GLOBALT ANSVAR
- *Swedish Partnership for Global Responsibility*

Legal Issues in Corporate Citizenship

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About the Swedish Partnership for Global Responsibility

The Swedish Partnership for Global Responsibility was introduced by the Swedish Prime Minister together with the Ministers for Foreign Affairs, Trade, Development Cooperation, Industry and Environment on 7 March 2002 with the purpose of promoting the OECD Guidelines for Multinational Enterprises and the principles set forth in the UN's Global Compact. One important aim of the initiative is to facilitate the ambitions of Swedish companies and organisations to implement corporate social responsibility in practice in the fields of human rights, environment, core labour standards and efforts to combat corruption. The production of studies on important issues, the arrangement of seminars for the dissemination of knowledge as well as general promotion of information on existing global conventions and guidelines are important components of the initiative. This study has been commissioned by the initiative and provides important insights into the legal aspects of corporate social responsibility, CSR.

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Executive Summary

This paper is aimed at public policy makers and businesses in the high income countries of the North. It aims to show how law shapes corporate social responsibility (CSR).[1] In doing so, the paper addresses one of the basic dividing lines of the CSR agenda in Europe, North America and Australia – a line between people who argue that CSR should be limited to consideration of 'voluntary' business activities 'beyond compliance' with legal baselines, and those who argue for a broader starting point, based on an understanding of the total impacts of business in society. As the definitional debate rages, the legal baseline for CSR is itself changing.

Legal analysis has the potential to bring valuable insights to both public policy and business management. Failure to take account of the legal dimensions of corporate social responsibility substantially weakens the chances of making meaningful process in some of the most difficult 'boundary' areas about the proper balance between government, business and civil society roles and responsibilities.

Transparency and access to information on social and environmental aspects of company performance are central themes of the CSR agenda. Mandatory legislation on various aspects of business transparency is emerging around the world. It can form part of company law, environmental regulation, or tailored legislation for institutional investors or on social and environmental reporting. Pressure for enhanced public sector accountability has also given rise to calls for company reporting on revenues paid to host government by companies in the extractive industries.

Even voluntary approaches to CSR have a legal context. Laws on misrepresentation or false advertising frame voluntary company reporting, for example. And voluntary approaches such as company codes of conduct can shape the standards of care that are legally expected of businesses. In the workplace, agreements reached through collective bargaining between employers and trade unions can become legally binding through incorporation in employment contracts.

The relationship between voluntary and mandatory approaches is evolving in innovative ways - with broader implications for global governance in an era of economic globalisation. The new Kimberley Process Certification Scheme addresses the problem of 'conflict diamonds.' It links an intergovernmentally agreed framework of national controls on trade in rough diamonds to industry self-regulation through a system of warranties and 'conflict free' guarantees on invoices for rough diamond sales.

Litigation is also bringing new light to the CSR agenda. A new wave of legal actions – mostly in US courts, but also in some EU countries – is testing the boundaries of existing legal principles in relation to some of the most difficult issues of the CSR agenda. For example, a series of cases in the US, France and Belgium are testing how fundamental principles of international law – particularly human rights law – apply to parent companies of multinational corporate groups.

Many of these cases are closely associated with campaigns against companies that invest in countries associated with abusive regimes. A related set of actions has been brought against parent companies in their home territories, testing the circumstances under which they can be held liable to pay compensation to people harmed by their operations in other countries. Many of the cases present courts with delicate issues about the potential for judges to interfere with domestic foreign policy, or the legitimate policy choices of governments in other countries.

These 'foreign direct liability' claims are not the only examples of litigation at the frontiers of corporate social responsibility. One action in the US has tested the liabilities of retailers in respect of abuses of labour rights elsewhere in the supply chain – potentially reducing the scope for companies to 'contract out' the risky operations that might be targeted through foreign direct liability cases. And a legal action in California against sports goods giant Nike is testing whether the US First Amendment on freedom of speech protects companies from litigation over factual statements that they make in response to criticism from non-governmental organisations (NGOs). The implications for the future of company social and environmental reporting, as well as the development of verification and assurance standards, are significant.

Legal actions such as the so-called 'McLibel' litigation, or more recently Nestlé's litigation against the government of Ethiopia, offer examples of a different intersection between litigation and CSR; when litigation proves reputationally unwise. Breaches of minimum legal requirements can also place companies' reputations as good corporate citizens on the line. For example, action against a cartel that had fixed prices of vitamins around the world drew attention to the CSR implications of basic principles of fair dealing.

CSR also has an international trade law dimension. Voluntary labelling and certification schemes developed in European countries have more than once generated discussion in the World Trade Organization over potential negative impacts on market access as well as WTO-compatibility – an area of considerable legal uncertainty. Companies and public policy makers can play important roles in reducing trade tensions by working to shape a CSR agenda that is more sensitive to, and inclusive of, developing country stakeholder needs and interests.

For companies, the connections between law and CSR raise some fundamental management challenges. One clear message concerns the need for businesses to integrate legal risk management with reputational risk management. That means that lawyers will need to become more involved at the same time as learning from the culture of transparency and partnership that informs CSR. It means 'joining up' strategies for day-to-day CSR communication with strategies for communicating about litigation and responding to 'bad practice.' And integration between lawyers and CSR professionals is also critical to giving meaning in concrete cases to 'best practice' (rather than corporate restructuring) as a response to the emerging legal risks of foreign direct liability.

On the public policy side, the legal dimensions of CSR point to a need to revisit the institutional settings of CSR. Litigation has raised important public policy questions that have not been adequately addressed elsewhere. A global public policy dialogue could deliver integrated solutions – beyond the false ‘legal versus voluntary’ divide – to some of the most difficult outstanding CSR issues. A key challenge is to ensure better integration between national and international policy agendas on good public governance, corporate social responsibility and corporate accountability.

Some tough policy discussions almost certainly lie ahead. For example, the frontier CSR litigation raises substantial question marks over the social and environmental efficiency of limited liability as a mechanism for allocating risk. And the agenda on environmental and social reporting leads naturally to the potential for a future debate on the role of a right of public access to information held by companies.

However challenging the implications, it is increasingly clear that law and litigation are an important part of the CSR toolkit around the world. It is high time to get beyond the tired dogma of ‘voluntary versus mandatory’ to look at the real challenges of ensuring that economic globalisation is coupled with good environmental and social performance on the part of businesses around the world.

Contents

1. Why Legal Issues Need to be Factored into CSR

The current corporate social responsibility (CSR) agenda is immature, though the issues that it is concerned with are as old as human endeavour. Basic definitional issues are still contested. One of the principal dividing lines across much of Europe and North America is between people who say that the corporate social responsibility agenda should be limited to a consideration of 'voluntary' activities by businesses 'beyond compliance' with legally mandated baselines, and those who argue that the starting point should be far broader – based on an understanding of the total impacts of business in society, or the potential contributions of businesses to the societies in which they operate.

The narrow definition guides the European Commission's formal policy approach to CSR. The European Commission's July 2002 Communication on corporate social responsibility defines it as '*a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis*.[2]' The Communication goes on to say that: '*Despite the wide spectrum of approaches to CSR, there is large consensus on its main features [including that] CSR is behaviour by businesses over and above legal requirements, voluntarily adopted because businesses deem it to be in their long-term interest.*'

It would be unfair to suggest that 'voluntarists' deny that law is relevant at all. But the 'voluntary/regulatory' divide operates as a brake on discussion of *new* legislation or regulation as a response to contested CSR issues. And it has tended to support the emergence of an unhelpful disconnect between discussion of CSR and discussion of corporate accountability through law.

It is unarguable that law shapes CSR. This paper shows how, and offers some thoughts on the implications for public policy and business strategy. It is about law, but it is not written to provide legal advice. The principal audiences are businesses and public policy makers in high income countries. The aim is ambitious: to shift CSR thinking beyond the current 'voluntary versus regulatory' divide by showing how the legal baseline for CSR is itself changing.

There are at least seven reasons why legal analysis needs to be factored into public policy and business strategy on CSR.

- The voluntary approach takes as its starting point a particular subset of tools for responding to business impacts; not a consideration of impacts themselves. It prevents the CSR agenda from understanding properly the 'big picture' of its own context. The CSR agenda has already given rise to a number of legislative developments in areas like mandatory social and environmental reporting or social labelling. And legal responses to CSR can be found around the world – not just in rich countries. New legislation in Ghana requires logging companies to secure a Social Responsibility Agreement with customary owners of the land. In Taiwan, a 1998 Government Procurement Act introduced a new requirement that products bearing the "Green Mark" ecolabel (itself run by the Taiwan

Environmental Protection Authority) should be given priority in government procurement and benefit from a price advantage of 10 percent. And in the Philippines, (as in many other countries) the government offers tax incentives for companies to make philanthropic donations.

- Law is part of what surrounds us. When the terms of a code of conduct are incorporated into a contract with a supplier, they become legally binding as *de facto* minimum standards. Established law and regulation, for example on misleading advertising or misrepresentation, may be applied in the context of CSR tools such as company reports or press releases.

- In many developing countries, the notion of corporate social or environmental responsibility remains inextricably linked to the challenge of ensuring that all businesses comply with minimum legal requirements for environment and labour protection, fair competition and corporate governance. The corporate social responsibility agenda can then be understood as a potential driver for better compliance and enforcement of minimum standards. Responsible businesses around the world have a direct commercial interest in even-handed implementation and enforcement of minimum standards. It is an essential element in the creation of a level playing field in which businesses can seek marketplace benefits through voluntary action.

- The CSR agenda can drive consideration of legal issues in the intergovernmental context – particularly questionmarks raised by developing country governments within the World Trade Organisation on the potential negative market access impacts of labelling or certification schemes and their WTO compatibility.

- Established legal concepts – such as principles of civil liability – are increasingly being applied in politically contentious transnational legal actions against parent companies of multinational corporate groups. These actions are themselves closely connected to a civil society-driven ‘corporate accountability’ agenda that has received only limited attention from public policy-makers, though the issues that it raises are key to ongoing discussion of the implications and impacts of economic globalisation and how best to manage it.

- The rigorous legal approach to analysis that is demanded by CSR-related litigation is helpful in unpacking some of the most difficult ‘boundary’ issues about the respective roles and responsibilities of business, civil society, and governments.

This report cannot hope to cover the full range of interactions between CSR and law. Instead, it offers illustrations from those points of intersection that are strategically significant to the future of CSR – concluding with some thoughts on the implications for business management and for public policy.

2. Transparency and access to information

A frontier battleground

Transparency is a recurring theme of both the CSR agenda and the mainstream corporate governance agenda. The idea that decision-making by companies' direct stakeholders (shareholders, lenders and financiers) should be informed through access to information on the state of a business's commercial standing influences accounting practice and company and commercial law. The sustainable development agenda has added to this starting point an increasing understanding of 'triple bottom line' reporting that addresses environmental and social issues alongside financial performance. The CSR agenda in turn has deepened and broadened the clear business imperative for more effective communication with other stakeholders who have the capacity to make or break a company's reputation as a 'good citizen': consumers, employees, community members, non-governmental organizations (NGO)s, governments and international institutions.

