentially ethical and the other essentially political. They are not intended to be competing models or mutually exclusive models – they are models that co-exist through a shared idea of connection – connection with others who find themselves now not citizens in a political sense but lonely citizens of the marketplace of a globalized world. Both are models that offer suggestions for invigorating individual action with a sense of purpose and direction. Young’s work in this area is explicitly grounded in the corporate activity and social responsibility debate which has the advantage of making her work seem more accessible to the issue at hand. I will take first the ethical model that I put forward as an underpinning for individual re-engagement with the woes of the world.

**Ethical Responsibility**

Levinasian ethics in common with all expression of ethical thought that are non-normative – virtue ethics and ethics of care being but two examples – does not include a ‘distribution’ mechanism or to put it another way it does not supply an ‘ought’ as in ‘what ought I to do?’. In fact Levinasian ethics goes further than either virtue ethics or ethics of care away from ‘guidance’ mode by declining to discuss virtues or characteristics or offer anything that could be used as a normative guide for resolving dilemmas (Davis, 1996). Levinasian ethics stands or falls by its ethical exhortation – to take responsibility for the other. How I take responsibility through conduct is something that rests with me – that burdens me. In cases where I act but do not do justice to the other there is no escape from responsibility by blaming others or by citing the demands of society as expressed through law (Vetlessen, 1997: 11). When taking this responsibility there will be numerous occasions when there is no obvious right choice or even consensus on the right choice. The point is that the absence of this pre-ordained choice gives space for the individual to voice their concerns and act upon them.

For Levinas it is crucial that social interactions with other people are underpinned by ethical relations because in the absence of ethical relations the humanity of the other may be ignored. To ignore the humanity of the other is to allow the other to become faceless in a crowd. It is then a small step to be indifferent to the fate of the other. What is required is the establishment of a relationship with the face of the other (Levinas, 1969: 50); the other that is entreatling for consideration in the face of adversity and vulnerability. The
other is everything that I am not, so the other can be poor or rich in comparison to me, clothed when I am not, hungry when I am not, working for 50p a day in a windowless factory when I am not (Morgan, 2007: 62). Totality and Infinity is the central text in the Levinasian canon for ascertaining what is meant by this idea (Berasconi, 2000: 62). The face to face relation, which is not an encounter in the sense of totality, has an ethical significance. The face of the Other is inaccessible from outside and so cannot be reduced to impersonal reason. It is this focus on individuality and recognition that places Levinas and Bauman together in opposition to Kant. For Levinas an encounter with ‘the face of the other’ is not an encounter which requires the appearance or the visibility of the other (Finkielkraut, 1997: 12). Instead Levinas is referring to notions of human fraternity which demand that responsibility for the other is taken, that care for the other is exercised before care of the self (Smart, 1998: 89). He is appealing for the face to be respected and regarded rather than looked at (Shildrick, 2002: 89). When Levinas ties the idea of the Face to a sense it is to hearing rather than seeing (Aarnes, 1997: 20). Levinas’s idea of the human relation is that it takes precedence over both logic and reason. For Levinas a speech situation is the ‘original relation’ (Peperzak et al., 1996: 6). The face of the other is something that is spoken to. When the other is called, spoken to or listened to the other is not being contemplated but conversed with. The obligation to the other can not be effaced (Levinas, 1988: 58). As with the idea of face the question of proximity for Levinas is not one of spatial relationship or spatial environment; ‘the proximity of beings of flesh and blood is not their presence in flesh and bone’ (Levinas, 1981: 78). Proximity instead is the relationship with the other which ‘cannot be reduced to any modality of distance or geometrical contiguity, nor to the simple “representation” of a neighbour; it is already an assignation . . . an obligation’ (Levinas, 1981: 100–1). This takes us back to Bauman’s observation of the choice that an individual has: to be moral or not.

Levinas’s call to infinite responsibility may produce conflicting choices. Levinas recognizes this difficulty with his ethical imperative when he refers to the ‘third’ and the fact that once proximity extends beyond just one other to encompass the third, in his terms another neighbour and a neighbour of the other, distinguishing between the two is impossible (Levinas, 1981: 157). Infinite responsibility for the other, including the third, is limited in Levinas’s calculation by justice (Douzinas and Warrington, 1994: 178) because ‘in . . . justice, I and the Other can be compared as contemporaries or peers . . . At the level of justice I and the Other are co-citizens of a common polis’ (Critchley, 1992: 232). Within justice Levinas includes not only the rule of law but also notions of co-existence, contemporaneousness and co-presence. The idea of law is not a developed concept within Levinas’s thought. What is much more important to him is the ethical inspiration that underlies law. Law in the form
of legislation and institutions to be founded in justice needs to be based in the abandonment of self-interest. Then legislation and institutions can help to build relationships with others (Manderson, 2006: 183–93). Justice embodies an acknowledgement of the ‘personal nature of persons’, ‘human dignity’ and ‘human personality’ (Levinas, 1990: 105–6).

Political Responsibility

Iris Marion Young constructs a similar narrative in that it depends on social connection which she describes as a model of political responsibility (Young, 2004; Young, 2006). The labels ‘political’ and ‘responsibility’ need definitions as they are both being used in a rather novel way.15 Young’s idea of the political is a broad one that exceeds government and statehood and becomes the act of reorganizing or reordering some aspect of collective life and persuading others to do the same (Young, 2006: 123). The definition of responsibility is one that is grounded not in fault, blame or liability or based upon some clarion call to care in a moral sense about people less well off than ourselves in a faraway country but on the act of connection; by using products that are produced in a way that involves environmental degradation or sweated labour for example we are connected to but not responsible for those activities (Young, 2003: 40). She uses the anti-sweatshop movement in the US (Howard, 2007: 31) to illustrate her idea as activists behind this movement have targeted institutions, such as universities, which bulk buy clothing made in this way and put their own branding on it as being responsible for those conditions even though they are recognized as not being directly to blame for them. Political responsibility is forward looking in that it leaves blame and fault16 in the past and centres instead on a recognition that injustice is not acceptable. The grounding of this model in ‘connection’ and not ‘fault’ is particularly useful in the context of corporate activity in that it renders the out-sourcing argument or the ‘no knowledge’ argument inapplicable. Used in this way it has an advantage over the Levinasian model which cannot be applied to corporations as institutions.

