

A CISDL LEGAL BRIEF



LEGAL STRATEGIES TO PROMOTE CORPORATE SOCIAL RESPONSIBILITY AND ACCOUNTABILITY: A PRE-REQUISITE FOR SUSTAINABLE DEVELOPMENT.

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Introduction and Context

Sustainable development is not about the environment alone - it is about the promotion of integrated environmental, social and economic progress towards a common goal. This integrated concept of sustainable development has tangible expression in both international and 'soft law'. It evolved to address some of the most pressing concerns of human society. Such concerns include the current unsustainable patterns of production and consumption.² Worldwide economic and population growth over the last four decades has begun to threaten global security and the sound management of public goods.³ Environmental concerns include threats such as ozone depletion, climate change, depletion and fouling of natural resources, and extensive degradation or loss of biodiversity and habitat.⁴ As equally important are the core social concerns. These include the need for stronger labour rights and standards, better health services, prohibitions on child labour and discrimination against women, and protection for communities impacted by corporate activities.⁵ These critical issues must be addressed if we, as a global community, are to continue to grow and progress in a sustainable manner.

Corporations have a pivotal role to play in the sustainable development agenda. The modern corporation has now come to dominate global economic activity. A study undertaken by the Washington based Institute for Policy Studies, *Top 200- The Rise of Corporate Global Power*,⁶ provides one of the clearest insights into this dominance. After comparing the corporate sales of the largest 200 corporations as listed by *Fortune* in 1999, with the Gross Domestic Product (GDP) of the world's nations for the same year, the study found that of the 100 largest economies in the world, 51 are corporations while only 49 are countries. While together, the sales of the top 200 corporations are the equivalent of 27.5 percent of world economic activity.⁷

However, the success of the corporation as a business institution has not been without its costs. In the production of goods and services, corporations have contributed to many of the environmental and social problems that the global community is grappling with. Consequently, governments, intergovernmental agencies, environment and social development groups, civil society and increasingly, the private sector, have become active participants in global efforts to address the environmental and

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² United Nations Environment Programme, *Global Environmental Outlook Report* (Cambridge University Press, 2000).

³ *Ibid*

⁴ *Ibid*

⁵ See generally, Plan of Implementation of the World Summit on Sustainable Development, Johannesburg, South Africa, 2002 available at http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POIToc.htm. See also the nine principles of the *Global Compact* available at http://www.unglobalcompact.org/Portal/?NavigationTarget=/roles/portal_user/aboutTheGC/nf/nf/theNinePrinciples

⁶ Anderson, S and Cavanagh, J, *Top 200: the Rise of Corporate Global Power*. Washington: Institute for Policy Studies, 2000.

⁷ Note 6 at 3.

social impacts of corporations. Due to the sheer size of companies and their importance within the global economy, this is an essential step on the road to sustainable development.

At the forefront of these efforts has been a world wide trend towards ‘corporate social responsibility’ and ‘corporate accountability.’ Although these terms have no single definition, a common understanding of ‘corporate social responsibility’ (CSR) is the need for corporations to integrate environmental and social considerations, along with traditional economic considerations, in their production and governance practices.⁸ The notion of ‘corporate accountability’ is, in many respects, the ‘flip side’ of the CSR coin. It is concerned with the need for corporations to explain and accept responsibility for their actions. Traditionally, corporate regulatory regimes in many jurisdictions have focused on ensuring that corporations, particularly company directors, are accountable to their shareholders. A more expansive notion of corporate accountability ensures that companies are accountable to a wider group of stakeholders such as employees, customers and the communities in which they operate.⁹

This legal brief will discuss four major strategies that have been pursued to ensure that corporations are environmentally and socially responsible and that they are held accountable for their actions in the event they breach these responsibilities.¹⁰ These strategies include:

1. The use of voluntary initiatives to promote improved corporate environmental and social performance;
2. Legal proceedings to impose foreign direct liability for environmental damage or human rights violations;
3. Law reform in national corporate regulatory regimes; and
4. International treaties and conventions.

Strategy 1: Voluntary Initiatives to Promote Improved Corporate Environmental and Social Performance.

In 1992 the United Nations officially encouraged the use of voluntary initiatives through Agenda 21.¹¹ Before this time, only a handful of formal voluntary initiatives actually existed. Over the past decade they have increased in popularity to the point where they now number in their thousands¹² and are viewed, at both the national and international level, as the preferred instrument to improve corporate environmental and social performance. Common aims of such initiatives (as can be seen below) include: minimizing negative environmental impacts of corporate activity; increasing ecological efficiency in the production of corporate goods and services; encouraging corporate adherence to internationally recognized human rights and labour standards; and encouraging adherence to public triple bottom line reporting.

Voluntary initiatives take many different forms. The United Nations Environment Program (UNEP) for example, has sought to divide voluntary initiatives into five major categories:¹³

(i) **Industry initiatives** in which industry has exclusive management responsibility including defining the targets, if any, to be reached and whether or how to report progress publicly. These initiatives may be industry-specific, cross sectoral, or otherwise exclusive to the company, as well as national or international in their reach. For example, the ‘code of conduct’ adopted by the global footwear company, Nike, governing the company’s product facilities in the areas of environment, health, safety and which prohibits the use of child and forced labor.¹⁴

⁸ See for example, the Canadian Government’s definition of CSR at <http://strategis.ic.gc.ca/epic/internet/incsr-rse.nsf/vwGeneratedInterE/Home>. It is important to recognise that there are many notions of CSR, some of which concentrate purely on the financial responsibility of the company to maximise profits on behalf of the investors. See for example, Friedman’s widely cited claim that the social responsibility of business is to make profits as cited in Lansdowne R and Segal J, “The Social Responsibility of Modern Corporations” (1978) 2 UNSWLJ 336 at 337. For a perspective on the varying ways of conceptualising CSR see generally Tolmie J, Corporate Social Responsibility (1992) 15(1) UNSWLJ 268.

⁹ Canadian Democracy and Corporate Accountability Commission, *Final Report- the New Balance Sheet: Corporate Profits and Responsibility in the 21st Century*. Toronto, 2002 at 2.

¹⁰ Not all strategies are discussed. For example, there is no discussion of the strategy to remove environmentally harmful subsidies that promote unsustainable corporate activity or economic instruments, such as pollution taxes, that can also promote CSR.

¹¹ *Agenda 21*, Chapter 30.

¹² UNEP, *Voluntary Initiatives: Current Status, Lessons learnt and Next Steps*. UNEP, 2000 at 3. To view the discussion paper see http://www.uneptie.org/outreach/vi/reports/voluntary_initiatives.pdf

¹³ *Ibid* at 5.