The CSR agenda on transparency has several legal dimensions. They include legislation requiring companies to report on particular environmental or social issues; legislation that establishes legal frameworks for the administration of environmental or social labelling schemes, and legislation requiring pension fund managers to report on the environmental or social policies that they apply to their investments.

There are other less obvious connections between law, transparency and CSR. These include legal issues associated with voluntary company reporting, rights of public access to information held by companies, and the international trade law implications of voluntary labelling or certification schemes.

Transparency and access to information are much more than a theme in the CSR agenda: they are among its frontier battlegrounds.

Mandatory reporting legislation

There is now an emerging body of legislation requiring pension funds mangers to report on their social or environmental policies. The United Kingdom began the trend when, in 1999, Parliament approved the Pension Disclosure Regulation. The Regulation amended the 1995 Pensions Act, requiring all trustees of UK occupational pension funds to disclose "*the extent,(if at all), to which social, environmental or ethical considerations are taken into account in the selection, retention and realization of investments*".[3] Belgium, Germany and Australia have followed with broadly parallel legislation. This kind of legislation has been relatively uncontentious – it is 'enabling' rather than prescriptive in terms of what has to be reported.

Much more contentious is the emergence of requirements for companies to report on non-financial aspects of their performance. On the negative side are those who fear that mandatory reporting requirements stifle innovation and become a ceiling rather than a floor for reporting on environmental and social issues. On the plus side are those who point out that relatively few companies currently report on a voluntary basis, and that the business case for voluntary reporting does not apply consistently to all companies.

Key questions include: what to report on? (there is more legislation covering environmental reporting than social reporting or integrated reporting); which companies? (the triggers include a public listing, number of employees, turnover, environmental emissions, or a combination of these); and what kind of legislation? (company law is a frequent home for reporting requirements – particularly as part of a new wave of comprehensive reviews of company law around the world. So too is environment law).

Reporting on operations in other countries is the particular focus of the US-based International Right to Know Coalition which is made up of more than 200 environmental, labour, social justice and human rights organizations. The coalition has come together in support of a legislative proposal for an 'international right to know' which would require US companies to report on key environmental, labour and human rights practices of their overseas operations. The proposed legislation would apply to companies incorporated in the United States or registered with the Securities and Exchange Commission.[4]

> In 2001 the French Parliament passed legislation requiring mandatory disclosure of social and environmental issues in companies' annual reports and accounts. It requires all companies listed on the 'premier marché' (those with the largest market capitalisations) to report against a template of social and environmental indicators, including those related to human resources, community issues and engagement, labour standards and key health, safety and environment issues.
> www.occes.asso.fr/fr/comm/nre.html

Even voluntary approaches to reporting can effectively become mandatory by virtue of the authority of financial institutions to regulate their members – as with the requirement of the JSE Securities Exchange South Africa for companies listed on the JSE to report to Global Reporting Initiative standards.

> In 2002, the JSE became the first stock exchange in the world to require publicly listed companies to report to the standards set by the Global Reporting Initiative. The requirement takes effect by virtue of the JSE's adoption of a Code of Corporate Practices and Conduct incorporated within proposals in the King Report on Corporate Governance for South Africa – the so-called 'King 2' report. Launched in March 2002, King 2's Code of Corporate Practices incorporates a provision on Integrated Sustainability Reporting, which states that '*Disclosure of non-financial information should be governed by the principles of reliability, relevance, clarity, comparability, timeliness and verifiability with reference to the Global Reporting Initiative Sustainability Reporting Guidelines...*'[5]

Legally mandated disclosure requirements for publicly listed companies can also drive reporting on environmental or social issues. For example, it has been suggested that the Malaysian requirement for publicly listed companies to disclose all 'material information' necessary for investing is sufficiently broad to cover some environmental data.[6] The corporate governance-driven move to greater transparency complements the CSR-driven move to intensification of mandatory reporting, though the audiences may not coincide.

Though the 'voluntary versus mandatory' debate on company environmental reporting has only recently become a feature of the CSR agenda, mandatory corporate reporting of environmental data that is included in public registers held by regulators has long been a familiar part of environmental law. That this should have been lost on the current CSR agenda is a reflection of the limited integration of the mainstream 'business and environment' agenda within CSR.

The CSR-related transparency agenda has a different central preoccupation in moves to enhance transparency in the extractive industries. Companies in the oil and gas and mining sectors have come under increasing pressure to report on the revenue that they pay to host countries under royalty, tax or production sharing arrangements. The ultimate goal here is public sector accountability, not corporate accountability. A legally binding approach, through stock exchange listings requirements, is one of the options that have been put forward.

In 1999, the UK-based NGO Global Witness published a damning report, *A Crude Awakening*,[7] which drew links between the activities of the oil and banking sectors and the plundering of state assets during the Angolan civil war. The particular focus since then has been on countries whose economies are heavily dependent on oil, gas or mining revenues and in circumstances where there is a substantial risk of embezzlement, or that the revenues may be used to fund armed conflict. Lack of transparency in government income and expenditure hampers citizen efforts to call their governments to account. For NGOs campaigning on this issue, the call is not for companies to pull out, but to publish the details of the payments that they make. But BP's voluntary commitment to publish financial data related to its Angolan operations showed that voluntary initiatives can meet opposition from host country governments. NGOs within the UK-based 'publish what you pay' campaign argue that the solution is mandatory disclosure by publicly listed companies through stock exchange disclosure requirements. The IFC, UNDP, Tony Blair and George Soros have supported enhanced transparency. And at the Johannesburg World Summit on Sustainable Development, UK Prime Minister Tony Blair announced a new multi-stakeholder initiative to explore the options – an Extractive Industries Transparency Initiative.[8]

3. Voluntary initiatives interacting with law

Voluntary approaches to corporate citizenship take effect in a legal context. For example, even when company reporting is entirely voluntary, as a response to the various business drivers of corporate social responsibility, it has legal implications. Public disclosure of negative information on environmental impacts has the potential to feed compensation claims or prosecutions. Laws on misrepresentation or false advertising frame what companies may legally say about themselves.

There are many other examples of CSR-driven activities that are affected by their legal contexts. Labelling or certification schemes become binding when they are incorporated into supply chain contracts. Company codes of conduct can affect the standards of care that are legally expected of businesses. In one legal action (discussed below) a code of conduct became legally binding by virtue of its inclusion in a settlement agreement for approval by a US court.

In the process of social dialogue, agreements that are reached through collective bargaining between workers and trade unions may be translated directly into contracts of employment, or otherwise affect the terms of the legally bounded relationship between workers and their employers. The first negotiated, global, multi-employer collective bargaining agreement was concluded in 2000 between the International Transport Workers' Federation (ITF) and ship-owners and ship-managers represented by the International Maritime Employers Council.

> "At national level, there is not an example in human history of private voluntary initiatives, in the absence of a basic framework mandated by government and trade unions controlled by their members, protecting, in a comprehensive manner, rights of workers".
> *Jim Baker, ICFTU*

At international level, the revised OECD Guidelines for Multinational Enterprises, agreed in 2000,[9] are an example of an emerging body of international processes that, whilst not strictly speaking binding as international law, are not purely voluntary either. The OECD Guidelines are politically binding on participating countries, (six non-OECD members alongside the 30 OECD countries) who are required to establish 'national contact points' to deal with issues raised about the implementation of the Guidelines in specific instances. Companies may be the subject of investigations by national contact points whether they like it or not and without having the option to pick or choose which guidelines they apply. In the Netherlands, additional incentives for businesses to apply the Guidelines come from their incorporation (on a non-binding basis) within official support programmes.

Controversy over so-called 'conflict diamonds' has also generated innovative approaches to the management of intergovernmental discussions, bringing industry self-regulation into a framework of mandatory national controls. The Kimberley Process was triggered by international concern over the role of diamond sales in the funding of armed conflict in parts of Southern Africa. Again, research by the NGO Global Witness was an important catalyst. The success of the Kimberley Process Certification Scheme[10], which was concluded in November 2002, will rest on an innovative combination of national regulation implemented to an internationally agreed baseline, coupled with commercial incentives for industry players to avoid adverse reputational impacts or contractual claims for breach of warranty.

NGO analysts have joined overall positive responses to the Scheme, though some have suggested that the overall package of measures fails to offer a sufficient degree of public scrutiny or independent monitoring. The only formal auditing or verification so far agreed lies with company audits that back the industry system of warranties and guarantees. And since that in turn is based on contracts, outsiders will not be able to bring claims in the event that conflict diamonds are falsely warranted to be from legitimate sources.

In 2000, a group of Southern African diamond producing countries initiated the Kimberley Process, with a view to stemming the flow of 'conflict diamonds' whilst at the same time protecting the legitimate diamond industry. The Kimberly Process Certification Scheme was developed with the active engagement of the diamond industry and civil society groups. A total of 51 countries (including the EU 15) agreed the text at the date of adoption and others have pledged to join as soon as they are able. The agreement reflects a political agreement among signatory governments – it is not binding as a matter of international law. The Scheme centres on trade controls and agreed minimum standards for a new international certification scheme for rough diamonds. Participating countries agree only to allow imports of rough diamonds carrying validated Kimberley Process Certificates issued by designated authorities in exporting countries. The Scheme incorporates incentives to bring non-participating countries on board. Participating countries agree to ban trade in rough diamonds from non-participating countries.[11] Industry self-regulation is critically important to the success of the scheme. Members of key industry trade associations have agreed language for a warranty that is designed to appear on all invoices for sales of rough diamonds. This warrants that the diamonds that are the subject of the invoice have been purchased from legitimate sources not involved in the funding of conflict. It also carries a 'conflict free' guarantee. The system of warranties is referred to in the text of the agreement itself but is voluntary and entirely self-regulatory. It offers an additional layer of assurance alongside the government-led controls at national level by helping to secure the full traceability by government authorities of rough diamond transactions.

4. Litigation that brings new light to CSR

Litigation brings new light to the CSR agenda in three principal ways.

- Transnational litigation *against multinational corporations* that aims to generate legal precedents at the boundaries of CSR
- Legal actions *by* companies that damage their reputations as good corporate citizens
- Legal actions *against* companies in established areas of environment, competition or labour law that generate transnational reputational impacts

Testing the boundaries of CSR

A new wave of legal actions aims to hold parent companies legally accountable in developed country courts for negative impacts of operations in developing countries – 'foreign direct liability'. These cases test the boundaries of existing legal principles in relation to some of the most difficult issues of the CSR agenda. There are broadly speaking two types of case:

- The first set of cases focuses on the application of principles of international law to multinational corporations.[12] It reflects the call for multinational corporations to adopt minimum international standards wherever they operate. It also tests the boundaries of the existing international legal framework in its application to companies.

- A second set of cases focuses on general principles of civil liability – for example under the law of negligence. These cases are closely related to a campaign call that companies should apply 'best practice' wherever they operate.[13]

Two other types of 'CSR boundary litigation' have emerged in the US. One focuses on the liability of retailers in relation to human rights abuses, or violations of labour rights, further up the supply chain. It is closely related to the campaign call that responsible corporate citizens should accept responsibility for negative impacts in their supply chain, not limited to companies in the same corporate group.