Young’s model, as one would expect of a model grounded in political rather than ethical theory, is outcome centred; it asks that outcomes be sought which try to address and alter injustice. To take up responsibility for injustice an individual needs to reflect on, and persuade others to reflect on, structural inequalities and the causes of that inequality and then be prepared to think through how means can be designed to change that inequality. Young acknowledges that responsibility may be discharged through engagement with the state but is more in favour of the promulgation of a public discourse at the level of individuals. Political responsibility for her translates into a model of political action based around the parameters of connection, power and privilege.
Connection involves working to remove the anonymity of inequality by asking questions of importers and retailers for example about the sourcing and manufacture of their products. The power to challenge inequality varies depending on one’s location in the process but even end of chain consumers have the power to make corporations change their practices if they choose to use it. The notion of privilege in Young’s model is more difficult as those who benefit from cheap products may not be in a position to afford others available at a higher price. This of course supposes that higher price goods are more likely to be ‘clean’ which is not necessarily the most accurate of assumptions. In any case Young and Levinas are both promoting awareness and acknowledgement of the other not self-denial of necessary goods.

Conscientization

Young’s model of political action aims to move relationships from the unconscious to the conscious using her idea of connection and then shape those relationships so that individuals recognize their responsibility (Young, 2004: 371). Levinas is advocating something similar by drawing attention to the need to respect and regard the face of the other rather than simply look at it. What brings these two models together is this idea of progression from non-recognition of responsibility to recognition of responsibility. In common they have this idea of moving from the unconscious to the conscious. The work of Paulo Freire provides a three-stage description of the process of conscientization or the awakening of critical consciousness (Freire, 1973: 19). Freire’s work is grounded in radical pedagogy and, although his work is widely applied in many other disciplines, this influences the way in which he describes the stages. Much of Freire’s work is expressed in terms of how knowledge is transferred and acquired and is written in opposition to what would be, for most of us, the traditional model of education through knowledge banking.

The first stage involves a very limited understanding of reality. In the context of Freire’s work this might mean that an individual knows what is required for them to survive. The perception is that the world is static and cannot be changed. The second stage involves grasping that the world is a more complex place and that there are many other issues other than mere survival but there is no understanding of causal relations. In the third stage the individual has a much deeper knowledge of reality which requires an understanding of issues, their causes and effects and a willingness to revise knowledge. At the third stage the individual has achieved critical conscientization; the ability to analyse, problematize (pose questions), and affect the sociopolitical, economic, and cultural realities that shape their lives. Conscientization is part of a dialogical process that Freire considers can only take place in ‘authentically democratic regimes’ (Mackie, 1980: 96). Causal reality has been grasped
(Friere, 1973: 44) and individuals as a result are in a position to transform situations rather than simply recognize and adapt to them (Kenway and Modra, 1992: 156). As McLaren puts it ‘Freirean pedagogy is . . . about the struggle for critical consciousness read against the powerful dialectical contradictions of capitalism that exist between productive labor and capital and between production and exchange and their historical linkage and development’ (McLaren, 2001: 127).

**CSR AND DEMOCRACY**

**The Problem of Passivity**

There is no doubt that corporations are aware that anti-corporate protests are regarded as a legitimate form of protest. Their response is corporate social responsibility policies and initiatives (Himmelstein, 1997). This they see as a way of responding to concerns and they use it both as a marketing tool and a way of holding off regulatory intervention (Higgins and Tadajewski, 2002). My point in this section is that to be a passive political consumer of CSR policies is not sufficient to hold corporations accountable and influence their behaviour and more importantly it is a rejection of the opportunity to be moral in Bauman’s terms, a rejection of the other in Levinas’s terms and a rejection of Young’s conception of responsibility. It is the case that there is growing consumer activism and in many ways the achievements of consumer activism are considerable (Klein et al., 2002). One obvious example is Nestlé. From 1974 to 1984 consumers were urged by activists to boycott Nestlé products as a demonstration of their feeling against Nestlé’s practice of distributing Infant Milk Formula in the developing world. This boycott was re-introduced in 1988 due to Nestlé’s alleged non-compliance with the World Health Organization Code on the Advertising of Milk Substitute. Individuals can participate in the debate around the boycott or consult lists of Nestlé products using information posted on the Internet. The availability of global information, the ease of global communications and the decline in the importance of physical place and presence have made all of this very much easier but as I explain below these same factors also incline individuals towards passivity.

The number of consumers involved in consumer activism is relatively small. It is estimated that in the UK there is a market share of 40 per cent of total sales for some ‘ethical’ products but that the collective market share for ‘ethical’ products is less than 2 per cent (Ethical Purchasing Index, 2002). More importantly to this can be added the wealth of empirical evidence that suggests no matter what the protestations of consumers around so called ethical consumption these protestations do not translate into actual purchase (Belk
et al., 2005). Discussion of this sort of consumer activism misses the point in that it is only through active engagement using the models that I have described above that individuals can re-engage with politics. Individual action is a way of repoliticizing society through consumption. As engaged consumers, individuals can become reunited with politics rather than mere passive consumers of politics. New technologies of communication and information repository, while they can inform individuals and inspire them to overcome moral neutrality, also create massive asymmetries of information between the corporate sector and individuals. Information from corporations is subsumed within the architecture of corporate reporting (Crowther, 2000).

The Democratic Deficit

The asymmetry of information between individual and corporation in the context of CSR is crucial to the issue of the democratic deficit that surrounds corporate activity. There is an argument, usually attributed to Milton Friedman (1962) that corporations are essentially private actors, albeit often large and powerful ones, and that as such any contribution they make to the wider society through corporate social responsibility is a voluntary one and should be welcomed as a gift made over and above the requirements of the taxation regime. A rather different rationale, which ties together the idea of the corporation as a private actor with the idea of the corporation as a committed donor of money, is that it is essential for corporations to support the non-profit sector to prevent greater state regulation of corporate activity. One way of controlling public spending and ensuring minimal government interference is for the corporate sector to bolster other organizations capable of providing some of these functions (Eells, 1956: 104, 136). The idea of corporations as private actors is a contentious one. There are many arguments that can be marshalled to the effect that at the very least there is a strong public dimension to their existence. Not least of course that corporations, which considered themselves the buffer between the retention of private interests and a growing state, were unelected and thus, unlike Government, outside the democratic process (Reich, 1998: 13).