¹⁴ To view the code of conduct go to <http://www.nike.com/nikebiz/nikebiz.jhtml?page=25&cat=code#code>

(ii) **Government initiatives** through which governments set the goals to be met (usually in consultation with industry and other stakeholders) and monitor the performance of the companies that volunteer to take part. For example, the Australian Government's voluntary Greenhouse Challenge designed to abate the greenhouse gas emissions of Australian industry. Participating organisations sign agreements with the government that provide a framework for undertaking and reporting on actions to abate emissions.¹⁵

(iii) **Joint government / industry initiatives**, negotiated agreements or covenants, in which government and industry negotiate the objectives, and how to monitor and report progress. They may be company or industry sector specific, or cover cross-sector issues. Other stakeholders usually have only a consultative role. For example, the long term agreement between the Dutch government and the Dutch textile industry to improve energy efficiency.¹⁶

(iv) **Third-party initiatives** through which third parties (non-government, non-business) develop and run the initiative, although companies or industry associations maybe involved in an advisory capacity or as members of the organization. For example, the forest certification scheme coordinated by the Forest Stewardship Council (FSC) which is focused on ensuring the environmentally appropriate, socially beneficial and economically viable management of the world's forests.¹⁷

(v) **UN and other international voluntary initiatives** through which the UN or other intergovernmental organization acts as catalyst for the development and implementation of initiatives. For example, the UN Global Compact designed to bring companies together with UN agencies, labour and civil society to support nine principles in the areas of human rights, labour and the environment.¹⁸ A further example is the Global Reporting Initiative (GRI) whose mission is to develop and disseminate global Sustainability Reporting Guidelines. These guidelines are used by organizations for voluntary reporting on the economic, environmental, and social dimensions of their activities, products, and services. Initiated in 1997 by the Coalition for Environmentally Responsible Economies (CERES), the GRI became independent in 2002, and is an official collaborating centre of UNEP.¹⁹

1.1 The Benefits of Voluntary Initiatives

There are numerous benefits associated with the use of voluntary initiatives as an instrument for bringing about improved corporate environmental and social performance. They can be implemented faster than economic or regulatory instruments, which ordinarily must undergo a lengthy legislative process before implementation. Voluntary initiatives are therefore useful to quickly address an immediate environmental or social issue.²⁰

Many voluntary initiatives are designed, implemented and administered by an individual corporation or an industry association. As a result, governments are not burdened with the administration and enforcement costs that are associated with regulatory or economic instruments.²¹ Voluntary initiatives also offer a degree of flexibility to private participants and governments.²² Unlike regulatory and economic instruments, the targets or processes associated with voluntarily initiatives can be quickly adjusted to suit the different needs of participants or to meet evolving environmental or social problems.

Finally, voluntary initiatives allow for significant cultural change within a corporation.²³ This is because the initiatives are adopted voluntarily by the corporations concerned and are not made in response to prescriptive regulatory standards. This creates a sense of ownership and acceptance of the initiative among corporate directors, management and employees.

1.2 Limitations of Voluntary Initiatives

Whilst carrying some clearly recognizable benefits, the effectiveness of voluntary initiatives in bringing about improved corporate environmental and social performance has been questioned. Both UNEP²⁴ and the OECD²⁵ have published

¹⁵ For information on Australia's Greenhouse Challenge go to, <http://www.greenhouse.gov.au/challenge/about/index.html>. It should be noted that there is considerable cross over between categories 2 and 3. For example, the UNEP discussion paper places the Australian Greenhouse Challenge within category 2 when it could just easily fall within category 3.

¹⁶ To view a summary of the outcomes of this voluntary initiative go to http://www.ecece.org/library_links/proceedings/1997/pdf97/97p3-167.pdf.

¹⁷ To view the certification criteria of the FSC go to www.fscoax.org

¹⁸ See, Global Compact website <http://www.unglobalcompact.org/Portal/Default.asp>

¹⁹ See GRI website <http://www.globalreporting.org/about/brief.asp>

²⁰ Note 12 at 3.

²¹ Ibid.

²² Ibid.

²³ Ibid.

discussion papers and reports outlining the limitations of voluntary initiatives. The OECD's most recent (2003) report, *Voluntary Approaches for Environmental Policy: Effectiveness, Efficiency and Usage in Policy Mixes*²⁶ is perhaps the most critical analysis to date. This report, which analysed a significant number of national and international environmental voluntary initiatives, found that the majority had failed to bring about a change in corporate behaviour beyond that of 'business as usual':

While the environmental targets of most but not all voluntary approaches seem to have been met, there are only a few cases where such approaches have been found to contribute to environmental improvements significantly different from what would have happened any way. Hence, the environmental effectiveness of voluntary approaches is still questionable.²⁷

Critics of voluntary initiatives often focus on the obvious fact that voluntary initiatives are non-binding. This has meant that such initiatives are unable to incite all companies to improve their environmental and social performance and thus, on their own, can not deal with negligent or consistently poor performers. Other criticisms have focused on the fact that many voluntary initiatives lack clearly defined and quantitative targets, are poorly monitored and do not contain any meaningful enforcement mechanism to ensure compliance.²⁸

Perhaps the most significant limitation, is their ineffectiveness in bringing about changes in corporate environmental and social performance when used in isolation. This was one of the key messages of UNEP's discussion paper, *Voluntary Initiatives: Current Status Lessons Learnt and Next Steps (2000)*:

Typically, the successes and failures of an initiative result not so much from its own design as from the strengths and weaknesses of outside pressures (e.g. fear of regulatory action or liability claims, anticipation of new tax burdens or new market opportunities). Voluntary initiatives should not be proposed and adopted as substitutes for regulation or used as justification for dismantling regulatory capacity.²⁹

When voluntary initiatives are adopted as substitutes for regulation or used as justification for dismantling regulatory capacity, 'regulatory capture' is said to have been achieved by industry.³⁰ Some authors have commented on the increasing trend, particularly in North America and Europe, to view CSR as an option to be pursued only through voluntary measures. This, they feel, operates as a break on the implementation of new legislation or regulation in response to hotly contested CSR issues.³¹ These observations suggest there is a degree of regulatory capture of efforts to promote CSR and increased corporate accountability which threatens to stall further progress in the improvement of corporate environmental and social performance.

Strategy Two: Foreign Direct Liability for Environmental Damage or Human Rights Violations

Foreign direct liability is the instrument used by civil society to enforce minimum standards and seek corporate accountability in cases of the worst conduct. This approach uses domestic courts (often in the corporate headquarter State) to find companies directly liable for violating international law, or to force significant punitive settlements.³² Successful law-suits have generally taken place against global 'rogue' corporations: those whose profits come from operating below the minimum standard in countries without strong regulatory regimes or enforcement.³³ Several barriers faced by victims have led them to

²⁴ Note 12.

²⁵ OECD, *Voluntary Approaches for Environmental Policy: An Assessment*. Paris: OECD, 1999. For a more recent OECD report on voluntary initiatives, see OECD, *Voluntary Approaches for Environmental Policy: Effectiveness, Efficiency and Usage in Policy Mixes*. Paris: OECD, 2003.

²⁶ OECD, *Voluntary Approaches for Environmental Policy: Effectiveness, Efficiency and Usage in Policy Mixes*. Paris: OECD, 2003.

²⁷ *Ibid* at 14.

²⁸ See generally, note 12 and note 25.

²⁹ Note 12 at 11. Quote from Robert Gibson, University of Waterloo, Canada- UNEP workshop participant

³⁰ Note 26 at 43.