A final legal action at the boundaries of CSR concerns the availability in the US of the First Amendment enshrining freedom of speech as a 'trump card' against a claim based on statements made by a company in defence of its record and practices on labour issues.

International law applied to companies

Almost all of the cases that test the application of international law to multinational corporations have been brought in the US, where the 1789 Alien Tort Claims Act (ATCA) gives District Courts the power to hear civil claims by foreign citizens for injuries that are caused by actions 'in violation of the law of nations or a treaty of the United States.[14]' Before the 1980s, the courts had restricted the use of the statute, so that foreigners were prevented from bringing actions against their own officials in US courts. But by 1997, case law had clarified the scope of the statute to cover not just foreign officials, but also claims against private individuals for injuries resulting from atrocities committed in pursuit of genocide or war crimes. In 1997 a US District court held that the statute potentially covered litigation against oil companies that were said to have conspired or acted in partnership with the Myanmar military junta to violate international law, including through the use of forced labour by the Myanmar military to build a gas pipeline. In 2001 this action, against Unocal, was dismissed on the basis that there was insufficient direct connection between the human rights violations at issue and Unocal's own acts or omissions. That decision is under appeal, and a trial of separate claims brought under Californian state law (as opposed to ATCA federal law) is due to start in February 2003.[15]

Not all of the ATCA cases have been brought against US multinationals. When an action in the US involves a non-US company, a key question is whether the defendant company has sufficient business presence to afford jurisdiction to the US court. This has been an issue in litigation against Total related to its partnership with Unocal in Myanmar (the case was dismissed for lack of jurisdiction), as well as litigation against Shell over its operations in the Niger Delta. In the Shell litigation, the presence of an investor relations office in New York was sufficient to provide a New York district court with personal jurisdiction over the two Shell parent companies.[16]

Other litigation against non-US parents includes cases against Canadian oil company Talisman over its investment in the Sudan, and litigation against Rio Tinto over its operations in Bougainville, Papua New Guinea. And in one ATCA case, the defendant company was not a global brand or even a multinational based in an OECD country, but the Taiwan-headquartered textile company Nien Hsing Textile Co, through its US affiliate. The case also illustrates how foreign direct liability can be used as part of a broader strategy to secure improvements in labour conditions.

The action against Nien Hsing Textile Co concerned violations of labour rights at Chentex Garments, a Nicaraguan wholly owned subsidiary of Nien Hsing. Union leaders whose union was affiliated to the Confederation of Sandinista Workers were fired and a total of some 700 workers were fired or left in protest following company reactions to strike action to secure a wage rise. The workers also alleged blacklisting and assaults. The story was unusual in the intervention of US Trade Representative Charlene Barshefsky, who in October 2000 warned a Nicaraguan official that the US could withdraw trade benefits if conditions at Chentex did not improve. An ATCA claim in the US was filed in December 2000 as one element in a broader strategy to secure improvements, including domestic litigation in Nicaragua. A major breakthrough for the claimants came in April 2001, the Managua Court of Appeals in Nicaragua ordered the reinstatement of 9 union leaders. In May 2001 a motion to dismiss the US case was granted the day in consequence of an agreement between the workers' trade union and Nien Hsing, in which the company agreed to recognize the union, reinstate fired union leaders and a further 17 members, drop all legal actions against the union leadership, and to compensate the fired union members.[17]

Transnational cases like those under the ATCA take courts into difficult areas of public policy, inviting the judiciary to step into politically charged adjudication with insufficient guidance from the legislature or the executive. It is not surprising that there are many hurdles to bringing a legal action under the ATCA – even leaving aside the difficult question of what is required for a *parent company* rather than an operating entity to attract liability. Some of these principles are designed to ensure that US courts do not infringe other countries' territorial sovereignty, or that actions are brought in the most appropriate legal forum. Among them is the legal principle of *forum non conveniens* which is applied in the US and, with some variations, in the UK, Australia and Canada. This principle allows courts to refuse to hear a case where there is some other available legal forum 'in which the case may be tried more suitably for the interests of all the parties and for the ends of justice'. It is almost unknown in civil law jurisdictions, but has a major impact in 'foreign direct liability' cases in common law countries.

Foreign direct liability cases are difficult to understand in isolation from their specific foreign policy context. In some cases, host country governments are understandably unsupportive of litigation, particularly when the legal action involves allegations related to corporate proximity to human rights abuses by public officials or security forces. But this is not always the case. For example, ATCA litigation against Texaco over the impacts of operations in the Ecuadorian Amazon was initially opposed as an infringement of territorial sovereignty, but a change of government brought official support for the litigation.

A more recent development is the practice of seeking the non legally-binding advice of the US State Department on the foreign policy impact of individual cases. The first case to do this was an ATCA case brought against English/Australian mining house Rio Tinto over the impacts of its operation in Bougainville and its contribution to the conflict there. In August 2001, Judge Margaret Morrow sought the opinion of the US State Department on the US foreign policy implications of case. The State Department replied that the continued adjudication of the claims would '*risk a potentially serious adverse impact on the peace process [in Bougainville], and hence on the conduct of our foreign relations.*' The court refused to review the US State Department's assessment of the US foreign policy implications of the case. The action was conditionally dismissed on 9 July 2002 under legal doctrines that maintain separation of powers between the judiciary and the executive in the US and prevent interference in another country's sovereignty when it is unwarranted as a matter of international law.[18]

Judge Morrow dismissed the Bougainville case against Rio Tinto on condition that the company agreed in writing to have the action proceed in the courts of PNG. She ordered that the company's consent must expressly state that any potential legal bar to litigation in the PNG courts would not be raised. Papua New Guinea has enacted legislation, initially triggered by litigation in Australia against BHP, a major PNG investor, making it a criminal offence for citizens of PNG to bring legal proceedings in a foreign court for compensation arising from mining or petroleum projects in Papua New Guinea. Rio Tinto has agreed to the condition, and the plaintiffs have appealed Judge Morrow's decision.

A second ATCA case to seek a US State Department opinion was an action against US-based oil giant ExxonMobil. ExxonMobil is being sued over its relationship with Indonesian government security forces charged with protecting workers, contractors and facilities in the troubled province of Aceh in Indonesia, where ExxonMobil operated as the production-sharing contractor of the national oil company. The case hinges, once again, on the alleged 'complicity' of the company in human rights abuses including torture, rape and killings allegedly perpetrated by members of the Indonesian military. ExxonMobil had itself lost contract workers to the conflict, and others had been kidnapped. The Free Aceh Movement has been described as a 'terrorist organisation' by the Indonesian government.

ExxonMobil argued in court that the case could set back efforts to fight terrorism, and in May 2002 the judge asked the State Department to provide a non-binding opinion on whether adjudication of the case would harm the interests of the United States. The State Department's legal adviser responded in a letter[19] which acknowledged concerns over human rights abuses by 'elements of the Indonesian armed forces in locations such as Aceh', but concluded nonetheless that '*adjudication of the lawsuit at this time would in fact risk a potentially serious adverse impact on significant interests of the United States, including interests related directly to the ongoing struggle against international terrorism… adjudication at this time could adversely affect United States interests in two ways.. First, the GOI may respond to the litigation by curtailing cooperation with the United States on issues of substantial importance to the United States. Second, the litigation's potential effects on Indonesia's economy could in turn adversely affect important United States interests…Working side by side with US firms, Indonesian* *companies and government agencies see the advantages of modern business practices including transparency, respect for contracts, fair labour practices, anti-corruption, efficiency and competitiveness. We would expect that foreign companies, such as from the People's Republic of China .. would be far less concerned about human rights abuses, or about upholding best business practices".*[20]

The State Department attached a separate letter from the Indonesian Ambassador to the United States, setting out the Indonesian government's objections to the continuation of the case in the US. These included the objection that "*as a matter of principle, we cannot accept the extraterritorial jurisdiction of the a United States Court over an allegation against an Indonesian government institution, e.g. the Indonesian military, for operations taking place in Indonesia… adjudication in the United States court will definitely compromise the serious efforts of the Indonesian government to guarantee the safety of foreign investment, including in particular those from the United States, and thus will adversely affect Indonesia's struggle to secure economic recovery*."

In 1999, Washington had cut military-to-military ties with the Indonesian military because of human rights abuses in East Timor. A New York Times Editorial, from the 18th August, remarked that "*[c]oming the same week that Secretary of State Colin Powell traveled to Indonesia to promise a partial resumption of military aid … the administration's statement was an invitation to more abuse, a sign that human rights could become a needless casualty of the anti-terror campaign*".[21]

None of the ATCA cases against a company has yet gone to trial.

The issues surrounding direct investment in countries associated with armed conflict or systematic violations of human rights issues have become a familiar part of the CSR agenda. Are there some countries whose human rights record is so appalling that the only ethical thing for a business to do is to stay out rather than applying a policy of 'constructive business engagement' to encourage the host nation to improve? Are there some states that are so corrupt or so steeped in violent conflict that no direct investment by a multinational corporation could benefit ordinary citizens?

Companies have adopted a variety of strategies to respond to these ethical issues and the reputational dilemmas that they present. Some have chosen to continue their investment. Others have adopted a policy of refusing to do business in places where they determine that they cannot operate in line with their own internal business principles. Much remains contested. Is it right to try to view companies as public advocates of political change? Is it proper for international NGOs to target multinational corporations instead of oppressive regimes? Are efforts to build strong civil society *in situ* not more important? One emerging test focuses on local stakeholder views – though which views, and expressed by whom, are still difficult issues.

In September 2002 British company Premier Oil sold all its interests in Burma to Malaysian oil company Petronas as part of a wider restructuring process. Human rights groups claimed victory.[22] In contrast, there may be circumstances when cleaning up and staying in may be viewed as the most responsible thing to do. When in October 2002, Canadian company Talisman announced that it was pulling out of Sudan, British development NGO Christian Aid argued that 'withdrawal is not a socially responsible thing to do… Talisman should have stayed in the country and said to the government: "We are suspending our operations until you come up with a peace deal."'[23]

> "Talisman's shares have continued to be discounted based on perceived political risk in-country and in North America to a degree that was unacceptable for 12% of our production. Shareholders have told me they were tired of continually having to monitor and analyze events relating to Sudan. We are encouraged by recent developments in Sudan, but had to weigh all possible outcomes against having a firm and fair offer, in hand, right now. Selling our interest in the project resolves uncertainty about the future of this asset".
> *Talisman CEO Jim Buckee, announcing Talisman's withdrawal from Sudan, Financial Times, October 31*

In November 2001, the Presbyterian Church of Sudan and one of its pastors filed a class action on behalf of non muslims in Sudan under the Alien Tort Claims Act.[24] They allege that Talisman has been complicit in human rights violations by government forces. The case can be readily contrasted with those against ExxonMobil and Rio Tinto. President Bush authorized US sanctions against Sudan in October 2001, and the government of Sudan has been classified as a state sponsor of terrorism since 1997. Indeed, US law prohibits US oil companies from doing business there. In February 2002, the government of Sudan was added as a co-defendant to the ongoing ATCA case. No US State Department opinion has been sought.