CSR is a competitive sector within corporate activity (Smith, 1994). As the failure of New Right regimes demonstrates competition of itself does not create sustainable progress and development, hence the present stress on the need for competitiveness at a global level to embrace local co-operation and to pay attention to on-going skills training and adoption of new technology. The creation of a competitive structure out of social responsibility and involvement is not likely to result in successful and sustainable development. CSR policies are used by the corporate sector to support first and foremost profit-driven corporate aims. ‘Enlightened self-interest’ is the best way to
describe this type of intervention. The theory behind it is in part one of increasing the available ‘spend’ of potential customers and in part about product marketing. Corporate donations to projects which improve living standards generate an immediate kickback to the corporation in terms of product demand. However this type of intervention may do nothing to deliver long-term benefit across a wider spectrum of society. Most large corporations now have a community affairs department or at least a community affairs officer. Ideas of competition and marketing are being pushed into the voluntary sector in the form of corporate demands for a ‘strong brand image’. This sort of pressure will create divisions of worthiness between voluntary sector concerns based on what causes corporations think will most appeal to potential customers (King, 2006). This can be referred to colloquially as the appeal of fluffy animals and small children in comparison with inner city concerns and perhaps the problems of some minority groups (Commission on the Future of the Voluntary Sector, 1996, para. 2.5.7). Corporations through CSR policies, cause-related marketing activities, endowment of charitable foundations and straightforward cash donations to communities are able to influence wealth distribution and social policy initiatives and delivery while not being accountable through the democratic process. If we extend the list of CSR activities into developing host countries then we have not just a democratic deficit to contend with but also the possible creation of a particular type of civil society (Vogel, 2006).

Individual action that is inspired by the political and ethical models that I suggest above can challenge the power of corporate actors by questioning the hierarchical nature of CSR interventions. Corporations are anxious to use CSR policies to legitimate themselves within society. This creates an opportunity for relationships to be built in which individuals question corporate philanthropic and marketing interventions and force corporations as a matter of strategy to engage in critical discussion (Silver, 2001). One such strategy is supplied by socially responsible investment (SRI). In the US the total value of all assets consciously invested as ‘responsible investments’ is $2.29 trillion. In the UK the figure is put at in excess of £4.5 billion for consumer investment alone, that is, ignoring the activities of institutional investors, and can be compared with a figure of £500 million in 1995 (EIRIS, 2000). Another might be shareholder activism. If we move away from the legal notion of shareholding to consider the effect of the marketization of pension provision, then, in the UK the move away from pension provision through the welfare state to occupational pension has created a new class of investor albeit one that is at one step removed from the market – the employee. Pension fund trustees in the UK are estimated to hold on behalf of employees £800 billion of assets in both defined contribution and defined benefit schemes or 16 per cent of institutional investment. From 3 July 2000 occupational pension funds in the UK
have been obliged to disclose in their statements of investment principles ‘the extent to which, if at all, social, environmental or ethical considerations are taken into account in the selection, retention and realization of investments’.24 ‘Just Pensions’ an offshoot of the UK Social Investment Forum predict that this will have a considerable impact on SRI in the next few years.

Both of these interventions require individuals to choose between products, to evaluate claims made by corporations and ultimately to take responsibility for the fate of others when they make choices. An interrogation of so-called ‘codes of conduct’ presented by individual industries, individual corporations or global actors such as the UN25 can have the same effect. To ignore the chance for interrogation and to engage instead in unthinking and uncritical endorsement of ‘green’ ‘clean’ and ‘fair’ product claims and marketing strategies is to ignore the opportunity to achieve social change. The thrust of conscientization is that it goes beyond the language of critique and explanation and moves into the dynamics of achieving change (Torres, 1994: 442). The interrogation I suggest may well result in difficult choices for the individual between equally deserving causes but to be in a position to make this choice is to be a politicized individual.

NGOS AND INDIVIDUAL ACTION

At a functional level NGO membership by the individual can be seen as the ideal way to overcome the collective action problem. By joining an NGO such as Amnesty or Greenpeace and so supporting it financially an individual could argue that they had done a positive act rather than remained passive. At a deeper level I would suggest that there is in fact little difference between passive purchasing of products and endorsement of NGO activity through mere membership. Membership is passive unless it is accompanied by the sort of critique and interrogation I advocate above for CSR policies. While this is well rehearsed for CSR policies it is less so for NGOs – their innate goodness has made that sort of enquiry rather problematic. In fact there is a growing critique of NGOs based upon diverse ideas such as capture by the corporate sector, lack of accountability, lack of adversarial engagement which is beginning to gain currency. Individual ethical and political responsibility demands that this critique is engaged with. In 1997 William Fisher produced a very influential piece (Fisher, 1997) reprising the role that had been assigned to NGOs at events like the Rio Conference in 1992 (Little, 1995). Then the issue for NGOs was whether they could gain acceptance from the development industry. They were idolized as everything governments were not – flexible, responsive and not over burdened with bureaucracy. Since 1997 however there has been something of a volte face in this area. The core role of NGOs has
moved from an advocacy of humanitarian issues to one of participating in policy development and implementation and service provision. Activities such as formal and informal linkages with each other and the development of strategic partnerships with governments and their agencies and the corporate sector which might be seen as the natural progression of maturing organizations (Shaw, 1992) are instead viewed with suspicion. NGOs carry the scars of years of interacting with neo-liberal economic reforms. They have joined the rush for ‘efficiency’ through creating technical and bureaucratic structures rather than continuing to debate values (Holloway cited in Pearce, 2000). They have become increasingly similar to the enemy rather than sustaining a radical alternative (Zadek, 2001). What happens then is that there is a re-flowering of groups with more grassroots links and less structure. If they survive and mature then they themselves become subject to the same attack (Eden, 2004: 604).

The development literature saw NGOs as evidencing the flowering of civil society which itself was the essential ‘harbinger of political and economic reforms in the third world’ (Rajagopal, 2003: 259), the solution for everything from conflict to establishing democracy (Stewart, 1997: 16). It was the ultimate tool of anti-statism (Hadenius and Uggla, 1996). Civil society is now viewed with more caution. It is caught between the jaws of individualism and communitarianism. Composed of individuals with multiple identities and interests it is seen as a concept that is riven with different ideas as to composition and agenda (Petras and Velymeyer, 2001: 129–30). Are NGOs for example anymore than the mouthpiece of those members of ‘civil society’ who have access to education, information and computers? If this is the case then they merely serve to deepen the digital divide.