³¹ Ward H, *Legal Issues in Corporate Citizenship*. International Institute for Environment and Development: London, 2003 at 1.

³² S. Zia-Zarifi, 'Suing Multinational Corporations in the U.S. for Violating International Law', 4 *UCLA J. Int'l L. & Foreign Aff.* (1999), 81.

³³ See B. Frey, 'The Legal and Ethical Responsibilities of Transnational Corporations in The Protection of International Human Rights', 6 *Minn. J. Global Trade* (1997), 181-87, which illustrates corporate accountability scenarios, duties, and liability, and asserts the inadequacy of voluntary codes without government regulation.

sue parent companies, rather than local subsidiaries. Firstly, such corporations may organise themselves so that the local subsidiaries are insolvent, not worth suing or are uninsured; furthermore, the claimants often have no means of obtaining substantial access to justice in their home courts, particularly when contingency fee or legal aid arrangements are not in place; and finally, minimal worker's compensation schemes can preclude claims against an employer.³⁴

The main legal stumbling block to such suits has been the *forum non conveniens* principle of private international law, under which common law courts exercise jurisdiction to halt a claim on the grounds that the claimants' domestic courts provide a 'more appropriate' venue (forum). Narrow judicial interpretations can also limit the extraterritorial scope of domestic legislation. Procedural barriers, such as establishing standing, presenting the existence of personal jurisdiction over the defendant, and defeating dismissal for comity have also inhibited many claims.³⁵ Whereas these hurdles have barred recovery in the past, recent litigation in the United States (US), the United Kingdom (UK) and others, indicate a turning tide. A handful of cases now proceeding through courts demonstrate that corporations may be held directly liable for violating norms of customary international law or for the tort of negligence, wherever they are committed.³⁶

2.1 The United States Alien Tort Claim Act

In the US., the *Alien Tort Claims Act* (ATCA) grants the federal court jurisdiction over 'any civil action by an alien for a tort committed in violation of the law of nations or a treaty of the United States.'³⁷ It achieved its status as an instrument of corporate liability in 1980, when the Second Circuit decided *Filartiga v. Pena-Irala*.³⁸ The statute gained further prominence when *Kadic v. Karadzic*³⁹ held that the ATCA could be used against private individuals. A successful claim under the ATCA must present three elements: (1) an alien sues (2) for a tort (3) committed in violation of the law of nations.⁴⁰

Since most of the 100 world's largest corporations are from the US, this is now being used to address egregious human rights violations. The statute, part of the first *Judiciary Act* of 1789, was rarely invoked for the first 190 years of its existence.⁴¹ In the *Burma v. Unocal* case,⁴² the federal district court in California upheld access to U.S. courts for citizens of Burma who claimed that Unocal had effectively 'enslaved' them during the construction of an oil pipeline through their country. Also, workers in Saipan's (Mariana Islands) garment industry recently brought suit against U.S. corporations for violations of the U.S. *Fair Labor Standards Act*.⁴³ Although few ATCA cases against corporations have been litigated on the merits, many suggest that meritorious cases will still proceed, forcing the door open for increased corporate liability.⁴⁴

2.2 Tort of negligence

The US trend for accountability is also echoed in the United Kingdom, specifically in a series of recent cases on access to justice for foreign victims of multinational corporations.⁴⁵ While claims brought against Unocal and Shell in U.S. courts used the 1789 ATCA, the UK trilogy of *Thor*, *Rio Tinto* and *Cape Industries* were based on more conventional tort/negligence

³⁴ In *Cape Plc.* case, all these factors applied. It is noteworthy also that *Adams and Others v. Cape Industries Plc and Another*, [1990] 1 Ch 433, to 572, in which a group of United States asbestos victims unsuccessfully attempted to enforce a Texas judgement against Cape's UK assets. Cape had no assets in the United States and had liquidated its subsidiary. The Court of Appeal expressly endorsed the conclusion of the court of first instance that Cape had deliberately engineered the restructuring while 'reducing if not eliminating the appearance of any involvement therein of Cape or its subsidiaries.'

³⁵ See M. Shaughnessy, 'Human Rights and the Environment: the United Nations Global Compact and the Continuing Debate About the Effectiveness of Corporate Voluntary Codes of Conduct', 16 *Colo. J. Int'l Em'tl. L. & Pol'y* (2000), 159, at 165.

³⁶ H. H. Koh, 'Transnational Public Law Litigation', 100 *Yale L.J.* (1991), 2347, at 2349; but see also, G. A. Christenson, 'Customary International Human Rights Law in Domestic Court Decisions', 25 *G.A. J. Int'l & Comp. L.* (1995), 225, at 230-31.

³⁷ Alien's Action for Tort (also referred to as the Alien Tort Claims Act), 28 U.S.C. § 1350 (1994). See also S. Zia-Zarifi, n. 32 above.

³⁸ *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

³⁹ *Kadic v. Karadzic* 70 F.3d 232 (2d Cir. 1995).

⁴⁰ *Ibid.*, at 239, 241.

⁴¹ Despite several superficial changes to the ATCA's wording, no substantive changes have been made since the statute was enacted as part of the first Judiciary Act, ch. 20, § 9, 1 Stat. 73, 77 (1789). See A. Burley, 'The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor', 83 *Am. J. Int'l L.* (1989), 81.

⁴² *Nat'l Coalition Gov't of the Union of Burma v. Unocal, Inc.*, 176 F.R.D. 329 (C.D. Cal. 1997). See also *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997). But also see *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000).

⁴³ *Doe I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058 (9th Cir. 2000).

⁴⁴ See S. Zia-Zarifi, n. 32 above.

⁴⁵ R. Felix et al., 'Three Minerals, Three Epidemics' Asbestos Mining and Disease in South Africa', in M.A. Mehlman, A. Upton, eds, *The identification and control of environmental diseases: hazards and risks of chemicals in the oil refining industry* (Princeton Scientific Publishing, 1994), 265.

principles. These cases, however, indicate a change in the attitude of the English courts towards compensation claims brought against a parent company of a corporation in domestic courts.

The most recent and definitive judgment was given by the House of Lords in a case brought by more than 3,000 South African asbestos victims.⁴⁶ All claimants were South African, suing for damages and loss of life caused by asbestos related cancer. Cape Industries Plc's asbestos mining and processing business originated in South Africa and it maintained an interest there until 1989. In the following years the company operated only in the UK. The victims argued that as a parent company which exercised *de facto* control over its foreign subsidiary, and being aware that its operations involved risks to the health of the employees of that subsidiary, Cape Industries Plc. owed a duty of care to those workers. The company tried to avoid the case on the basis of *forum non conveniens*, but it was held that due to the difficulty of pursuing the case in South Africa, it could proceed in England.⁴⁷ Some suggested at the time that '[i]t is not that this decision has suddenly increased everyone's liabilities, it has just made it more likely that the cases will be heard in England.'⁴⁸ The *Thor Chemicals* case concerned a parent company which was instrumental in designing a hazardous technology and system of operation and exporting it to South Africa.⁴⁹ The courts recognised that proximity, foreseeability of harm, reasonableness and public policy are key factors in determining whether or not a legal duty of care is owed by a defendant. With regard to the latter two factors, the conduct and motives of the defendant were deemed relevant. This followed squarely from the principle laid down by the Lords in the case of *Connelly v. Rio Tinto Plc*,⁵⁰ on a similar set of facts. In the *Cape Industries* case, it was relevant that directors of the parent company were fully aware of the hazards associated with asbestos exposure, and the conditions and risk of harm to those working at or living in the vicinity of its South African operations.