A different kind of legal action was launched in November 2002. The defendants are 21 multinational corporations, many of them significant investors in South Africa. They include US, Swiss, German, UK, French and Dutch-based multinationals. The plaintiffs claim compensation for the alleged roles of the companies in 'aiding and abetting' the human rights abuses of the former apartheid regime, for example by providing computers that enabled the regime to create and sustain the pass book regime, or through involvement in key industries such as mining, transportation and armaments that were, according to the plaintiffs, 'so integrally connected to the abuses themselves that apartheid would probably not have occurred in the same way without their participation'.[25] The case is founded on both the ATCA and common law principles of liability. The South African government has not supported the litigation, citing the country's need to attract foreign investment,[26] and already there are reports that US business interests have suggested that the case could discourage investment in South Africa.

Transnational civil liability claims against parent companies

A second kind of foreign direct liability claim against parent companies focuses on principles of ordinary civil liability. These kinds of foreign direct liability cases have been brought in the UK, the US, Canada and Australia. In the US, state level civil liability claims are often pursued alongside actions brought under the ATCA. Two of the cases – both against English company Thor Chemicals, have settled out of court. A third case reached a £21million out of court settlement after a lengthy legal battle, but the defendant company failed to make the first payment within the specified timeframe, and the litigation has been revived. That case was brought by some 7,500 South African absestosis and mesothelioma sufferers against an English multinational, Cape plc, which had at one time been the world's largest asbestos mining company. Cape had disinvested from South Africa by the late 1970s, and had not had any presence there since that time. The English litigation was supported by the South African government, which intervened in favour of the claimants – in direct contrast to the more recent apartheid reparations case, which concerns current investors.

Many of the civil liability cases have stumbled, sometimes for several years, over the application of the *forum non conveniens* principle. The principle has been considered twice by the House of Lords, the highest court in the UK, (the Cape litigation was one of these cases) both times in favour of the plaintiffs continuing the action in England. But there are still strong arguments that the way that English courts have applied *forum non conveniens* breaches obligations under the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, which establishes a general principle across the EU that defendants can be sued in the courts of the contracting state where they are domiciled.

In the US, judicial decision-making on *forum non conveniens* contains an additional 'public interest' element that is not applied in the English case law.[27] US courts consider the relative 'public interests' in hearing a case in one jurisdiction over another, deciding whether they, or the host country courts, have the greater 'public interest'. For example, in litigation in the US following the Bhopal gas plant disaster, the Court decided that the Indian interest in creating standards of care and enforcing them, and of protecting its citizens, far outweighed any American interest in deterring multinationals from exporting allegedly dangerous technology.[28]

Though the *forum non conveniens* principle is less relevant from a civil law perspective, other issues raised by the civil liability cases offer additional insights into the possibility for plaintiffs to hold multinational corporations accountable in 'worst cases'. Litigation in England against the small chemicals multinational Thor Chemicals shows the limitations of personal injury litigation in cases where environmental harm is also at issue – and it reveals the challenges that plaintiffs can face when corporate restructurings threaten to frustrate efforts to secure accountability.

Thor Chemicals manufactured products including mercury-based chemicals at its headquarters in Margate. Over a period of time during the 1980s Health and Safety Executive revealed unacceptably high mercury levels. As Thor discontinued its mercury-based operations in the UK, they intensified at its plant in South Africa, and the company began an ultimately unsuccessful mercury reprocessing operation, collecting mercury wastes from its clients – many of them outside South Africa - for incineration on site. The plant was closed after tests revealed unacceptable mercury levels. Very high mercury levels were found in waters below the site and in the Thor Chemicals workforce.

A formal Department of Manpower inquiry revealed gross negligence leading to the poisoning of at least 29 workers. Three workers died, but a criminal prosecution in South Africa led to a fine of just US$3700. The company argued that the poisoning was the result of an act of sabotage. A planned environmental prosecution was dropped in 1995 as President Mandela announced a formal Commission of Inquiry, whose recommendations have not yet been fully implemented.

Meanwhile, the first of a series of legal actions by the Thor workers had begun in England. The plaintiffs argued that the parent company and its chairman should be responsible for their injuries because they were directly responsible for setting up and maintaining a factory in South Africa which they knew, or ought to have known, would be unsafe for people working there.

The first and second of the actions, involving a total of twenty workers, were ultimately settled out of court in April 1997 for a total of £1.3 million. A third action was begun in 1998, after a 1997 demerger of the Thor Group, which had transferred all but three subsidiaries to a new parent company. The Court of Appeal concluded that the demerger may well have been motivated by a desire to put the group's assets beyond the reach of future claimants after the first two cases had settled. The parent company was ordered to pay money into court if it wanted to continue to defend the action, triggering a settlement of £240,000.

The English litigation provided Thor workers with compensation. But the contaminated South African site is still home to more than 3000 tonnes of mercury-containing wastes. Regulators are evaluating clean-up options, but the chances of recovering the full expenditure from the South African company, now renamed Guernica, seem slim.[29]

English litigation against Rio Tinto (at the time still called RTZ) by a former worker at its Rossing Uranium Mine reveals the challenges faced by plaintiffs seeking to unravel complex corporate structures in order to identify the right defendant.

Mr Connelly is a Scot who moved to Namibia in 1977 to work for Rossing Uranium at its mine. His job involved maintaining the two machines that crushed the uranium ore. He would work on one machine whilst the other was still operating, generating clouds of silica and radioactive uranium dust. Four years after leaving Rossing to return to Scotland in 1982, Mr Connelly developed cancer and had his larynx removed. He sought legal advice, and began an action – not against his old employer in Namibia but in England, against its parent company, Rio Tinto.

The case went to the House of Lords on the issue of which country the action should be heard in – and the House of Lords decided that his case could continue in England. Rio Tinto's lawyers then employed a different, ultimately successful, argument – that Mr Connelly was too late in bringing his action. The court's reasons[30] demonstrate clearly some of the issues faced by plaintiffs in unravelling complex corporate structures so as to make a claim. Mr Connelly believed that he was employed by one of Rio Tinto's subsidiaries – Rossing Services Ltd. But when he sought advice from a solicitor in Scotland in 1987, having moved back there, his solicitor discovered that in truth his employer was Rossing Uranium, and initiated an unsuccessful action to make a claim against Rossing Uranium in Nambia. It was years later, in 1993, having exhausted the options available to him in Namibia under workmen's compensation legislation, that Mr Connelly took advice from another law firm – this time in England. His new solicitors advised him that he might be able to bring an action against one or more of the English companies in the Rio Tinto group. The action was brought in 1994 on two main bases. First, that that Rio Tinto, the parent company, had devised or advised Rossing Uranium on its health safety and environment policy. Second, that at all relevant times an employee of Rio Tinto or one of its English subsidiaries implemented the policy and supervised health and/or safety and/or environmental protection at the mine.

The court accepted that the allegations, if proved, seemed to impose a duty of care on Rio Tinto and its English subsidiary. Mr Connelly's initial solicitor in Scotland gave evidence that he had not given any consideration to the possibility of suing any other company within the Rio Tinto group as he was not aware of any basis on which another company might be held responsible. But the judge concluded nonetheless that 'if there is any merit in the plaintiff's claims against the present defendants then on the face of it I can see no reason why Mr Bonington should not have been able to discern this possibility for himself, and to make the necessary enquiries to establish whether there would be any basis for such an approach'. Mr Connelly was out of time in bringing his action because the court held that he was deemed, via his Scottish solicitor's actions, to have had constructive knowledge of the identity of the English defendant companies and he had not brought his action within 3 years of that time.

Mr Connelly himself maintained throughout that he had no understanding of the precise workings of the relationship between the English-based Rio Tinto companies and his employers, Rossing Uranium.

Foreign direct liability in civil law jurisdictions

So far, just one of the 'foreign direct liability' cases has called for the application of principles of civil liability from a civil law system. That was an action against the Quebec-based gold mining company, Cambior, over pollution in Guyana following the collapse of a tailings dam. The case failed in 1998 on the principle of *forum non conveniens*, which is expressly incorporated into the Quebec civil code.

The lack of cases in civil law regimes is likely, in part at least, to be attributable to distinctions in the legal cultures of common law and civil law systems. Perhaps most important is the fact that common law systems attach great importance to the role of judicial precedent, whereas in civil law systems its influence on the progressive development of law is limited.[31] There is less emphasis on litigation and judicial pronouncement as a strategy for resolving difficult public policy dilemmas. A greater public trust of 'home-grown business' in some civil law countries may also contribute to reducing the role of litigation in the overall mix of strategies for improving environmental and social performance.

"German procedural law doesn't offer any incentive for a law firm to take up public interest cases the way US-American law does…Contrary to the so-called American Rule, according to which it is up to each party to pay his/her representative, in German civil procedure the loser takes it all (the loser has to pay all the costs), which means the financial risk of litigation is a lot higher. Secondly, while in the USA it is possible to stipulate contingent fees and thus shift the risk of losing on the lawyer, German law prohibits this kind of contract. It also invalidates "quota-litis" contracts and orders lawyers to be paid minimum fees that are strictly fixed by the law and may not be waived. The fees are even relatively lower where the total amount of money involved is higher. Lastly: There is no such thing as a class action. In total: Why should a law firm want to take up a difficult public interest case concerning lots of people?"
Eva Kocher: Legal and Hard Law measures related to private standards – the German case, December 2001

As between the US and Europe a further major distinction lies with the financial risks of going to court. In the US, the general principle is that each party pays their own costs. In Europe, the general principle that the loser of a case pays both their own and the winners' costs operates as a significant disincentive to bringing unfunded cases.

Principles of civil liability have so far not given rise to many 'foreign direct liability' claims for compensation in civil law countries, but two criminal law actions are ongoing in Belgium and in France. TotalFinaElf's Burma operations are the testing ground. Total had initially been sued alongside Unocal in the US under the Alien Tort Claims Act over its investment in Myanmar, but the action against Total was dismissed in 1997, with the support of the French government, on the basis that the court lacked jurisdiction over Total.

In April 2002, a group of Burmese refugees now living in Britain, the US, Germany and Belgium filed a criminal claim in Belgium against TotalFinaElf. The action is based on the Belgian law of 'universal competence' which gives Belgian courts jurisdiction in cases alleging crimes against humanity, no matter where in the world the alleged abuses took place, and even in cases brought by non-Belgian citizens. The plaintiffs all claim that they were the victims of crimes against humanity committed by personnel within the Burmese military junta. TotalFinaElf, as well as its CEO and the director of its Myanmar operation are co-respondents in the action on the basis of their alleged complicity.[32]

In August 2002, a separate legal action against TotalFinaElf and its CEO was filed in France by plaintiffs who claim that they were forced to labour on the Myanmar Yadana gas pipeline by military authorities paid by Total 'dans une dynamique de parteneriat'. The action is based on French law on the crime of kidnapping, rather than the notion of a 'crime against humanity', which is less well developed.[33]

Foreign direct liability in legislative initiatives

Alongside efforts to test the boundaries of existing laws through transnational litigation, there have also been legislative attempts to address similar issues. These include Australian Democrat Senator Vicky Bourne's Corporate Code of Conduct Bill 2000,[34] which sought to impose minimum environment, employment, health and safety and human rights standards on the conduct of Australian corporations employing more than 20 persons in a foreign country, backed by legal penalties in Australia. The Bill was rejected following its passage through a parliamentary committee process which generated wide-ranging submissions from NGOs and business groups.[35]

In the US, Congresswoman Cynthia McKinney's Corporate Code of Conduct Act would not only have required US-based multinationals to institute a Code of Conduct (the provisions of which were set out in the Act) coupled with detailed liability provisions, but also required federal agencies to give preference, through procurement or financial assistance, to those in compliance.[36] Congresswoman McKinney lost her seat in 2002.