Legitimacy and Accountability

Once these questions are asked of NGOs then the floodgates open with regard to questions about their legitimacy and accountability. In respect of legitimacy the key question is one of authority and representation (Lister, 2003) in both procedural and substantive fields. The more established NGOs become the more the structures they adapt become subjected to the same criticisms that are made of governments (Collingwood and Logister, 2005) and to a lesser extent corporations in this regard. Who gives NGOs the authority to act? The level of democratic deficit within NGOs depends to a certain extent on the model of legitimacy that is used but whatever the model it is hard to be certain that the individuals NGOs make claims on behalf of have been consulted, have participated in agenda-setting and are at ease with being represented in this way (Chandhoke, 2002: 46–7). In this regard NGOs are in a weaker position than corporations which can point to validation through the market and compliance
with formal regulation (Kovach, 2006: 199). This is an argument which can easily be dismissed by pointing to notions of creative compliance and non-compliance within the corporate sector but it does have an initial attraction. Criticisms at a level below this are concerned with the construction of claims based on unverifiable data and the aggregation of diverse individuals into ‘interest groups’. There are no easy answers to any of the questions raised about NGOs. Demands for greater accountability cannot be met by the provision of a simple matrix or feedback loop. Instead what occurs is another set of questions about accountability to whom, for what and how? The crisis that NGOs are suffering is in part attributable to the general reconfiguring of global patterns of governance in a post-Westphalian world (Clark, 2003), however this is sufficient to provoke the individual liberal conscience into wondering what else can be done.

CONCLUSION

In this chapter I have tried to build on my own previous work in relation to the CSR activities of corporations and the motives behind their actions (Wheeler, 2001) by setting out the parameters within which individuals in the twenty-first century might interact with CSR endeavours. I see this as a way in which individuals who are currently disenchanted with the political process might re-engage and take positions of individual ethical and political responsibility towards others. I acknowledge that, in addition to the problem of collective action to which I have alluded above and to which on a level of functionality I see no real answer to, reliance on individual engagement can be viewed as a weakening of existing collective structures such as organized labour. It risks creating divisions within activism and risks reinforcing existing divisions (Chang and Wong, 2005) such as the digital divide and income inequalities. My answer lies I think in the fact that what I am suggesting is not an alternative or replacement methodology for protest but a methodology to embrace those who are currently outside or on the edge of civil society and to inspire them to protest.

NOTES


3. Putnam’s definition of social capital, ‘features of social organizations, such as trust, norms, and networks, that can improve the efficiency of society by facilitating co-ordinated actions’ is to be found in his earlier work Making Democracy Work: Civic Traditions in Modern Italy (1993) Princeton, NJ: Princeton, University Press, at p.167.


5. For a review of rational choice theory as it applies to voting behaviour see Dowding, K. (2005), ‘Is it rational to vote? Five types of answer and a suggestion’, BJPIR 7, 442.


7. The destabilizing of traditional identity is very much a Western phenomenon. In other places there has been a retreat into local identity based often on the restatement of religious or ethnic identities, for example the positions in Iran and Iraq. In other places the break-up of the Eastern Block has encouraged a rise of nationalistic feeling again founded on religious and ethnic identity. See Jones, M. (1998), ‘Blade runner capitalism, the transnational corporation and commodification’, Cultural Dynamics 10, 287 at p. 291 and the references contained therein.

8. For example Giddens suggests that equality and freedom will both lead to autonomy but they could be seen as pulling in opposite directions, The Third Way p. 37. For a discussion of the rise of issue competition see Green-Pedersen, C. (2007), ‘The growing importance of issue competition in Western Europe: the changing nature of party competition in Western Europe’, Political Studies 55, 607.


10. Whether national governments have intervened to create global market places rather than having global market places thrust upon them by the activities of multinational enterprise is a matter of some debate, see Callinicos, A. (2007), Against the Third Way, Cambridge: Polity Cambridge, pp. 20–8.

11. Bauman is offering a continuation here from his earlier work Legislators and Interpreters: On Modernity, Post-Modernity and Intellectuals (1987) Cambridge: Polity. Polity, There, Bauman points to the idea of the declining importance of ‘legislators’ or experts who set rules which individuals blindly perform in accordance with. They are to be replaced by ‘interpreters’ who set out a range of explanations and values that may help the individual to come to their choice.


13. The quote is from Levinas.

14. Although this point is also taken implicitly in other places.

15. Young’s ideas for this are drawn from a wide range of sources but perhaps the most influential is the work of Hannah Arendt, see above (2001) at pp. 375–7.


17. This is a gloss on the points made in the now iconic volume by David Caplovitz, The Poor Pay More (1967) London: Collier Macmillan. However the albeit small scale empirical evidence available would suggest that income is not necessarily a determinant of participation in political purchasing, see Stolle, D., Hooghe, M. and Micheletti, M. (2005), ‘Politics
in the supermarket: political consumerism as a form of political participation’, *IPSR* 26, 245 at p. 260.

18. Freire did apply the political thought that underlay his pedagogy more widely towards the end of his life. He connected critical consciousness to the need to create solidarity to oppose the ‘neoliberal discourse spreading through the world’ and to counteract the fatalism that accompanied explanations of problems such as hunger and unemployment at the end of the twentieth century, see Rossatto, C. A. (2005), *Engaging Paulo Freire’s Pedagogy of Possibility*, Oxford: Rowman and Littlefield, at pp. 13–14. This part of the book is the transcript of an interview that its author conducted with Freire shortly before his death in 1997.


20. Under the present political regime a public dimension to corporate existence is as likely to be achieved through ‘moral regulation’ as legislative intervention, see the discussion provided by Wilson, G. (2000), ‘Business, state and community: “responsible risk takers”, New Labour and the governance of corporate business’, *JLS* 27, 151. At n. 64 therein the author also references the conventional theoretical material that is usually put forward in the public/private debate on corporate status.

21. See the summary of the corporate positions on corporate community investment in *Corporate Citizen*, Autumn 1997, p. 5.