Interlinked with legal liability in tort for negligence is the principle that practising 'double standards' in relation to health and safety should not be legally defensible. Whether a risk of injury can be foreseen does not depend on local laws or regulations. If standards are less stringent overseas, a corporation still has, or ought to have had, awareness of the risks. Compliance with local standards may ensure no prosecutions for contravention of local laws but is not a defence to a claim brought in negligence. As stated by Sir Anthony Tuke, former Chairman of Rio Tinto: 'It is not enough for international companies to shelter behind the laws of the countries in which they operate; their responsibilities go beyond that.'⁵¹

The legal developments secured by these cases and similar cases in other jurisdictions,⁵² are an important development towards greater corporate accountability. Legal advances provide a salutary warning against the application of double standards. In light of such cases, multinationals may need to take active measures to ensure that worldwide operations comply with international standards.⁵³

Strategy 3: Law Reform in National Corporate Regulatory Regimes.

Despite the regulatory capture exhibited in some North American and European jurisdictions, certain countries are exploring measures to enshrine notions of 'CSR' and 'corporate accountability' into their domestic corporate regulatory regimes. This represents a fundamental shift in the way many jurisdictions view national corporate laws. Traditionally, environmental and social issues have been considered 'outside' the scope of corporate law belonging instead in other regulatory regimes.⁵⁴ It is

⁴⁶ See *Lubbe and Others v. Cape Industries Plc*, [2000] 1 W.L.R. 1545.

⁴⁷ Following the Connelly ruling, the British Lord Chancellor proposed legislation to reverse the effect of the decision, *inter alia*, because of concern that it might cause MNCs to shift their operations away from the UK. It is of interest that subsequently in a merger between Rio Tinto and Australian mining company, CRA, CRA shifted its head office to London.

⁴⁸ See 'Forum Non Conveniens in America and England: A Rather Fantastic Fiction,' 103 *LQR* (1987), 398, 400.

⁴⁹ See *Sithole & Others v. Thor Chems. Holdings Ltd. & Another*, The Times 15 February 1999, COURT OF APPEAL (CIVIL DIVISION) The Times 15 February 1999

⁵⁰ (1997), 3 WLR 376.

⁵¹ Rio Tinto Corporation, 1992 *Annual Report* (Rio Tinto, 1992).

⁵² Cases involving foreign direct liability for human rights abuses and environmental violations have also been heard in Australia, Europe and Canada. For further discussion on these cases see generally, Cordonier Segger, M.C., "Sustainability and Corporate Accountability Regimes: Implementing the Johannesburg Summit Agenda" (2003) 12(3) *Review of European Community and International Environmental Law*. 295- 309. See also generally, Ward H, *Legal Issues in Corporate Citizenship*, London: International Institute for Environment and Development, 2003.

⁵³ O. Kamminga and S. Zia-Zarifi (eds), *Liability of Multinational Corporations under International Law* (Kluwer, 2000).

⁵⁴ For example, in many common law jurisdictions, corporate law as it is taught and practised is concerned with the legal relationship between a narrow category of corporate actors. Along with the corporation itself, corporate law is viewed primarily to be concerned with the rights, interests, duties and

also an indication that CSR is ready to move away from its ‘voluntary identity’ and be integrated as a mandatory consideration in the governance of the modern corporation.

3.1 Reporting and Disclosure.

The “frontier battleground” of this shift has been in the areas of mandatory corporate reporting and disclosure.⁵⁵ Mandatory sustainability reporting requirements for corporations have now established a firm foot hold in the national corporate legal regimes in many jurisdictions. Some examples include:

South Africa- As a consequence of recommendations flowing from the King Committee on Corporate Governance in 2002, all companies with securities listed on the JSE Securities Exchange South Africa, financial entities defined in legislation regulating the South African financial services sector, and public sector enterprises and agencies must now comply with a Code of Corporate Practices and Conduct which, *inter alia*, requires each entity to issue an annual sustainability report. According to paragraph 5.1.3 of the Code:

“Disclosure of non financial material [in the report] should be governed by the principles of reliability, relevance, clarity, timeliness and verifiability with reference to the Global Reporting Initiative (GRI) Sustainability Reporting Guidelines.”⁵⁶

France- *Law no 2001-420 on New Economic Regulations* (2001), (art 116) requires all companies listed on the ‘premier marché’ to report against a number of sustainability indicators relating to human resources, community issues, labour standards and key health, safety and environment issues.⁵⁷

Norway- *The Accounting Act* (Regnskapsloven) (1999) requires company directors, via the directors report that is included in the annual financial reports lodged by all companies, to report on the following:

- (a) An account must be given of the working environment and an overview must be given of implemented measures that are of importance to the working environment. In addition, separate information is required about injuries, accidents and absence due to illness.
- (b) An account must be given of the matters relating to the enterprise, including resources used in production and products, which contributes to an impact on the external environment and of the measures which have been implemented or are being planned to prevent or reduce negative impacts on the environment.⁵⁸

Mandatory corporate environmental reporting laws requiring varying levels of reporting have also been enacted in Australia, Belgium, Denmark, Sweden and the Netherlands.⁵⁹

There is now also an emerging body of legislation applicable to the financial sector requiring investment fund managers to disclose their social or environmental policies. The UK was the first to introduce this form of disclosure when, in 1999, UK Parliament approved the Pension Disclosure Regulation. The Regulation amended the *Pensions Act* 1995 (UK), requiring all trustees of UK occupational pension funds to disclose “*the extent, (if at all), to which social, environmental or ethical considerations are*

liabilities of “corporate insiders”: shareholders and the directors. Although it may concern itself with some outside actors, such as creditors or others who enter into contracts with the corporation, corporate law in common law jurisdictions does not concern itself with the corporation as a social or environmental actor. See for example, Tomic R, et al, *Corporations Law in Australia* (Sydney: Federation Press, 2nd ed., 2002) at 67.

⁵⁵ Note 31 at 3.

⁵⁶ The executive summary of the *King Report 2002* is available online at [http://www.gcgf.org/WABA/philip%20Armstrong%20\(executive%20summary%20\).pdf](http://www.gcgf.org/WABA/philip%20Armstrong%20(executive%20summary%20).pdf)

The JSE Securities Exchange (South Africa) listing rules require annual disclosure of the extent of a listed company’s compliance with the Code of Corporate Practices and Conduct and the reasons where relevant for non compliance. The sustainability Reporting requirements are contained in section 5 of the Code of Corporate Practices and Conduct.