The legal limits to subcontracting

One potential risk management response to 'foreign direct liability' claims based on ordinary principles of civil liability might be for multinational corporations to put distance between a parent company and legally risky business operations by contracting them out. Few sectors do not subcontract some of their work. But the garment sector is notable for its extensive use of subcontracted inputs at the heart of the chain to manufacture the clothes that are then sold to a brand name. One legal action – again in the US – has tested the responsibility of retailers in the fashion industry for violations of labour rights higher in the chain. There is no reason why, given the right circumstances, its strategies might not be applied in a transnational legal action.

In 1999, three separate lawsuits were filed in Californian state and federal courts and in a US federal court on the West Pacific island of Saipan against a number of US clothes retailers and against garment contractors based in Saipan.[37] Saipan is exempt from US immigration and minimum wage laws. The legal actions were brought by NGOs and a class of some 30,000 foreign textile workers, most of whom had been brought from China and the Philippines by apparel companies to work in their factories in Saipan. Some workers were forced to pay recruitment fees in their home countries. These fees effectively tied people to their employers in Saipan to pay back the debt.

A first legal action alleged breaches of Californian state law on unfair business practices on the basis that the defendant companies had falsely advertised their goods as sweatshop free, and aided and abetted violations by their contractors in Saipan of laws against involuntary servitude as well as other misleading labelling and advertising practices.

A second action was based on federal laws: the Alien Tort Claims Act, the Anti-Peonage Act, which prohibits use of forced labour, and RICO – the Racketeer Influenced and Corrupt Organizations Act. To state a claim, plaintiffs must allege unlawful conduct of an enterprise through a pattern of racketeering activity violating specified 'predicate acts,' which include involuntary servitude and indentured labour. RICO broadly defines 'enterprise' to include 'any union or group of individuals associated, in fact, although not a legal entity.' The plaintiffs' alleged that the defendants' behaviour amounted to a pattern of racketeering activity, which exists when a person commits or aids and abets two or more specified acts that have sufficient continuity and relationship so as to pose a threat of continued criminal activity.

The substantive legal principles at stake in the case have not been tested, since settlement talks began early in the action. By March 2002, agreements had been reached with a total of 19 mainland retailers. And in September 2002, settlements on different and more stringent terms were reached with a further seven US retailers and 23 Saipan-based manufacturers. The settlements will need court approval to take effect, but they are far more creative than any adjudicated resolution of the case could have been. Alongside provisions on back pay, recruitment fees and prohibitions on future violations of relevant laws, they are innovative in providing for strict monitoring, and for incorporating a comprehensive new Saipan Code of Conduct which governs working and living conditions in the Saipan factories and living quarters.

The settlement agreement does not include any admission of liability by the defendant companies. In a sentiment echoed by defendant companies in many other US suits, the general counsel of Target said that "This was just a case brought by class action lawyers to stir up publicity and they did it.[38]" One defendant company, Levi Strauss, continues to fight the case.

A legal broadside against transparency?

Many companies that are already facing litigation over environment, labour or human rights issues have found it difficult to balance legal risk management and reputation management in their public statements. Some companies have chosen simply to remain silent. Yet how companies communicate negative impacts is a key measure of their credibility as good corporate citizens.

The existing communication challenges have been made all the more difficult by a headline-grabbing discussion over the implications of a Californian lawsuit against Nike, sports goods company and internationally recognized brand.

> "The sad truth is that both silence and greater self-disclosure, no matter how well-intentioned, simply invite more suspicion, cynicism and litigation".
> *Elliot Schrage, Financial Times, May 27 2002*

In *Kasky* v *Nike*, environmental activist Marc Kasky challenged a variety of statements made by Nike over a period beginning in 1996, when the company was under sustained attack from a variety of individuals and NGOs over labour practices in its supply chain. Nike responded, in a variety of communications ranging from press releases through to letters addressed to university presidents. In essence, these communications said that Nike products were manufactured throughout the world in accordance with a strict code of conduct, and that they were free from sweated labour. Mr Kasky claimed that the statements were false or misleading, and that they should be censured under California's unfair competition legislation. Unfair competition is defined as 'any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by' California's false advertising law.

Nike cited the US constitution's First Amendment, which enshrines freedom of speech. Initially, the San Francisco Superior Court and the California Court of Appeal dismissed the action, agreeing with Nike that the company's statements were indeed protected by the First Amendment. But in May 2002, the California Supreme Court ruled by a majority of 4:3 against dismissing the action on First Amendment grounds.[39] Key to the court's ruling was its determination that Nike's statements amounted to 'commercial speech', because they were directed by a commercial speaker to a commercial audience (consumers of Nike products), making representations of fact about Nike's business operations 'for the purpose of promoting sales of its products'. Commercial speech is not subject to the same level of protection as 'political speech' under the First Amendment. US legislatures are free to prohibit commercial speech that is false or misleading. The consequence is that Nike's statements - in the specific contexts in which they were made - are subject to California's laws on unfair competition in the usual way. That in turn means that Nike will have breached unfair competition law if members of the public are likely to have been deceived by its statements.

The court's decision that Nike's statements should be viewed as made 'for the purpose of promoting sales of its products' is a logical reflection of the centrality of the 'business case' within the CSR agenda – particularly given the direct reputational impacts, and therefore potentially the impacts on sales of the NGO campaign that Nike's statements were designed to respond to.

One of Nike's responses to the Californian Supreme Court judgment was to cancel publication of its annual social report. But it is not clear that the tests applied by the Californian Supreme Court would apply to voluntary company reports in the same way as Nike's statements. The long-term reputational benefits that are among the principal drivers of voluntary company reporting may not be held to have the same nexus with 'promoting sales' as the kinds of defensive factual statements that are at stake in the Kasky case. It should not be assumed that Kasky attacks company reporting in the same way as a defensive external relations campaign that responds to specific attacks from NGOs or trade unions.

The Californian Supreme Court stressed that "*Our holding ... in no way prohibits any business enterprise from speaking out on issues of public importance or from vigorously defending its own labor practices. It means only that when a business enterprise, to promote and defend its sales and profits, makes factual representations about its own product or its own operations, it must speak truthfully... We emphasise that this lawsuit is still at a preliminary stage, and that whether any false representations were made is a disputed issue that has yet to be resolved.*"

In January 2003 the Supreme Court announced that it would review the Californian Supreme Court's judgment.[40] Its ruling will be important for NGO accountability as much as for corporate accountability. As it stands, Nike's critics would appear to have the benefit of the First Amendment as a sword, allowing them to cast the company's social credentials into doubt, without allowing Nike the use of the First Amendment as a shield. But reversing the Californian Supreme Court's ruling would leave Californian consumers with far reduced legal safeguards against company falsehoods or misleading claims over environmental or social performance. The risk is that the 'commercial speech' doctrine may in future be extended to apply to NGO statements – (when NGOs are held to make statements for the purposes of promoting support and therefore funds, as opposed to in the public interest). That would certainly put the cat among the pigeons.

Kasky v *Nike* asks a Californian court to set out how one part of Californian and US federal law sets the substantive legal baseline for 'greenwash.' It is widely considered that company environmental or social reports or statements on environmental or social issues are not credible unless verified by an independent third party. But verification can be costly and it has significant limitations, often acting principally as assurance of the process that a company followed in arriving at a report, not that the data presented in the report is complete and accurate. There are still considerable issues of credibility in the verification marketplace itself.

Even if the full force of the First Amendment does apply to corporate statements such as those at issue in the Kasky litigation – effectively protecting them from suit under US legislation – public pressure for factually correct statements is unlikely to diminish. Indeed, the effective denial of a significant part of the legal baseline for corporate communications is more likely to increase pressure for development of standards for independent verification and assurance to apply to corporate communications across the board. On the other hand, if the Californian Supreme Court's judgment on 'commercial speech' is upheld, some companies are likely, for the short term at least, to determine that the legal risks of voluntary statements or reports on social or environmental performance outweigh the potential business benefits. That in turn could increase public pressure for mandatory company reporting on environmental and social issues. Either way, the verification and assurance community has a key role to play.

It is important not to overreact - for the time being at least. True, in the litigious US, the discovery that companies can be sued – by people who have not suffered damage - over the statements that they make about their social or environmental practices in defence of NGO attacks is bound to set alarm bells ringing. But the case has not gone to trial. No court has ruled directly on how Californian law actually applies to the facts at issue – only on the extent to which Nike's statements are protected by the First Amendment. And even if parts of Mr Kasky's case are upheld, Californian legislators remain free, as one commentator has suggested, to establish a clear 'safe haven' where right-minded corporate communications can remain free from the threat of litigation. [41]

There may be more significant similarities between the substantive legal standards in the Nike litigation and those applicable in other parts of the world than is immediately apparent. In the European context, Article 10 of the European Convention on Human Rights contains a right to freedom of expression, which, according to Article 10(2), may in certain circumstances be subject to restrictions. There has been considerable debate on the extent to which Article 10(2) parallels the US 'commercial speech' doctrine. The margin offered to signatories in restricting 'commercial speech' is certainly wider than in relation to 'political speech.' [42]

There are also other legal techniques for incentivising accurate corporate communications over environmental or social issues. For example at European level, the Sale of Consumer Goods and Associated Guarantees Directive (1999/44/EC) introduces a general requirement that sellers across the EU deliver goods to consumers which are in 'conformity' with the contract of sale. Conformity includes "*any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling*". Quite how the new requirements might apply to CSR-related statements is still an open question. Sellers have a defence if consumers knew or could not reasonably be unaware of the lack of conformity or if they were "reasonably unaware" of the relevant public statement. Where there is a lack of conformity, consumers can ask sellers to replace or repair the goods, or as a fall-back ask for an appropriate reduction to be made to the price. And in extreme cases, consumers can ask for contracts to be rescinded.

These remedies look modest in comparison with the real power of the Nike case to strike fear into the business community: Mr Kasky sought the surrender of all profits earned as a result of any unfair business practices, and an injunction requiring Nike to undertake a court-approved public information campaign to correct any false or misleading information.

Commercial litigation that damages corporate reputations

One way or another, many people would consider that the *Kasky* v *Nike* litigation is bad for corporate citizenship, either because of its potential chilling effect on corporate reporting, or (if the Supreme Court reverses the ruling on the First Amendment) because of its failure to protect consumers from corporate 'greenwash'. History is replete with other examples of litigation that clashes with reputation management – when companies choose to litigate in circumstances that prove reputationally unwise.