24. Similar regulation has been adopted in Australia, France, Germany and Belgium.

25. An example would be the activities of Coca-Cola – it may have joined the UN Global Compact in March 2006 and so given every indication that it endorsed the Compact’s ten core principles around *inter alia* workplace standards, human rights and environmental protection but this does not stop persistent allegations of breaches of these same standards in Colombia and in Kerala, India, see www.columbianaactionnetwork.org


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## Index

Aarhus Convention (1998) 194  
Aarnes, A. 231  
Abramson, P. 226  
AccountAbility 25  
Action Aid 107  
Adams, C. 161  
Addo, M. 147  
advertising industry self-regulation 179  
Advertising Standards Authority 179  
Agenda 21 15  
Albert, M. 123  
Alfredsson, G. 154  
Alien Tort Claims Act (1789) 19, 28, 102  
Allott, P. 65, 77  
Alternative Trading Organizations 161  
Amnesty International 75, 209  
Annan, K. 14  
apartheid South Africa 29  
ARESE 208  
Australia, Corporate Code of Conduct Bill 207–8  
Axelrod, R. 46  
Ayres, I. 50, 172  
Baecker, D. 131  
Bagott, R. 179  
Bainbridge, S.M. 130  
Bakan, J. 87  
Baker Report on BP corporate safety culture 203–204, 219  
Baldwin, R. 171  
Baldwin, T. 126  
Bähl, K. 126  
base of the pyramid business development 17–18  
Bass, S. 16  
Baue, W. 208  
Bauman, Z. 228, 229  
Baumol, W.J. 55  
Baums, T. 117, 123  
Beckert, J. 117  
Becket, Margaret 94  
Belk, R. 234  
Beloe, S. 186  
Bendell, J. 88  
Benson, B.L. 47  
Bentley, T. 227  
Berasconi, R. 231  
Berle, A.A. 41  
Bernstein, L. 173  
Bernstein, M.H. 174  
Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies (ICHR) 167  
Bigg, T. 23  
Birds, J. 96  
Black, J. 49, 50, 171, 177  
Blair, Tony 58, 227  
Blankenburg, S. 95  
Blecher, M. 149–50  
BNFL (British Nuclear Fuels) 197–8  
bottom of the pyramid business development 17–18  
boundaries of corporate responsibility 24–6  
BP 91  
corporate safety culture 219  
Texas City oil refinery explosion 203–4  
Braithwaite, J. 50, 172  
Branson, D. 102  
Bratton, W.W. 131  
Brazil 90  
Brennan, F. 212  
British American Tobacco 90  
British Herpetological Society 197  
British Nuclear Fuels (BNFL) 197–8  
Brown, Gordon 21  
Buchanan, J.M. 47  
business core competences 25–6, 34  
business lawyers 31–3
business/state regulatory partnership 56–7
Buxbaum, R.H. 128

Cadbury Committee 212
Café Direct 160
Cameron, David 58
Campbell, D. 229
Cape plc 19
Carroll, A.B. 91
Caruso, D. 126
Cashore, B. 180
Cassese, A. 65
Caterpillar 86
Caux Round Table 75
Cave, M. 171
CBI (Confederation of British Industries) 212
Centros 125
Cerin, P. 205
certification schemes 179, 181
Fairtrade movement 161–3
Chandhoke, N. 238
Chandler, D. 187, 209, 210
Chang, D. 239
Charter on the Economic Rights and Duties of States 68
Cheffins, B.R. 128
chemical industry self-regulation 180
Chemical Safety and Hazard Investigation Board (CSB) 204
Christian Aid 75, 90, 97, 170, 209
Citizen Audit 226
citizens 52–3

conscientization 233–4, 237
consumer activism 234–5
ethical responsibility 230–32
and international law 64–5
and non-governmental organizations 237–9
political participation
abandoned citizen 227–9
non-participation 225–7
voting patterns 224–5
political responsibility 232–3
citizenship 51–4
civil liability 19
civil society 58, 149–50, 238
Clapham, A. 65
Clarke, I. 239
Clarke, J. 228
Clarke, N. 229
codetermination model of governance 114, 118–20, 123, 128
Coca Cola 86, 90, 241
codes of conduct 171, 178–9, 237
Coleman, J. 147
collective corporate social responsibility 44–6
Collingwood, V. 238
Collins, J. 42
commercial law 145–6
Commission on Human Rights 71–2, 89, 154
Commission on the Future of the Voluntary Sector 236
Committee on Economic, Social and Cultural Rights (CESCR) 154–5, 159
Communication on Implementing Community Environmental Law (EC) 201
community-based control regimes 173
Companies Act (1985) 94
Companies Act (2006) 22, 43, 210–16
Companies, International Trade and Human Rights (Dine) 147
company directors 54–7, 212–13, 214
company law 9–10, 128
comparative perspectives 115–20
European Union 124–7
as facilitative system 93–4
limited liability 95–6
and shareholder primacy 94–5
comparative advantage theory 152
competition-based control regimes 173
compliance 97, 99, 179–80, 181–2
concession theory 147–8
Confederation of British Industries (CBI) 212

conscientization 233–4, 237
constitutionalism 50
consumer activism 234–5
consumer groups 50
Convention on Biological Diversity (1992) 191
Convention on Civil Liability for Oil Pollution Damage (1969) 65
core competences 25–6, 34
Index