⁵⁷ Law on New Economic Regulation (Nouvelles Regulations Economiques – NRE) article 116, paragraph 4. The reporting indicators are available in English in Mansley M, *Open Disclosure: Sustainability and the Listing Regime*. London: Claros Consulting 2003 available at http://www.foe.co.uk/resource/reports/open_disclosure.pdf

⁵⁸ For further information about the environmental reporting provisions contained in Norway’s Accounting Act go to http://www.enviroreporting.com/others/norway_act.pdf.

⁵⁹ A useful summary of these initiatives can be found in Mansley M, *Open Disclosure: Sustainability and the Listing Regime*. London: Claros Consulting 2003 available at http://www.foe.co.uk/resource/reports/open_disclosure.pdf.

taken into account in the selection, retention and realization of investments". Australia, Belgium, and Germany have followed the UK's lead and introduced broadly parallel legislation.⁶⁰

3.2 Foreign Direct Liability- Proposed Legislative Initiatives.

Numerous corporate law reform proposals have sought to incorporate the principles of foreign direct liability into national legislation. In Australia, the Australian Democrats proposed the *Corporate Code of Conduct Bill* 2000 (Cth), which was designed to, *inter alia*, impose environmental and human rights standards on the operations of Australian corporations and their related entities when operating in a foreign country.⁶¹ In addition, the Bill would also allow persons, both natural and corporate, who have suffered loss and damage as a consequence of the activities of an Australian company to bring actions in the Federal Court seeking injunctions and or compensation.⁶² Although the Bill is still listed as "current," it is unlikely to be passed into law whilst the current coalition government is in power. A Parliamentary Inquiry led by coalition government members rejected the Bill claiming it was unnecessary and unworkable.⁶³

Proposals for this form of legislation are not confined to Australia. In the United States, a similar bill was unsuccessfully proposed by Congresswoman, Cynthia McKinney, aimed at transnational operations of U.S companies.⁶⁴ Likewise, the *Corporate Responsibility Bill* (UK), a private members bill tabled in 2002 in the UK Parliament, included an extra territorial element that would have enable affected communities abroad to seek damages in the UK for human rights and environmental abuses committed by UK companies or their overseas subsidiaries.⁶⁵ Although legislative proposals of this kind have yet to be accepted into national legislation, their strong support among the NGO community and by some members of government is an indication that proponents for this form of legislation will continue to persevere.⁶⁶

3.3 Directors Duties

The most important emerging area of corporate law reform is in the areas of company directors' duties. Under corporate law, directors manage the affairs of a company and have a duty *to act in good faith and in the best interests of company*. This duty is widely recognised, with some statutory variations, in common law jurisdictions, including the United States, and has now been adopted by an increasing number of civil law jurisdictions around the world.⁶⁷ The crucial role of directors in determining corporate culture is highlighted by the observations of an Australian Parliamentary Committee which in 1989 investigated the social and fiduciary duties and responsibilities of company directors in the Australian (common law) jurisdiction:

⁶⁰ Note 31 at 3.

⁶¹ *Corporate Code of Conduct Bill* 2000 (Cth), clause 3(1).

⁶² *Corporate Code of Conduct Bill* 2000 (Cth), clause 17.

⁶³ Parliamentary Joint Statutory Committee on Corporations and Securities, *Report on the Corporate Code of Conduct Bill*. Canberra: Senate Printing Unit, 2001 at 46. Although, some level of support for the objects of the Bill was expressed by the Australian Labor Party, currently in opposition.

⁶⁴ *Corporate Code of Conduct Act* H.R. 2782, 107th Cong (2001), is available online at <http://www.theorator.com/bills107/hr2782.html>.

⁶⁵ The *Corporate Responsibility Bill* (UK) (Bill 129) is available on line at <http://www.publications.parliament.uk/pa/cm200203/cmbills/129/2003129.pdf>

⁶⁶ For evidence of the support for the Australian Bill see generally Parliamentary Joint Statutory Committee on Corporations and Securities, *Report on the Corporate Code of Conduct Bill*. Canberra: Senate Printing Unit, 2001. For evidence of support for the UK Bill go to <http://www.corporate-responsibility.org/>

⁶⁷ For a discussion of this directors' duty within its wider common law setting see Canadian Democracy & Corporate Accountability Commission (CDCAC), *Canadian Democracy & Corporate Accountability: An Overview of Issues*. Toronto: CDCAC, 2001 pp 30 -33. For an example of this duty in the United States see Sections 512 and 1712 *Pennsylvania's Business Corporation Law* (15.Pa.C.S). Most statutory variations to this duty are 'permissive' in nature and are not intended to impose a separate fiduciary obligation on the directors to consider interests outside those of the company's interests. For example, in New Zealand, section 132 of the *Companies Act 1993* (NZ) clarifies that the duty of the a director to act in the best interests of a company does not inhibit a director to make provision for the benefit of employees of the company in connection with the company ceasing to carry on the whole or part of its business. For an example, of this directors' duty in a civil law jurisdiction see *Russian Law of Joint Stock Companies* 1996 (Russia), Article 71. For a wider discussion of its adoption in civil law jurisdictions see OECD, *Experiences From the Regional Corporate Governance Roundtables*. Paris: OECD 2004 pp 44-45.

Directors are the mind and soul of the corporate sector. They are crucial to how it operates and to how its great power is exercised. They determine the character of the corporate culture. Their actions can have a profound effect on the lives of a great number of people, be they shareholders, employees, or the public generally. They can weaken and even suppress market forces. They can disturb and destroy an environment.⁶⁸

If, as this Australian Committee observed, directors “are the mind and soul” of the corporate sector and are “crucial to how its great power is exercised”, the interpretation of the directors duty to act in the best interests of the company is a key determining factor in how corporations will behave. The traditional interpretation of this duty, particularly in common law courts, is that a director’s duty is to the company. The company’s shareholders are the company and therefore no interests outside of those of the shareholders can be considered by the directors.⁶⁹ This interpretation tends to codify the shareholder primacy principle and has led to a concern that environmental and social interests are incompatible with the interests of shareholders focused on profit maximisation.⁷⁰

This narrow interpretation has been somewhat adjusted through case law⁷¹ and statute in some common law jurisdictions to clarify that directors can consider other interests than just the shareholders’. For example, thirty-two states in the United States have now enacted ‘constituency statutes’, which explicitly permit directors to consider the interests of non-shareholders.⁷² Some of these statutes are broadly worded so that directors can consider the effects of their decisions on employees, customers, the community and society in general.⁷³ Arguably, this could extend to a consideration of environmental impacts given the social consequences of environmental degradation.

However, some commentators feel that U.S constituency statutes are “red herrings” and have done little to advance the interests of non-shareholders under U.S corporate law.⁷⁴ Whilst these statutes represent a statutory variation of the directors’ duty to act in the best interests of the company, the laws do not oblige directors to act in a socially or environmentally responsible fashion while pursuing company objectives. Of the thirty-two constituency statutes in place all but one are permissive in nature.⁷⁵ In other words the directors may take the interests of non-shareholders into account, but need not do so. As a consequence, constituency groups do not have enforceable rights should their interests be ignored.⁷⁶ In the case of the only mandatory constituency statute in place in Connecticut, the additional non-shareholder interests need only be taken into account in a small number of business decisions relating to plans of merger, sale of assets and an approval of business combination. These statutes therefore do not represent a marked departure from the statutory and general law duties of directors currently in place in most jurisdictions.