Perhaps the most notorious example is the epic courtroom battle between fast food company McDonald's and two environmental activists, Helen Steel and David Morris. Steel and Morris defended themselves against McDonald's in a libel trial that became the longest ever trial in English legal history. The trial in the 'McLibel' case lasted for a total of 314 days. It focused on allegations made in a six-page leaflet, 'What's wrong with McDonald's' which dates from 1986 and which the company claimed Steel and Morris had distributed. The judge's ruling was handed down in an 800-page judgment on 19th June 1997.

The judge awarded total damages of £60,000, reduced in 1999 to £40,000 on appeal. But McDonalds' victory was ultimately partial at best. 'Not since pyrrhus has a victor emerged so bedraggled', said one newspaper.[43] McDonald's was reported to have spent a total of £10million on the action.[44] Though a number of the statements included in the leaflet were held libelous (notably that the company was responsible for destroying rainforests with poisonous chemicals, dispossessing farmers in Latin America and causing starvation in the third world), others were upheld, including that some animals used in McDonalds' products were treated cruelly, that McDonalds exploited children in the targeting of its advertising and that workers in Britain were paid poorly. The leaflets continue to be distributed to this day by activists and via the internet.

A second example of commercial litigation that proved a CSR embarrassment concerns access to medicines. In 1998, the Pharmaceutical Manufacturers' Association of South Africa, together with forty pharmaceutical companies, initiated a legal action against the South African government, along with Nelson Mandela, then President of the Republic of South Africa and a number of other senior political figures and state officials. The companies sought to challenge the constitutionality of provisions in the 1997 Medicines and Related Substance Control Amendment Act on the grounds that they were in breach of South Africa's international obligations on protection of intellectual property and its own Patents Act. The Amendment Act set out a range of measures to secure access to affordable medicines, including provisions on compulsory licensing of patented drugs, requirements for pharmacists to dispense generic drugs in place of brand-name drugs, the introduction of a pricing committee, and provisions on so-called 'parallel imports' of patented, brand-name drugs from countries where they are available at lower cost. The legislation formed a key part of South Africa's response to the AIDs pandemic, though its coverage was not limited to HIV/AIDs treatment drugs.

The reputational risks for the companies bringing the actions were huge. At a minimum, naming Nelson Mandela a defendant in the action cannot have been wise. A powerful international NGO campaign against the companies rapidly gathered momentum, spearheaded by the South Africa-based Treatment Action Campaign. The campaign drew attention to the contrasts between the companies' action to uphold their patent rights, and the human rights of the people living with HIV/AIDS in South Africa whose health the South African legislation was designed to protect.

"Some 4.5 million South Africans were living with HIV, many of whom could not afford access to treatment because of high prices, partly as a result of a previous patent regime that hampered generic production. Here was the South African government trying to address the problem.. and the companies, through the lawsuit, were trying to stop it from doing so.."
Sumi Dhanarajan, Oxfam GB

Shortly after an adjournment in the case, a number of the companies announced significant reductions in the prices of drugs used to combat HIV and AIDs, and in April 2001 the action was unconditionally withdrawn.

Even day-to-day commercial litigation can intersect with CSR. Nestlé made headlines in December 2002. As press coverage of famine in Southern Africa increased, Nestlé's long-standing US$6million claim against the government of Ethiopia took on a new significance. At face value, the claim was a straight commercial one – compensation for the 1975 nationalisation of a business owned by a German company that had since become part of Nestlé. But the imagery was stark: a huge multinational corporation suing a cash-strapped government in one of the world's poorest countries at a time of desperate human need. As pressure mounted, the company accepted an initial compensation payment of US$1.6million, and announced that it would be making the money available immediately for famine relief in Ethiopia.

A company spokesman argued that the settlement was in the Ethiopian government's own interest: "*It is in the Ethiopian government's interest to reach a deal as a way to ensure continued flows of foreign direct investment in the country*.[45]" A company spokesman said that "*we are not interested in taking money from the country of Ethiopia when it is such a desperate state of human need*," announcing that the company was initiating inquiries with representatives of the Red Cross and Red Crescent over how best to direct the money. Finally, on 24th January 2003, Nestlé announced that it had signed a settlement agreement for a total of some US$1.5million, bringing an end to the litigation.

Should Nestlé accept the compensation payment, and then work with civil society based organizations not the government, or a partnership involving the government, to determine how best to target that money to famine relief? The company's strategy for handling the settlement has landed squarely in another of the CSR agenda's boundary issues: the potential for CSR to undermine the role of democratically elected governments.

Breaches of minimum standards as CSR headaches

Nestlé's Ethiopian troubles are one example of day-to-day commercial practice acquiring a CSR hue in its specific context. Breaches of minimum legal requirements place companies' reputations as good corporate citizens on the line. The fall-out of British retailer Marks and Spencer's decision to close its French shops in early 2001 underscores the short-sightedness of internal management approaches to CSR that reflect a literal view of corporate citizenship as 'beyond compliance.'

In early 2001, Marks and Spencer announced the closure of its French shops. The 1700 French workers who stood to lose their jobs had not been consulted and initially learned about the company's plans through its press release. The company's action attracted political censure from the French finance minister, as well as the European Commissioner for social affairs. And Prime Minister Lionel Jospin remarked that "*The employees who enriched Marks & Spencer's shareholders deserve better treatment. Such behaviour should be punished*.[46]" A French judge later ruled that the company had breached EU and French law on consultation, and the company was forced to postpone its plans. The stores were eventually sold to Galeries Lafayette. Legal requirements may operate alongside non-binding guidelines: the French National Contact Point under the OECD Guidelines also reviewed the closure of the French stores.[47]

The corporate citizenship agenda has an under-explored 'economic' pillar, about basic principles of fair dealing. Examples include controversy over company taxation and transfer pricing, as well as the intensification of corporate governance regulation post-Enron. Competition law is also a key part of the governance framework for this economic pillar of corporate citizenship. In November 2001, the European Commission handed down its largest ever fine – 855.2million euro in total – over an illegal price fixing cartel on the supply of vitamins within the EU. Competition Commissioner Mario Monti noted that "*it is particularly unacceptable that this illegal behaviour concerned substances which are vital elements for nutrition and essential for normal growth and maintenance of life.*" The cartel had already led to fines in Canada, Australia and the US, where fines totalled US$725 million.

In the vitamins cartel case, no action was brought against the companies in a developing country, though one Indian NGO called for Indian competition authorities to take action.[48] But there is at least one developing country example of CSR and competition law coming together. In October 2002, a group of South African applicants including the Treatment Action Campaign, unions and doctors, filed a South African Competition Commission complaint against two major international drug companies, GlaxoSmithKline and Boehringer Ingelheim, charging excessive pricing in respect of key drugs for the treatment of AIDS. The complainants compare the cost of one of the most commonly recommended drug therapies for HIV/AIDS from Glaxo and Boehringer with the cost of the equivalent, best-priced, generic drugs. The difference, say the complainants, is approximately fourfold.[49]

5. The trade tensions of CSR

The dominant CSR agenda has been largely driven by stakeholders based in high income OECD countries: by northern multinational corporations, by international NGOs based in developed countries, by green or ethical consumers in the North, and by pension fund managers responding to the preferences of those consumers. So it is striking how many of the issues and initiatives highlighted in this paper tackle the behaviour or impacts of businesses operating in developing countries, or trading with producers from developing countries.

Developing countries and stakeholders based in developing countries are by no means entirely absent from the CSR agenda. Developed countries certainly do not have the monopoly on good practice or environmental or social concern. At the same time, there are concerns that some CSR standards that are applied internationally are insensitive or antagonistic to locally defined development priorities.

The trade-related impacts of CSR may lead governments to step up enforcement of minimum standards addressed by the CSR agenda – for example those associated with the most important International Labour Organisation conventions or around issues of child labour. In this sense, CSR can become a driver of enhanced compliance and enforcement.

The Thai Department of Labour Protection and Social Welfare, a division of the Ministry of Labour and Social Welfare, has recently set up an Office on Labour Standards Development. It aims to address the lack of enforcement on labour issues and to promote compliance to voluntary labour standards. A support programme entitled 'The Power of Labour Standards' has been launched, which will provide presentations and free training programmes to industry, subsidised consulting for factories, and a self-monitoring process.[50]

But concerns have also been expressed that CSR-driven labelling or certification schemes can unfairly squeeze small or marginalized producers who contribute the vast majority of economic activity in many parts of the world.

Two examples bring concrete insights into the trade tensions of CSR. In January 2002, legislation was approved in Belgium to establish a framework for the operation of a new social label. The 'law aiming to promote socially responsible production' supports the creation of a product-based label for goods manufactured in line with the fundamental social rights reflected in the International Labour Organisation's core conventions. Award of the label to eligible products is overseen by a 16-strong multistakeholder committee. The role of stakeholders in producing countries is one of the issues that the committee will need to consider.[51]

Discussion over the value of linking trade to labour standards through a 'social clause' in international trade rules has a long history and remains deeply divisive. And the Belgian label also sits uncomfortably with the antagonism of WTO law to regulations that differentiate between products on the basis of the environmental or social impacts of their production. But the Belgian label is voluntary, in the sense that businesses are free to decide whether to seek certification or not. Access to Belgian markets is in no sense conditional on certification. Nonetheless, following Belgium's notification of the draft legislation through WTO channels, a number of developing country governments[52] as well as some developed countries have raised concerns about the scheme in the WTO's Committee on Technical Barriers to Trade.[53] The concerns include that the scheme could not, as Belgium had argued, provide an "incentive for developing countries to develop socially responsible enterprises"; that the legislation might be in breach of WTO rules; and that linking social issues to trade would create an obstacle to international trade.

This Belgian experience echoes concerns raised in 1998 by the government of Colombia in a different context – the impacts on Colombian flower exporters of a voluntary German labelling scheme (which has since been revised), developed entirely by non-governmental stakeholders. In a paper submitted to the WTO's Committee on Trade and Environment in 1998, the government of Colombia set out its concerns over the discriminatory nature of the scheme and its impacts on Colombian exporters.

A new German "Flower Label Programme" (FLP) was offered only to flower exporters from Colombia and Ecuador. The programme involved a checklist and an audit committee comprised of German experts. The Colombian government drew attention to unclear criteria (e.g that only active pesticide ingredients registered in countries with 'stringent registration laws' may be used) and a provision that no Colombian or Ecuadorian exporter could meet requiring that "Only biodegradable products may be used for post-harvest treatments". The government of Colombia argued that no alternative biodegradable products for this type of treatment were as yet commercially available to producers needing to export their products over great distances. A further concern was the cost of the label to producers arising out of an annual verification visit and a fee charged for labelling each box of flowers.
Source: Government of Colombia, Environmental Labels and Market Access: Case Study on the Colombian Flower-Growing Industry, WT/CTE/W/76, 9 March 1998

Government and NGO-led voluntary labels both have the potential to impact in similar ways on producers once their requirements become contractually incorporated into the supply chain. But the WTO's existing rules do not equip it well to deal with voluntary labelling or certification schemes that are developed outside the mainstream standards community. Many would argue that the WTO is not well equipped to deal with measures that result from environmental or social concerns at all.

A final illustration of the potential WTO tensions of CSR comes from intergovernmental cooperation. The Kimberley Process Certification Scheme's restrictions on trade in diamonds with non-signatory countries raise questions about conflicts between national implementation and World Trade Organization rules, though participating countries have pledged to ensure that measures taken to implement the agreement will be consistent with international trade law.