249

corporate citizenship 44, 51–2, 53, 59, 103
corporate democracy 204
corporate environmental reporting requirements 205–7
Australian Corporate Code of Conduct Bill 207–8
definition 205
EC Communication on corporate social responsibility 208–9
French law, nouvelles régulation économiques (NRE) (2001) 208
UK Companies Act (2006) 210–16
UK private member’s bill on corporate responsibility 209–10
corporate environmental responsibility and corporate social responsibility 186–9
and environmental law 202–5
corporate governance 114–16
definitions 116–20
corporate law 9–10, 128
comparative perspectives 115–20
European Union 124–7
as facilitative system 93–4
limited liability 95–6
and shareholder primacy 94–5
corporate liability for natural environmental damage 199–201
corporate power 88, 103–4, 105
corporate responsibility 15
Corporate Responsibility Coalition (CORE) 209–10
corporate social responsibility 40–44, 85–6
current initiatives 89
definitions 9–12, 91–3
and democracy 234–5
limits of 89–91
company law 93–6
definition 91–3
limited liability 95–6
voluntary initiatives 96–100
reasons for 87–8
‘Corporate Social Responsibility: A Business Contribution to Sustainable Development’ (EC) 208–9
Corporate Stakeholder Responsibility 187
Corporation 2020 10, 34
Corporations Act (2001), Australia 207
Cosmas, Advocate General 196
Courville, S. 181
Craven, M. 149
Critchley, S. 231
critical citizens 226
Crooks, E. 203, 204
Crowther, D. 235
CSR at a Crossroads project 11
Dalton, R. 225
Dammann, J. 124
Davies, P.G.G. 194
Davis, C. 230
Davis, I. 23
Deakin, S. 116, 117, 131
Declaration on Social Progress and Development (1969) 153
Declaration on the Right to Development (1986) 153–4
Delanty, G. 226
democracy 150
and corporate social responsibility 234–5
democratic deficit 235–7
Department of the Environment, Fisheries and Rural Affairs (DEFRA) 188
Department of Trade and Industry (DTI) 209
Company Law Review Steering Group (CLRSG) 214–15
Development and Human Rights: the Role of the World Bank (World Bank) 156
Dewey, J. 57, 133
Dine, J. 100, 212
Directive of Unfair Commercial Practices (EC) 176
directors 54–7, 212–13, 214
Doane, D. 98
Doha Development Round 156
domestic legislation, non-compliance with 29
Dommen, C. 151
Dorf, M. 174
Dottinga, H.M. 192
Douzinas, C. 231
Dow Chemical 86
Drax Group 44
drivers of corporate social responsibility 11–12
DTI see Department of Trade and Industry
Durkheim, É. 49

Earth Summit 15
ECHR (European Convention on Human Rights) 192
ECJ (European Court of Justice)
Greenpeace (International) case 195–6
Jégo-Quéré & Cie SA v Commission 196
standing of environmental NGOs 195–6
UPA v Council case 196
Eco-Labelling Scheme 50
Eco-Management and Audit Scheme 50
Economist 115
ECtHR (European Court of Human Rights) 192
Eden, S. 238
Eells, R. 235
Eide, A. 154
Eidenmüller, H. 128
EIRIS 236
Eisner, M.A. 172
Elferink, A.G.O. 192
Elkington, J. 186, 205–6
employee involvement in governance 113, 114–15, 117–20
enabling environment 11–12, 18, 23, 87
English law
Greenpeace (No. 2) case 195, 197–8
Pergau Dam case 198
R v Poole BC ex p Beebee and others 197
R v Secretary of State for Foreign Affairs ex p World Development Movement Ltd 195, 198
R v Secretary of State for the Environment ex p Rose Theatre Trust Co Ltd 197
R v Somerset County Council and ARC Southern Ltd, ex p Dixon 198

enlightened self-interest 235–6
enlightened shareholder value approach to company law 21–2
Enterprise Solutions to Poverty (Shell Foundation) 26
environment as stakeholder 187–8, 204, 213
environmental damage 199–201
environmental health issues 192
environmental law
constituency and representational problems 193
and corporate environmental responsibility 202–5
corporate liability for natural environmental damage 199–201
definitional problems 189–93
representational problems 193
standing issues for environmental NGOs and others 194–5
English courts 196–9
European Court of Justice 195–6
environmental non-governmental organizations (NGOs) 213
legal standing issues 194–5
standing before English courts 196–9
standing before European Court of Justice 195–6
see also non-governmental organizations (NGOs)
environmental rights 192
Equator Principles 176, 181
Esty, D.C. 211
Ethical Purchasing Index 234
ethical responsibility 230–32
ethical values 29, 30
European Alliance 99
European Commission (EC) 99
corporate social responsibility 92
‘Corporate Social Responsibility: A Business Contribution to Sustainable Development’ 208–9
Directive of Unfair Commercial Practices 176
environmental law, standing issues for interested parties 194
environmental liability scheme 201
European Committee for Standardization 45
European Company 122
European Convention on Human Rights (ECHR) 192
European Corporate Governance Forum 127
European Court of Human Rights (ECtHR) 192
Fadeyeva v. Russia 192
European Court of Justice (ECJ) Greenpeace (International) case 195–6
Jégo-Quéré & Cie SA v Commission 196
standing of environmental NGOs 195–6
UPA v Council case 196
European Takeover Directive 122
European Union 64
corporate law 124–7
Eco-Labelling Scheme 50
Varieties of Capitalism 122, 133
European works councils (EWCs) 118
Everson, M. 50
Fadeyeva v. Russia 192
Fairtrade Foundation 162
Fairtrade labelling organization (FLO) 161–2
Fairtrade movement 145, 146, 149, 151, 160–61
certification 161–3
financial markets 47, 48
Financial Reporting Council 212
Finch, V. 212
Finkielkraut, A. 231
Fisher, W. 237
FLO (Fairtrade labelling organization) 161–2
Forest Stewardship Council 179–80
Foster, N.H.D. 211
foundations for corporate social responsibility 148–51
Fox, T. 12, 20, 28
France, corporate environmental reporting requirements 208
Frank, Barney 204
Frankental, P. 170
Franklin, M. 225, 226–7
Fratczak, I. 206
free trade 151–3
Freeman, J. 49, 52
Freeman, M. 150
Freeman, R.E. 187
Freire, P. 233–4
Friedman, M. 9, 40, 235
Friedmann, W. 64
Friends of the Earth 90, 97, 195, 209
G77 group 66–7
GATT 156
Geradin, D. 211
Germany co-determination model 115, 118–20, 128
corporate law reform 121–4
Corporate Governance Code 123–4
Social Model 120
supervisory boards 118
works councils 118
Gerstenberg, O. 50
Giddens, A. 227, 228
Global Compact 14, 68–71, 76, 100, 101, 105–6, 157
Global Exchange 86, 108
globalization 13–14, 53–4, 100–103, 211
and concession theory 148
and power 103–8
and state regulation 102–3
good corporate governance 127
good public governance 22–4
Goodpaster, K. 147
governance regimes 172–3
Goyer, P.R. 206
Grabosky, P. 172
Gray, R. 187
Greenbury Committee 212
Greening the Corporation (Thayer Robbins) 189
Greenpeace 195
Greenpeace International 196
Greenpeace (International) case 195–6
Greenpeace (No. 2) case 195, 197–8
Greenpeace (UK) 197–8
Guidelines for Multinational Enterprises (OECD) 19, 30, 31, 75, 100–101
Gunningham, N. 172, 181
Guzman, A.T. 102