In the UK, amendments proposed to the company directors’ duties under UK corporate law, in the government ‘white paper’ *-Modernising Company Law* (2002), arguably represent the greatest expansion of directors’ duties seen in any jurisdiction.⁷⁷ The proposed statutory amendments will codify the duties of company directors by requiring them to act in a way that will most likely promote the success of the company. When deciding on what will most likely promote that success, the director *must* take account of all “material factors” that it is practicable for him to identify. This includes, *inter alia*, the company’s need to

⁶⁸ Senate Standing Committee on Legal and Constitutional Affairs, *Company Directors’ Duties: The Social and Fiduciary Duties and Responsibilities of Company Directors*. AGPS: Canberra, 1989 at 7.

⁶⁹ See for example, *Dodge v Ford Motor Company* (1919) 204. Mich.459, 170 N.W. 668, 3 A.L.R. 413.

⁷⁰ Note 9 at 23.

⁷¹ *Tech Corp. Ltd v Miller* (1973) 33 DLR (3d) at 313-14. This decision of the Supreme Court of British Columbia clarifies that company directors, in common law jurisdictions, when acting in the best interests of the company may consider non-shareholder interests such as company employees and the communities in which the company operates.

⁷² For reference to each of thirty-two statutes see, Adams E and Matheson J, “A Statutory Model For Corporate Constituency Concerns” Vol. 49, No. 4, *University of Minnesota Law School Emory Law Journal*. pp 1085-1135

⁷³ See for example, Minnesota’ constituency statute Minn. Stat. Ann. 302A.251 (West 1998)

⁷⁴ See Springer J, “Corporate Constituency Statutes: Hollow Hopes and False Fears Copyright” (1999) *New York University School of Law Annual Survey of American Law* at 123.

⁷⁵ The Connecticut statute is the one exception. *Connecticut Corporate Statute* 33-756(d) requires a director of a corporation, which has a class of voting stock registered pursuant to Section 12 of the *Securities Exchange Act* of 1934, in determining what he reasonably believes to be in the best interests of the company to consider, *inter alia*, the interests of company employees, the community and societal considerations. However, these matters need only be considered in a small number of business decisions relating to plans of merger (s 33-817), sale of assets (ss 33-830 and 33-831) and approval of business combination (ss 33-841 and 33-844).

⁷⁶ Note 73 at 108.

⁷⁷ The White Paper, ‘Modernising Company Law’ (Cm 5553), published on 16 July 2002, is available at <http://www.dti.gov.uk/cld/review.htm>.

have regard to the impact of its operations on the communities affected and on the environment in circumstances where a “person of care and skill” would consider such a matter relevant.⁷⁸

The proposed UK variation on the directors’ duty, unlike most statutory variations in the US, is mandatory as opposed to being merely permissive in nature. It will also apply to all decisions of a company director. The real implications of this new duty are not yet known. Will it be effective in incorporating environmental and social considerations into corporate decision making or will it enable directors to overlook environmental and community interests in most circumstances as they are not deemed relevant or practicable to identify? Will it give socially responsible shareholders enforceable rights in the event company directors overlook environmental and community interests in deciding what will promote the success of the company? Could the duty establish grounds for persons in communities negatively affected by corporate activity to seek compensation or injunctive relief when company directors have failed to consider their interests? These questions will remain unanswered until the new duty is drafted into law and its meaning is examined by the courts.

Although the new duty does not go as far as some would have liked,⁷⁹ if implemented it will represent the first occasion in any jurisdiction in which environmental and community interests will be a mandatory consideration for company directors while fulfilling their duties and responsibilities to the company. This is quite symbolic, as it is from early English law that the fiduciary duties of directors can be originally traced. Accordingly, if the UK move to amend their corporate laws governing the duties of company directors as proposed, it is extremely likely that other jurisdictions will follow.

Consistent with the principle of ‘integration’ that permeates the concept of sustainable development, these first steps towards the integration of environmental and social considerations into economically focused corporate law regimes represents an exciting and necessary development in sustainable development law.⁸⁰

Strategy 4: International Treaties and Conventions

Just as national corporate regulatory regimes are evolving to enshrine notions of CSR and corporate accountability, it is becoming clearer that international treaties will soon play an important role in addressing one of the core concerns with regard to sustainable development: the impact of corporate activities on the environment and on the human rights of vulnerable communities.

The prevailing concept of a state’s territorial sovereignty under international law has traditionally dictated that the regulation of corporate activities in areas of environment and human rights falls within the national rather than international sphere.⁸¹ This has impeded the potential for international environmental and human rights treaties to impose liability on corporations that are responsible for environmental damage or human rights abuse.⁸²

But recent events suggest that a shift is occurring. International schemes and conventions have been recently negotiated on the regional level and in areas of particular urgency, with the participation of corporations and civil society organizations, to address the liability of both States and corporations. These treaty mechanisms are international, but effect direct changes in the marketplace and involve corporations at each stage. In international sustainable development law, this has happened in the

⁷⁸ See schedule 2, paragraph 2 of the White Paper above, note 77.

⁷⁹ For example, the Corporate Responsibility Coalition (CORE) unhappy with a number of aspects of the proposed corporate law reforms, has drafted a *Corporate Responsibility Bill* outlining a stricter, and arguably more effective, version of the proposed directors duty. To visit the CORE website and view a copy of Bill, which has been twice tabled as a private members bill in UK Parliament go to <http://www.corporate-responsibility.org/>.

⁸⁰ The principle of integration is evident in principle 4 of the *Rio Declaration on Environment and Development* which states that in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it. Furthermore, *Agenda 21* at paragraph 8.14 states that “to effectively integrate environment and development in the policies and practices of each country, it is essential to develop and implement integrated, enforceable and effective laws and regulations that are based upon sound social, ecological, economic and scientific principles.”

⁸¹ Ong D, “The Impact of Environmental Law on Corporate Governance: International and Comparative Perspectives” (2001) Vol. 12 No.4 *European Journal of International Law* at 696.

⁸² *Ibid* at 697. There are exceptions; A number of international conventions exist that impose civil liability on the operators of nuclear facilities in the event of transboundary nuclear incident. For example, the 1960 *Paris Convention on Third Party Liability in the Field of Nuclear Energy*

International Maritime Organization,⁸³ and in negotiations for the 2000 Cartagena Protocol on Biosafety to the 1992 Convention on Biological Diversity.⁸⁴ Another prime example is the 1973 Basel Convention, where negotiations have resulted in a new Protocol which, when it enters into force, can directly impose liability on corporate actors.