6. Management Challenges

Integrating the changing legal baseline into CSR strategy

The changing legal baseline for corporate citizenship around the world generates a new set of business incentives for improved environmental and social performance. Share prices respond rapidly to the threat of liability. Once crystallized, legal risks can substantially affect the cost of doing business, for example through increases in insurance premiums or the cost of borrowing on capital markets.

But the legal signals are by no means always clear – particularly where frontier legal actions are concerned. This generates challenges for institutional investors seeking to quantify risks or to define minimum standards for environmental or social performance as much as for potential defendant companies. One message *is* clear: any company that aspires to integrate corporate citizenship across the full range of functions needs to involve its legal advisers in the development of management systems for CSR.

A major challenge is to integrate legal risk management with reputational risk management – so that for a company committed to corporate citizenship the response to legal risks does not damage reputation and, conversely, so that the management of reputational risks does not give rise to litigation. Lawyers have as much to learn from CSR practitioners in external relations, community affairs, or environment and health and safety departments, as CSR practitioners have to learn from lawyers.

Achieving integration can mean no less than building understanding between different mind sets. Where the CSR agenda focuses on responsibility, legal risk management focuses on liability. Whereas the CSR agenda focuses on transparency, legal risk management focuses on confidentiality, and where the CSR agenda focuses on bridge-building and partnerships, the legal risk management approach is typically one of cautious defensiveness.[54]

Happily, it is also widely accepted that good legal advice is likely to be good commercial advice. Increasingly that means that lawyers must take account of the 'business case' for good corporate citizenship.

"The litigation lawyer may advise his client not to pursue a contractual claim despite a strong legal claim… The intellectual property lawyer may advise his multinational pharmaceutical client not to act against a third world country manufacturing cheap generic drugs in order to help fight disease even if this amounts to a violation of the client's patent rights. The construction or property lawyer may advise his client not to develop a site in case this would have an adverse effect on either the environment or in case this would involve numerous people being displaced from their homes. The employment lawyer may advise his corporate client to settle a claim brought by an employee for sexual or racial harassment so that litigation and adverse publicity may be avoided.. There is one fundamental reason why the business lawyer has already been providing practical commercial advice in addition to traditional legal advice – to guarantee the protection and integrity of the client's most valuable asset, its brand name and reputation".[55]

James Cameron and Sunwinder Mann, Baker & Mackenzie

Building effective communication strategies for legal challenges

There are often contrasts between the ways that external relations professionals choose to handle the day-to-day challenges of CSR communication on the one hand, and the communications challenges of ongoing litigation on the other. Unocal's response to the ATCA case against it gives a practical example. The quotes in the table below are taken out of their precise context to illustrate the challenges of effective communication.

Unocal Ethics and Values	**Extracts from 9th Circuit Court of Appeals judgment in *Doe* v *Unocal* (18/9/02)**	**Unocal statements in relation to the litigation[56]**
Unocal will 'respect human rights in all our activities' and 'obey the law and operate in accordance with the highest ethical standards' and 'expect the same from our partners, contractors and suppliers.'	"the evidence suggest[s] that Unocal knew that forced labor was being utilized and that the joint venturers benefited from the practice" "the evidence ..supports the conclusion that Unocal gave practical assistance to the Myanmar Military in subjecting the Plaintiffs to forced labor" "Unocal knew or should reasonably have known that its conduct – including the payments and the instructions where to provide security and build infrastructure – would assist or encourage the Myanmar Military to subject Plaintiffs to forced labour"	"The claims made in the Cristobal Bonifaz law firm press release concerning human rights abuses on the Yadana natural gas project in Myanmar (Burma) in which Unocal holds a financial interest are false, irresponsible and frivolous". "we are confident that no human rights abuses have occurred in the construction or operation of the pipeline. In fact, the company has met with the government on a number of occasions to express our concerns about reports of human rights abuses by the Burmese armed forces. We are absolutely convinced that the presence of Unocal and other companies who follow high ethical standards and modern business practices can have a positive impact on the economic and political life of the people of Myanmar." "At all times, the project was conducted in accordance with Unocal's guiding principles and values." "These cases had no basis in law or in fact. In our view, they were filed for political - not legal – purposes."

It is an open question whether Unocal's defensive communications initiative could potentially be actionable under the principles established in the Californian Supreme Court's judgment in *Kasky* v *Nike*. If so, silence may emerge as an attractive response – and indeed, this is the strategy adopted by a number of the other defendant firms in the cases mentioned in this paper. But silence is an inadequate response from a CSR perspective – past practices shape current perceptions. Provision of factual information about the litigation, to include legal resources from both sides of the case, may offer a middle way.

Lobbying around legal cases is not always helpful either. In the Cape plc litigation, advice from lobbyists and PR agents hired by the company was leaked to a broadsheet newspaper. It emerged that Cape had been advised that the Daily Mail, a right-wing tabloid newspaper, *"should be alerted to the arrival of the latest writ, its sheer size and the fact that it is being supported, on merit, by the Legal Aid Board… The intention is to portray the issue as a 'foreigners get legal aid' story to counter [the claimants' lawyers'] continuing efforts to promote the 'poor victims of heartless multinational' story*".. At the time that this story broke, in 1999, the system of civil legal aid in England and Wales was undergoing an overhaul.[57] Cape did not take the advice, but the leak cannot have been helpful.

Choosing appropriate legal risk management strategies

Even with effective integration of legal advice across a company's CSR strategy, some important strategic questions remain about legal risk management in the light of the emerging legal issues highlighted by the 'frontier' CSR litigation. The paradox is that whilst the CSR agenda tends to support increased engagement by parent companies in the development and dissemination of CSR strategies, engagement may enhance the risks of liability.

Businesses should not over-react to the legal risks of CSR or to NGO campaigns for new 'corporate accountability' mechanisms. It would be tempting to conclude that the ATCA litigation in the US amounts to a strong incentive for companies to disinvest from all conflict zones – even when their presence might bring net benefits. For the time being, the obstacles faced by plaintiffs in foreign direct liability cases remain formidable. No court has yet handed down a judgment that is bound to drive out existing investors or chill new investment. The CSR agenda has tended to focus on stimulating best practice. But responsible businesses also have an interest in ensuring that the most abusive forms of business behaviour are eradicated from the global economy.

What is urgently needed is certainty on 'best practice' in such circumstances, coupled with legal clarity over the circumstances when even 'best practice' may not be enough to avoid liability. Engagement in multi-stakeholder initiatives like the US-UK Voluntary Principles on Security and Human Rights can help to build consensus in these difficult borderline situations – but legal precedents on the substantive issues would also be valuable.

In personal injury cases, such as those against Cape or Thor in England, disinvestment from the host country would be a largely ineffective legal risk management strategy since public governance failures are less central to the legal issues at stake. Adoption of 'best practice' standards across a business's operations is a more effective approach, along with business support for efforts to enhance access to justice and the availability of effective remedies in-country. Even so, the phrase 'best practice' needs working through on a case by case basis: the balances to be struck in any particular case between home and host country priorities and civil society demands are not always easy.

The Saipan sweatshop litigation is a reminder that new legal standards may emerge around subcontracted production inputs – beyond 'product liability' to 'process liability'. Subcontracting is likely to be an incomplete risk management strategy for the long term. And the litigation against Thor Chemicals in England is a reminder that even corporate restructurings designed to put assets beyond the reach of potential plaintiffs may be subject to challenge – though not without difficulty.

Kasky v *Nike* raises more difficult challenges. Here, it is important to be guided not by the politically charged debate over the First Amendment, but by an assessment of the legal standards of substantive Californian unfair competition law. This is where the real legal risks are generated.

Playing a part in tackling international trade impacts

The application of WTO rules to voluntary labelling and certification schemes or codes of conduct is currently limited. The potential for CSR-related initiatives to generate trade tensions would be minimized if initiatives were developed with the full participation of all those stakeholders who might be affected by their adoption. Companies could play a major role in shaping a more 'equitable' CSR agenda. Codes of conduct and labelling and certification schemes applied in international trade and tailored to the local contexts in which they have impact would be far less likely to generate trade tensions.

It seems obvious for example that labelling or certification criteria should not unthinkingly reflect concerns that are technologically impossible for developing country exporters to meet – but no mechanisms exist to ensure that this does not happen. An overly simplistic provision on child labour in a supply chain code could shift employment to more dangerous but less internationally visible local industries.

Effective advance impact assessment could help to evaluate the potential market access impacts of new CSR-driven 'voluntary' schemes, identifying their relevance in local contexts, the elasticity in developing country producer capacity to respond, and locally tailored information dissemination and technical assistance needs. Some provisions requiring technological adaptation, for example on environmental grounds, might be achievable if sufficient time were given for adaptation, or if information was generated about local availability of alternatives.

The overall challenge is for companies to play a central role in shaping a CSR agenda that is both more sensitive to, and more inclusive of, developing country stakeholder needs and interests.

7. Public Policy Challenges

The Institutional challenge of CSR

The 'legal dimensions' of CSR point to a need to reassess the institutional settings for CSR. There is currently no forum beyond the CSR conference circuit where the full range of actors can come together to discuss CSR in its broadest sense. The communities of CSR around the world remain fragmented, underpinned by separate 'business and …' agendas – for example 'business and human rights', 'business and corruption' or 'business and environment'. In contrast, the global climate change community is able to focus on a single integrated process with its associated meetings and fringe events. Sub-themes in the climate change agenda (such as mitigation; adaptation; or energy taxes) are united by their connection to an ongoing institutional process in the form of the Framework Convention on Climate Change.

Some parts of the CSR agenda have given rise to some interesting mixes of policy-setting, self-regulation and legislation. The Kimberley Process, with its innovative combination of public and private regulation, and its multi-stakeholder engagement process, is one example. But there is no UN Commission on Sustainable Development, no United Nations Environment Programme for corporate social responsibility.

The CSR process with the most comprehensive scope and global reach is the UN Global Compact, launched in 1999 by UN Secretary General Kofi Annan. The processes of the UN Global Compact are based principally on dialogue and partnership-building around its 9 core principles. The Compact has not (for the time being at least) become a global public policy network that could deliver solutions – some of them potentially normative or legally binding in nature – to some of the most difficult outstanding issues of the corporate social responsibility agenda. But it could be seen as a step along the way to a broader global public policy dialogue on CSR.

There need to be more spaces where the dogma of 'voluntary versus regulatory' or 'public versus private' can be revisited in the light of the most difficult contemporary needs. A global partnership for corporate social responsibility must be prepared to address them.

International trade and CSR

Public policy makers can help to tackle the sources of the trade tensions of some voluntary CSR initiatives. CSR initiatives that reflect demand-side requirements may not coincide with local priorities; the willingness of consumers to pay more for responsibly produced goods and services is often overstated; and inspecting large numbers of disparate suppliers has the potential to lead to a rationalization of the supply base, favouring larger producers.

Joint development of standards among all stakeholders could make a valuable contribution to making CSR in international trade more equitable. For the longer term, a genuinely multistakeholder partnership could set procedural 'rules of the game' for standards development that could be applied to both voluntary and mandatory CSR standards. Well-designed, equitable standards are less likely to generate trade tensions, delivering more for sustainable livelihoods and for poverty alleviation.