Habermas, J. 51
Hadenius, A. 238
Hall, P. 122
Halpern, D. 227
Hamel, G. 132
Hammond, A. 17
Hampel Committee on Corporate Governance 212–13, 214
Hancké, B. 118, 119
Hansmann, H. 117, 128, 131
Harlow, C. 195
Harrison, L. 179
Harwell Wells, C.A. 94
Haufler, V. 98
Hawkins, K. 194
Hay, C. 225, 228
Heineneke effect 171
Herrmann, K.K. 98, 99, 100, 102, 107
heterarchical processes 48–9, 50–51, 52
Hidden Persuaders (Packard) 179
hierarchy 46–51, 54, 59
Higgins, M. 234
Himmelstein, J. 234
Hohnen, P. 90, 91
Holder, A. 98
Hood, C. 173
Hopkins, M. 187, 188
Höpner, M. 118
Hopt, K.J. 115
Hostages of Each Other (Rees) 179
Howard, A. 232
human environmental health issues 192
human resources model of governance 114–15
human rights 28–9, 149, 150, 153–4, 159–60
as institution building 149–51
and international commercial law
international financial institutions 155–6, 157–8
multinational corporations 156–7, 158–9
trade-related obligations 153–5
and transnational corporations 64–5

regulation, early attempts 66–8
UN, recent developments 68–76
human rights abuses 75–6, 86
Human Rights Council 77, 104, 106, 108
Human Rights Watch 75
Hume, D. 46
Hunt, P. 158

IFAT (International Fair Trade Association) 161–2
ILO (International Labour Organization) 66, 156, 157
core labour standards 97
Declaration on Fundamental Principles and Rights at Work 30, 69
Tripartite Declaration on Principles Concerning Multinational Enterprises and Social Policy 66, 67, 100, 166–7
in-house lawyers 32–3
individual citizens 52–3
conscientization 233–4, 237
consumer activism 234–5
ethical responsibility 230–32
and international law 64–5
and non-governmental organizations 237–9
political participation
abandoned citizen 227–9
non-participation 225–7
voting patterns 224–5
political responsibility 232–3

Inglehart, R. 226
Insight Investment 30
Inspire Art 125
Institute of Nuclear Power Operations (INPO) 180
inter-governmental organizations (IGOs) 64
International Chamber of Commerce 75
international commercial law 145–6
and human rights
international financial institutions 155–6, 157–8
multinational corporations 156–7, 158–9
International Covenant on Economic and Social and Cultural Rights 159
International Fair Trade Association (IFAT) 161–2
international financial institutions (IFIs)
commercial law and human rights 155–6, 157–8
human rights obligations 157–8
international human rights framework 153
International Labour Organization (ILO) 66, 156, 157
core labour standards 97
Declaration on Fundamental Principles and Rights at Work 30, 69
Tripartite Declaration on Principles Concerning Multinational Enterprises and Social Policy 66, 67, 100, 166–7
International Labour Rights Fund (ILRF) 96
international law 64–5, 101–2
International Law Commission 77
International Organization for Standardization (ISO) 29–30
International Organization of Employers 75
international policy contexts for corporate social responsibility
globalization 13–14
poverty reduction 16–18
sustainable development 14–15
international standards 97
ISO (International Organization for Standardization) 29–30
ISO 26000 30
ISO COPOLCO, definition of corporate social responsibility 92–3
Jacobs, Francis, Advocate General 196
Jacoby, S.M. 113
Japan, corporate governance 114–15
Jégo-Quéré & Cie SA v Commission 196
Johannesburg Plan of Implementation 15, 16–17
Jones, C. 229
Jones, I. 120
Joseph, S. 67
Just Pensions 237
Kakabadse, N. 202
Kamminga, M. 64, 78
Kearney, R. 229
Kemp, R. 174
Kenway, J. 234
Kenya 90
Kersting, C. 124
King, S. 236
Kirchner, C. 122
Klein, J. 234
Klein, N. 87
Knox, P. 156
Kocken, M. 161
KonTraG 121
Konzelmann, S.J. 131
Korten, D. 87, 88
Kovach, H. 239
Kraakman, R. 117, 131
Kruger, M. 72
Kübler, F. 117
Kysar, D.A. 180
labelling schemes 50, 161–2, 181
Ladeur, K.-H. 57
law and corporate social responsibility 18–20, 31–3
see also company law; international law
Law Commission 198–9, 212
Law on Corporate Control and Transparency (KonTraG) 121
Lawson, K. 225
lawyers and corporate social responsibility 31–3
Lazonick, W. 115
learning firm

corporate governance transnational regulation 127–8
knowledge society and corporate decision-making 130–33
Strine-Bainbridge Debate 129–30
Lee, M. 194, 195, 201
Legal Director/Baker and Mackenzie survey 31
Legal Opinion on Human Rights and the Work of the World Bank (World Bank) 155–6
legal risk management 31–2
Letchie, H. 229
Levinas, E. 229, 230–31, 232, 233
Levinasian ethics 230–32
Perspectives on corporate social responsibility