4.1 *Basel Convention Protocol on Liability and Compensation*

The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal entered into force in 1992.⁸⁵ It seeks to reduce to a minimum the amount of transboundary shipments of hazardous waste; encourage the treatment and disposal of hazardous wastes as close to their points of origin as possible; and to reduce the amount of hazardous waste in total. In 1999, parties to the Convention agreed on a Protocol on Liability and Compensation.⁸⁶ The new regime seeks to reinforce observance of the standards and procedures of the Basel Convention, and provide redress after environmental damage has occurred.⁸⁷ Furthermore, it provides a comprehensive regime for liability, and for adequate and prompt compensation for damage resulting from the transboundary movement of hazardous wastes and other wastes and their disposal (including illegal traffic in those wastes).⁸⁸

In addition to the strict liability regime, the Liability Protocol assigns liability to any person “for damage caused or contributed to by his lack of compliance with the provisions implementing the Convention or by his wrongful intentional, reckless or negligent acts or omissions.”⁸⁹ This includes legal persons, extending liability beyond States to corporations. The reference to ‘person’ rather than ‘Party’ underscores the direct liability of corporations which engage in such activities, and makes it clear that they are responsible for insurance. This mechanism ensures that sustainable development costs are internalised.⁹⁰ Contracting Parties can bring their claim for damages against the corporations in the court of another Party where ‘(a) the damage was suffered; or (b) the incident occurred; or (c) the defendant has his habitual residence, or has his principal place of business.’⁹¹ This provides access to justice for states, and grants clear jurisdiction to domestic courts. Any person liable under the Protocol is allowed to seek contribution from any other person liable under the Protocol, or from any person with whom the liable party has an express contractual agreement.⁹² Liability may also be reduced or disallowed if the injured party caused or contributed to the damage.⁹³

4.2 *The European Institutions*

On a regional level, a new legally binding instrument will be drawn up on civil liability for transboundary damage caused by industrial accidents in the Member States of the United Nations Economic Commission for Europe (UNECE),⁹⁴ by Parties to the UNECE Conventions on the Protection and Use of Transboundary Watercourses and International Lakes and on the

⁸³ See IMO Legal Committee, Draft International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (IMO Doc. LEG 67/3, 18 May 1992); Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London, Mexico City, Moscow, Washington, 29 December 1972).

⁸⁴ Governments in other negotiations, such as the Convention on Biological Diversity (Rio de Janeiro, 5 June 1992) and its Protocol on Biosafety (Montreal, 29 January 2000), have highlighted the complexity of the issue, in relation with the determination of causality assessment, type of damage, type of responsibility, conflict of laws in case of transboundary damage. They suggest that a fund could be formed, financed by biotechnology companies, to address possible hazards. See ‘First Meeting of the Intergovernmental Committee for the Cartagena Protocol’ 9:171, *ENB* (14 December 2000), found at <www.iisd.ca/biodiv/iccp1/14_thursday.html> .

⁸⁵ The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel, 22 March 1989), [hereinafter ‘Basel Convention’].

⁸⁶ See Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal (Basel, 10 December 1999), not yet in force, [hereinafter ‘Basel Liability Protocol’], Article 1.

⁸⁷ See. Murphy, ‘Liability in the Basel Convention’, 88 *Am. J. Int’l L.* (1994), 24.

⁸⁸ See Basel Liability Protocol, n. 86 above, Article 3.

⁸⁹ *Ibid.*, Article 5.

⁹⁰ These guarantees must satisfy the minimum limits established in Annex B to the Protocol. See *ibid.*, Article 14. Note that there is no limit for Article 5 fault-based liability.

⁹¹ Note 88, Article 17.

⁹² *Ibid.*, Article 8.

⁹³ *Ibid.*, Article 9.

⁹⁴ UNECE, Report of the joint special session (ECE/MP.WAT/7 and ECE/CP.TEIA/5, 11 October 2001).

Transboundary Effects of Industrial Accidents.⁹⁵ The instrument will build upon the Convention on civil liability for damage resulting from activities dangerous to the environment (Lugano Convention)⁹⁶ and will have the potential to prevent accidents from happening in the first place.⁹⁷

The Treaty Establishing the European Community and the binding decisions of the European Council and Commission develop directly applicable legal obligations for corporations. The Council and Commission issue labour and human rights related regulations and directives with which private companies must comply, and as mentioned above, many cases have been heard which directly impose obligations. European Community law is, arguably, a type of international law, but it provides both direct rights and duties on corporations. This follows both from the language of the Treaty of Rome itself⁹⁸ and from the acceptance of the ‘direct effect’ doctrine by both the European Court of Justice and the EU member States.⁹⁹ Indeed, the understanding that EU law can, when it is clear enough, have direct effect on individuals within member States, is now a cornerstone of the EU legal system.¹⁰⁰ It might be argued that this ‘new legal order of international law’ makes the EU unique and demonstrates that other, seemingly more ordinary treaty regimes can at best provide for the indirect sort of liability seen in the environmental or bribery conventions.¹⁰¹ In the alternative, perhaps the European Community's practice shows that States can conclude treaties providing for direct corporate responsibility and implement those treaties effectively. As such, it could serve as a model for further international developments, in the WSSD and other processes. As noted by Professor Steven Ratner in a different context, ‘the leap of faith is one of political will; the legal doctrine follows inevitably.’¹⁰²

4.3 WSSD Plan of Implementation- Towards an Intergovernmental Agreement on Corporate Responsibility and Accountability.

Each of the above examples relate primarily to the imposition of civil liability on corporations for environmental damage, just as the prior discussion of litigation in US or UK courts related primarily to liability for violations of health or human rights. Whilst being an important component of corporate accountability, it does not concern all aspects of the accountability agenda, such as sustainability reporting and issues with regards to access to justice. Furthermore, it does not encompass the wider notion of CSR which requires a company to integrate environmental and social considerations into all aspects of corporate activity ranging from the way they produce goods and services to their internal governance practices. However, an international treaty or agreement that might encompass these wider notions of CSR and corporate accountability could one day be a reality. *The Johannesburg World Summit of Sustainable Development (WSSD) Plan of Implementation* at paragraph 49 encourages action at all levels to:

Actively promote corporate responsibility and accountability, based on the *Rio Principles*, including through the full development and effective implementation of intergovernmental agreements and measures, international initiatives and public-private partnerships, and appropriate national regulations, and support continuous improvement in corporate practices in all countries.¹⁰³

One of the key questions is what might an “intergovernmental agreement or measure” that actively promotes corporate responsibility and accountability, based on the *Rio principles*, look like? For ‘effective implementation’, a key component of a new agreement, of course, would be its control or enforcement mechanisms. Such an agreement might need to take care to include the social (including human rights) and environmental aspects of corporate responsibility and accountability.

⁹⁵ Ibid; UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki, 17 March 1992); UNECE Convention on the Transboundary Effects of Industrial Accidents (Helsinki, 17 March 1992).

⁹⁶ Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (Lugano, 21 June 1993).

⁹⁷ UNECE, ‘Press Release: Civil Liability – Agreement Reached on New Legally Binding Instrument’ (ECE/ENV/01/04, 4 July 2001).

⁹⁸ Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Related Acts (Amsterdam, 10 November 1997), [hereinafter ‘EC Treaty’], at Article 249 establishes EU regulation as ‘binding in its entirety and directly applicable in all Member States.’