Promoting a wider public policy agenda on issues raised by frontier legal actions

Litigation is a hard substitute for meaningful public policy discussion - but the process of legal reasoning has much to add to public policy debate. There are a number of areas where insights from frontier legal actions point to the value of specific public policy debate.

Thinking through the implications of foreign direct liability

Transnational litigation has become firmly established within the armoury of campaign groups (particularly those in the US) that generate much of the business case for CSR. However frustrating (or expensive) these legal actions claims are for defendant companies, they raise important public policy questions that have not been adequately been addressed elsewhere.

There are practical reasons for suing: the non-availability of a long-departed investor in the host country; the possibility of large damages awards, particularly in US courts; the availability of public funding to bring a case; the strategic value of litigation as part of broader strategy to achieve changes in business behaviour. There are more profound reasons too: the threat of persecution in the host country if an action that antagonizes an oppressive regime were to be brought there; a lack of dedicated procedures for managing large group claims; the inaccessibility of justice through the courts to ordinary people; the impossibility of accessing legal funding; and simple lack of capacity among host country courts and legal professionals to bring large multi-party claims.

The human rights and development issues at stake in the foreign direct liability claims are too important simply to give way to the argument that investment may be discouraged by the possibility for such liability to attach. Equally, it is important that businesses be protected from frivolous or malicious claims. Costs penalties and preliminary hearings are one route to achieve this. It is important to be sanguine about what litigation can and cannot achieve, and not to oversell its value either to individual plaintiff clients or within the broader corporate citizenship agenda. Personal injury litigation, for example, cannot bring community-level remedies.

Each of the ‘frontier’ foreign direct liability cases challenges established notions of home and host company responsibility. What we know today about the impacts of economic globalisation, the political influence of businesses (particularly large ones) and the pluses (and minuses) of foreign direct investment as a vehicle for sustainable development suggests that old notions of territorial sovereignty and intergovernmental negotiating processes are badly in need of refurbishment. Foreign direct liability does nothing to build access to justice or to tackle public governance weaknesses in host countries – yet public governance weaknesses are at stake in almost all of the foreign direct liability cases. Corporate accountability and legal activism through 'frontier' legal actions that test the boundaries of existing legal principles should be a trigger, not a substitute, for broad public policy debate on the issues at stake.

The ongoing tendency to separate issues of corporate accountability from issues of good governance is less than helpful. They are two sides of the same coin – both need to be considered in an integrated way. One direct consequence is a need for public policy-makers to review the institutional and departmental links between CSR and good governance teams. The new cadre of CSR specialists in national and international development agencies need to develop strategies that draw on the skills and policy insights of colleagues working to strengthening governance and access to justice in developing countries. CSR should not be just an add-on.

Issues of corporate accountability were a prominent feature of NGO campaigning around the 2002 World Summit for Sustainable Development in Johannesburg. 'Worst case' examples of serious and preventable pollution incidents or of corporate involvement in human rights abuses invite reconsideration of existing intergovernmental frameworks. NGO pressure in this direction is unlikely to subside. For example, at the World Economic Forum in January 2003, Amnesty International announced that it would now "campaign for legal accountability of corporations for human rights under international law.[58]"

The challenge is to address the legitimate scope for transnational corporate accountability alongside international cooperation to strengthen civil society and to build effective access to justice and good public governance. Singling out transnational corporations would allow for consideration of the particular legal and regulatory challenges presented by the fact of their coordinated transnational management. But a new notion of common but differentiated responsibilities needs to go further than accounting for home and host country governments' responsibilities and transnational private actors. It may also call for new kinds of cooperation in relation to worst case abuses of the environment or human rights that are found in exclusively domestic companies. A multistakeholder global public policy network on corporate responsibility and accountability might offer a way forward.

Limited Liability and company law reform

The most difficult issue underlying many of the foreign direct liability cases concerns the risk management structure that is supported by limited liability; the principle that different companies within the same corporate group must, in general, be treated as separate legal entities. Limited liability – at least in the absence of a comprehensive market-based business case for corporate citizenship - generates incentives to allocate risk in ways that leave workers, communities and the environment without meaningful redress. It is an inefficient underpinning for efforts to internalize environmental or social externalities, particularly when coupled with significant public governance failures or weak civil society.

The broad issues are similar to those raised by the trade and sustainable development debate in the World Trade Organization. The WTO is broadly considered to have sharper teeth, and its members to be led in negotiations by stronger ministries, than its labour or environment or human rights counterparts in the community of international institutions.

Discussion continues to rage about the impacts of trade and investment liberalization on poor people and on the environment. The dogma is that trade and investment liberalization will bring benefits if the right policies are in place on the ground to ensure that they do so. Parallel questions might be asked of company law: what impact do principles of company law, including directors' duties and the notion of limited liability, have on the incentives for companies to behave as good corporate citizens? And are the right environmental or social policies in place to ensure that corporate governance does not lead to short-term decision-making at the expense of workers, communities or the environment?

Revisiting the principle of limited liability may be politically unpalatable. But there should be scope as the CSR agenda matures to take inspiration from the unwritten business code in commercial transactions that an honourable parent company stands behind its family members in case of trouble. The CSR agenda would benefit from discussion of whether there are circumstances when legal principles, for example those governing insolvency, should provide for parent companies to meet claims against subsidiaries by workers or communities adversely affected by their actions.

Transparent company communications

Marc Kasky's action against Nike in California brings a new focus to corporate communications on environmental and social issues. There can almost certainly be broad consensus that any corporate communication needs to be honest, truthful, clear and made in good faith. But there is still an important public policy debate on how that consensus should be enforced. Law must certainly have a 'bottom line' role if corporate communications are to retain their credibility; it is not credible to expect monitoring, auditing and verification of company reports to be a complete substitute. The more challenging issues are who should be given the right to force a company to 'prove it' in court, and what remedies should be available to them. Litigation, and the furore that it has generated, points to a clear need for broad public debate on the standards that should apply to company communications. Governments could play an invaluable convening role. They can support dissemination of information that helps counter unwarranted cautiousness in business responses to the Californian Supreme Court judgment. And, through advocacy, they can continue to support effective public pressure for corporate transparency so that the overall risk and reputation management environment continues to favour improved disclosure. *Kasky* v *Nike* potentially affects any business whose communications on environmental or social issues might be read in California. The challenge is to rise above the peculiarly US context of the case without losing sight of it altogether.

For the future, there may be value in thinking through a broader package of public policy measures around communication of environmental or social practices by companies. Many countries, including for example South Africa, have enacted legislation to protect workers who 'blow the whistle' on unlawful or corrupt activities. A question for the next generation of CSR may be whether the law should protect workers who blow the whistle on company greenwash, even when it is not illegal. Protection could add real weight to monitoring and verification of company reports. Arguably, new legislation in the US almost achieves this in relation to publicly traded companies.

The 2002 Sarbanes-Oxley Act, passed in response to a series of corporate scandals that included the collapse of Enron Corporation, provides protection to employees of publicly traded companies who disclose information about alleged misconduct. The misconduct must be related to a violation of any provision of federal law relating to fraud against shareholders, or of Securities and Exchange Commission rules. In turn, SEC rules require disclosure of any activities creating a material risk, or having a material impact, on the company's stock value.[59]

Towards a right of access to information held by companies?

Mandatory company reporting on environmental or social issues does not offer citizens a 'right to know.' Company reporting places readers in a passive role as readers and users of information generated to guidelines that they might not have shaped. Alongside 'passive' reporting, the environmental policy agenda views access to information in more proactive terms. Public rights of access to environmental information held by public authorities are found in constitutions around the world. Legislation on access to environmental information often also covers private entities such as water companies that carry out public functions or manage public services or exercise delegated administrative or regulatory responsibilities.[60]

Beyond the environmental sphere, and beyond the well-trodden territory of data protection legislation which offers individuals rights of access to data held on them by others, one country, South Africa, recognizes a constitutional right of citizen-initiated access to information held by private companies, when it is required for the exercise or protection of any rights.

As the CSR agenda matures, a public right of access to information held by companies (bounded by appropriate safeguards to protect commercial confidentiality and competitiveness) is a logical progression from passive reporting requirements.

8. Conclusion

The 'voluntary only' dogma of corporate social responsibility does no one any favours. It keeps companies from fully integrating legal risk management in their CSR risk management strategies; it feeds the notion that CSR is somehow entirely separate from corporate accountability; it keeps public policy makers from thinking creatively about their role; and it acts as a brake on efforts to tackle the real risks that CSR could come to be viewed as essentially a northern agenda. The hard fact is that legislation and regulation has become part of the CSR toolkit around the world. It has to be factored into CSR management strategies, and it needs to be reflected in the approach of public policy makers too.

Endnotes

[1] In this paper, 'CSR' is used synonymously with 'corporate citizenship', and encompasses environmental social and economic aspect of business impacts and performance.
[2] Communication from the Commission concerning Corporate Social Responsibility: A business contribution to Sustainable Development, COM (2002) 347(01), 2[nd] July 2002, available online at http://europa.eu.int/eur-lex/pri/en/dpi/cnc/doc/2002/com2002_0347en01.doc
[3] http://www.legislation.hmso.gov.uk/si/si1999/19991849.htm
[4] See www.irtk.org
[5] The Executive Summary can be found at http://www.gcgf.org/WABA/philip%20Armstrong%20(executive%20summary%20).pdf
[6] ERM Malaysia, *The state of corporate environmental reporting in Malaysia*, Certified Accountants Educational Trust, London, 2002, available online at http://www.acca.co.uk/pdfs/environment/other/TECH-ERM-001.pdf
[7] Available online via http://www.globalwitness.org/reports/show.php/en.00016.html
[8] See further http://www.dfid.gov.uk/News/News/files/eiti_intro.htm
[9] Available online at http://www.oecd.org/pdf/M000015000/M00015419.pdf
[10] http://www.kimberleyprocess.com/BulletinDisplay.asp?Key=38
[11] This included Rwanda and Uganda at the time of writing.
[12] See in particular International Council on Human Rights Policy, *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies*, Geneva, January 2002
[13] See generally Halina Ward *Governing Multinationals: the role of foreign direct liability*, RIIA EEP Briefing Paper New Series No. 18, Royal Institute of International Affairs, London, February 2001, available online at http://www.riia.org/pdf/briefing_papers/governing_multinationals.pdf
[14] Other statutes are also cited in some of the cases, including the Torture Victim Protection Act, but these are not considered further here.
[15] See generally the materials available via www.laborrights.org
[16] *Wiwa* v *Royal Dutch Petroleum (Shell)*, 2000 U.S. App. LEXIS 23274, available online via http://www.earthrights.org/shell/appeal.shtml
[17] Source: http://www.sweatshopwatch.org/swatch/headlines/2001/victory_may01.html, visited 3[rd] January 2003.
[18] *Sarei et al* v *Rio Tinto,* 221 F.Supp 2D 1116 (CD CA 9 July 2002), available online via www.cacd.uscourts.gov
[19] The text can be found via www.laborrights.org
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