regulation research 171–2
regulatory governance 171–2
regulatory partnership between business and state 56–7
Reich, R. 235
Reith Lecture (2007) 57
reputation 32, 98, 179
reputational risks 12
Responsible Care 180
responsible investments 236–7
Rimmer, L. 90
RING Alliance 11
Rio Declaration on the Environment 69
di Robilant, A. 126
Roe, M.J. 123
Roemer-Mahler, A. 25
Rogers, J. 119
Romano, C.P.R. 190
Rose LJ 198
Ross-Robinson, A. 188
Ruggie, J. 96
Rwabizambuga, A. 176, 181
Sabel, C. 174
Sachs, Jeffrey 57
sanctions 102
Sarbanes-Oxley Act (2002) 122, 176
Save the Children 210
scandals 178, 180
Schaap, A. 88, 105
Schaefer, A. 189
Schiemann J 197
Schindler, C.C. 124
Schmitthoff, C. 124
Schulten, T. 118
de Schutter, O. 157
Sciulli, D. 46
Scott, K. 192
Securities and Exchange Commission (SEC) 207
Sedley J 198
Self, P. 173
Selznick, P. 50
Sennett, R. 120, 226
separate personality theory 96
Shamir, R. 170, 180, 181
shareholder activism 236
shareholder primacy 94–5, 117
shareholder value 42–3
Shaw, M. 238
Shell 90, 91
Shell Foundation 26
Shildrick, M. 231
Sillanpää, M. 187
Silver, I. 236
Skogly, S. 157
small and medium sized enterprises (SMEs) 27–8
Smart, B. 231
Smith, A. 59, 174
Smith, C. 235
Smith, J. 96
social auditing 181
social license to operate 180–81
social movements 150, 188
socially responsible investment (SRI) 236–7
societal constitutionalism 46
soft law 19, 101, 106–7, 126, 154
Soskice, D. 122
South Africa 29
Soviet Bloc countries, transnational corporations’ regulation 68
spheres of influence 25, 26, 34
Stahl, B.C. 88
stakeholders 107, 187–8, 204–5, 213
standards and norms 29–30, 44–6, 54, 97, 107, 171, 179
Starbucks 42
state/business regulatory partnership 56–7
state hierarchy 46–51, 54, 59
state power 104–5
state regulation and globalization 102–3
Stewart, S. 238
stock exchanges 47, 48
Streeck, W. 118, 119, 120
Strine Jr., L.E. 116, 129–30
Strüve, A. 123
Sullivan, R. 91, 97, 98, 102
supervisory boards 118, 120, 121, 128
SustainAbility 25
sustainable development 14–15, 16–18, 30, 34, 186, 188
Sustainable Development Unit (SDU) 188
Syed, P. 226
systems theory 41, 59
Index

Tadajewski, M. 234
Teichmann, C. 122, 125
Tester, K. 229
Teubner, G. 50, 53, 99, 107, 174
Texas City oil refinery explosion 203–4
Thayer Robbins, P. 189
Thompson, Dorothy 44
Thomsen, S. 193
Thor Chemical Holdings 19, 95–6
Thrasher, M. 225
Three Mile accident 179
Tilburg Guiding Principles on World Bank, IMF and Human Rights 157–8, 167
tools of corporate social responsibility 11
Torres, C. 237
trade-related human rights obligations 153–5
trade sanctions 102
trade unions 118–19
Traidcraft 97
transnational corporations and human rights 64–5
regulation, early attempts 66–8
UN, recent developments 68–76
triple-bottom line 93
Tullberg, J. 103, 104–5
Tullock, G. 47

Ueberseering 125
Uggl, F. 238
UNCTAD 68, 91
UNCTC 66–8
UNESCO 156
United Kingdom
advertising industry 179
Companies Act (1985) 94
Companies Act (2006) 22, 43, 210–16
Company Law Reform 21–2
Department of Trade and Industry (DTI), company law review 210–12
government’s sustainable development strategy 188–9
Law Commission 198–9, 212
pension funds 236–7
private member’s bill on corporate responsibility 209–10
responsible investments 236
Social Investment Forum 237
United Nations 157
Charter 72
Commission on Human Rights 71–2, 89, 154
Commission on Transnational Corporations (UNCTC) 66–8
Committee on Economic, Social and Cultural Rights (CESCR) 154–5, 159
Conference on Environment and Development (1992) 15
Convention against Corruption 69
Convention Against Organized Crime 65
General Assembly World Summit Outcome (2005) 17
Global Compact 14, 68–71, 76, 100, 101, 105–6, 157
Human Rights Council 77, 104, 106, 108
Millennium Development Goals 16, 17
Millennium Summit (2000) 16
transnational corporations’ regulation 68–76
Universal Declaration of Human Rights 29, 30, 69, 72, 153–4, 158, 164–5
United States of America
Alien Tort Claims Act (1789) 19, 28, 102
Chemical Safety and Hazard Investigation Board (CSB) 204, 219
corporate law and shareholder primacy 94–5
corporate governance 114, 115
House Financial Services Committee 204
Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises and Human Rights, rejection of 75–6

nuclear industry 179
responsible investments 236
Sarbanes-Oxley Act (2002) 122, 176
Securities and Exchange Commission (SEC) 207
Universal Declaration of Human Rights 29, 30, 69, 72, 153–4, 158, 164–5
UPA v Council case 196

Vagts, D. 128
Varieties of Capitalism 117, 122, 129, 133
Velamuri, S. R. 187
Velymeyer, H. 238
Vetlessen, A. 230
Victor, D.G. 186
Vignon, J. 57
Villiers, C. 125, 205, 206, 209
Vogel, A. 236
Vogel, D. 180
voluntary initiatives 89, 96–100
Voss, J.P. 174
voting patterns 224–5

Wal-Mart 86
Wallace, C.D. 102, 206
Walsh, J.P. 41
Ward, H. 99
Warner, M. 25–6
Warrington, R. 231
Webb, D.J. 180
Weiss, M. 118, 119
Weissbrodt, D. 72
Welford, R. 188
Werlauff, E. 122
Werther, W.B. 187, 209, 210
Wheeler, D. 187
Whelan, C. 174
WHO 156
Wijnants, C. 200
Williams, C.A. 207
Wills, C. 161
Wilson, I. 148
Winter, J. 127
Wong, M. 239
worker involvement 113, 114–15, 117–20
works councils 118–19
World Bank and human rights obligations 155–6
World Business Council on Sustainable Development (WBCSD) 92
World Commission for Environment and Development (1987) 15
World Development Movement (WDM) 198
R v Secretary of State for Foreign Affairs ex p World Development Movement Ltd (Pergau Dam case) 195, 198
World Economic Forum 14, 58
World Social Forum 58
World Summit for Sustainable Development (2002) 15, 16
World Trade Organization (WTO) 64, 144, 151, 156
liberalization regime 151–2
World Wide Fund for Nature (WWF) 195, 197, 209
Worthington, S. 210
Wright, C. 176, 181
Yearley, S. 189
Young, I.M. 105, 232–3
Zadek, S. 14, 238
Zerk, J.A. 207
Zutshi, A. 161