⁹⁹ See ECJ 5 February 1963, Case 26/62, *Van Gend en Loos v. Nederlandse Administratie Der Belastingen*, [1963] ECR 3, at 12.

¹⁰⁰ See J.H.H. Weiler, ‘The Transformation of Europe’ 100 *Yale L.J.* (1991), 2403, at 2413-15.

¹⁰¹ See *Van Gend en Loos*, n. 99 above, at 12.

¹⁰² S.R. Ratner, ‘Corporations and Human Rights: A Theory of Legal Responsibility’, 111 *Yale L.J.* (2001), 443.

¹⁰³ See Plan of Implementation of the World Summit on Sustainable Development, Johannesburg, South Africa, 2002 available at http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POIToc.htm

Approach 1- International convention requiring domestic law implementation

One approach, based on the model of the corporate accountability convention proposed by some NGOs in the lead up to WSSD,¹⁰⁴ could be to require signatory states to implement law reforms within their own domestic corporate regulatory regimes. Such law reforms might include: mandatory sustainability reporting requirements (with reference to the GRI), new directors' duties to fully consider environmental and social issues in corporate decision-making, the imposition of liability on directors for corporate breaches of international and national environmental and social laws; and to guarantee the rights of redress for citizens whose interests are affected by corporate activity, including access for affected people anywhere in the world to pursue litigation where parent corporations claim a 'home' are domiciled or listed. Although there may not be the political support amongst many States for such a convention at this present stage, it is arguably one of the more effective means of ensuring corporate responsibility and accountability internationally. The convention could also be a vehicle for the implementation of uniform financial reporting, corporate governance and accounting standards that are so clearly lacking at the international level.¹⁰⁵ Accordingly, it will be a fully integrated economic, environmental and social instrument. The convention could be implemented under the auspicious of the U.N or even through negotiation of a special agreement pertaining to corporate governance through the framework of the World Trade Organisation.

Approach 2- Implementation through commonly agreed international principles.

Rather than relying on domestic implementation, a second means of implementation, as discussed in scholarly literature related to human rights aspects of corporate responsibility,¹⁰⁶ is for an 'intergovernmental agreement' to establish a set of commonly agreed principles of corporate conduct, perhaps building upon the existing nine principles of the UN global compact¹⁰⁷ or the guidelines for multinational enterprises established by the Organisation for Economic Cooperation and Development (OECD).¹⁰⁸ Prof. Steven Ratner, in a leading article which advances such proposals, recommends that such an agreement could set up a free-standing body or tribunal composed of representatives of the parties authorized to adjudicate over corporate violations of the principles and impose sanctions.¹⁰⁹ Ratner observes that this body might, for instance, have the power to order or authorize States to fine the offending company or increase tariff barriers on the exports and imports of the firm; to order or request that international arbitral bodies, such as the International Centre for the Settlement of Investment Disputes (ICSID),¹¹⁰ to refuse to hear claims brought by those companies; to order or request intergovernmental bodies that include corporate participants to preclude participation of violating entities; or to prohibit international organizations from signing contracts with offending firms.¹¹¹ He notes that these types of procedures might also allow for findings of violations against the State of incorporation of a particular enterprise, or even against the enterprise itself.¹¹² However, the new nature of this concept suggests that States, and the firms which influence them,¹¹³ might be unlikely to contemplate such a robust enforcement process in the near future. Instead, a more 'palatable' variation of this, which Ratner also advances, might be to authorize the special tribunal or body to receive and review reports from States, NGOs, or multinational corporations, or even hear complaints about conduct from local community representatives or NGOs.¹¹⁴ As he suggests, the findings flowing from

¹⁰⁴ To view the outline of the proposed convention go to- http://www.foe.co.uk/resource/briefings/corporate_accountability.pdf

¹⁰⁵ There is presently no binding international agreement that standardizes financial reporting, corporate governance standards and accounting standards between nation states. This is quite remarkable given the push towards a 'global market place' of recent decades.

¹⁰⁶ For further discussion, see a leading article on this issue by S.R. Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility', 111 *Yale L.J.* (2001), note 102.

¹⁰⁷ Note 18.

¹⁰⁸ The OECD guidelines for multinational enterprises can be viewed at http://www.oecd.org/document/28/0,2340,en_2649_34289_2397532_1_1_1_37425,00.html

¹⁰⁹ Note 102.

¹¹⁰ Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington, 18 March 1965).

¹¹¹ Note 102.

¹¹² *Ibid.*

¹¹³ J.L. Johnson, 'Note: Public-Private-Public Convergence: How The Private Actor Can Shape Public International Labor Standards', 24 *Brooklyn J. Int'l L.* (1998), 291.

¹¹⁴ Note 102.

the complaint, while not judicial in nature, would create a public - and, one hopes, objective - record of the activities of certain companies, allowing other actors, especially civil society groups, to mobilize action against them.¹¹⁵

Conclusion

Each of the above four strategies, has an important role to play in ensuring that companies are environmentally and socially responsible and that they are held accountable for their actions in the event they breach those responsibilities. An approach that relies on one strategy (e.g. voluntary initiatives) to the exclusion of others will be bound by the limitations that this 'blinker approach' will bring and will ultimately fail in achieving the objectives of CSR and corporate accountability. The lessons learnt from the implementation of existing voluntary initiatives tell us that what is required is an appropriate mix of voluntary and regulatory measures.

This legal brief also reveals that some strategies have so far been more suited to pursuing human rights and social objectives, such as the use of foreign direct liability outlined in strategy two. On the other hand, strategies, such as strategy four, have up to this point been largely confined to pursuing environmental objectives within the CSR agenda. The fact that some strategies are focused on environmental, as opposed to human rights and social issues, and *visa versa*, only reinforces the importance of need for the global community to act on its commitments arising from WSSD to "actively promote corporate responsibility and accountability based on the *Rio Principles*, through intergovernmental agreements and measures." Of all the initiatives outlined above, the implementation of an intergovernmental agreement has perhaps the greatest potential to unify the global community in a targeted effort to promote both environmentally and socially responsible behaviour within the business community the world over. Although such an agreement may be a few years away, it is important to recognise the urgency of the growing list of issues that now underpin the sustainability agenda and the important role corporations have in ensuring that sustainable development becomes a reality.

The Centre for International Sustainable Development Law (CISDL) is an independent legal research centre. Its mission is to promote sustainable societies and the protection of ecosystems by advancing the understanding, development and implementation of international sustainable development law. CISDL based in the McGill University Faculty of Law in Montreal, Canada, and works in cooperation with the Université de Montreal Faculty of Law, and the Université de Québec à Montreal, with guidance from the three Montreal-based multilateral environmental accords (the NAFTA Commission for Environmental Cooperation, the UNEP Biodiversity Convention, and the Montreal Protocol multilateral fund). CISDL convened Sustainable Justice 2002: Implementing International Sustainable Development Law in Montreal, June 13-15, 2002, as part of a legal partnership for sustainable development, and launches an International Jurists Mandate for the Implementation of International Sustainable Development Law (available at www.cisd.org), as well as a new book, *Weaving the Rules for Our Common Future*, at the WSSD.

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¹¹⁵ *Ibid.*