Corporate social responsibility: legal and semi-legal frameworks supporting CSR: Developments 2000-2010 and case studies

Lambooy, T.E.

CORPORATE SOCIAL RESPONSIBILITY

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Proefschrift

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Preface and acknowledgements

Corporate social responsibility (CSR) has rapidly gained a foothold in business. In the last decade, many companies developed 'Planet, People, Profit' strategies, and put them into practice. Governments and civil society have called on private actors in contribute in resolving the dilemmas and difficulties of global governance.

This book concentrates foremostly on legal aspects of CSR but also deals with CSR in the broader perspective of assessing best practices. It elaborates on international developments in this field over the decade 2000-2010. The introductory chapters sketch the background of globalisation in relation to sustainable development, thereby identifying the role of CSR and comparing it with corporate governance. Part I of the book offers an overview of, and discussion on, the legal and semi-legal frameworks which can assist a business organisation in the course of becoming a socially responsible company. Examples are the institutionalisation of CSR in the corporate governance code, annual reporting on CSR, setting up an anti-corruption programme to support the internal control process, making human rights impact assessments part of corporate due diligence investigations, making use of private regulation and sustainability labels, and providing consumer product information. Part II contains five case studies that show how CSR works in practice. Two of them focus on conflict situations concerning CSR practices of companies (one regards the oil industry in Nigeria, the second relates to the textile industry in India and the Netherlands). The other three case studies focus on water management by companies, biodiversity concerns for the capital market, and on how to invest in nature, respectively.

This book is the result of research on CSR performed in the course of 2004 - 2010, partly when I worked as a corporate lawyer with the international law firm Loyens & Loeff, and partly when I worked as a lecturer and researcher at the Molengraaff Institute, part of the Law School of Utrecht University and as a researcher at the Center for Sustainability of Nyenrode Business University.

The subject of corporate social responsibility has provided me with a lot of joy, both in studying the theoretical legal aspects and in examining how theories work in practice. It is fascinating to research the complex interrelationships between companies, public authorities and civil society in this field, and sometimes to part in current developments, for example through the performance of action-research projects.

I am grateful for the support of many people, some of whom I would like to thank explicitly. Firstly, I would like to express my gratitude to Professor Vino Timmerman, Professor Alex Geert Castermans and Professor Gerard Keijzers for their efforts throughout the research, guiding me in the ways of conducting research and the criteria it has to fulfil, reading through various stages of the drafts, providing time for regular meetings, and, most importantly, giving constructive criticism. Special thanks are also owed to the former prime-minister of the Netherlands, Professor Ruud Lubbers, who in the course of the years frequently conversed with me about the subject of corporate social responsibility and the added value of it for global governance. In particular, I acquired many insights in this field during the period in which I was requested to assist him in a mediation project concerning a conflict related to corporate social responsibility in an international supply chain. Special thanks are also owed to Professor Carel Stolker of Leyden University (the Dean of the Law School) who stimulated me to start this research project, and to my former colleagues at Loyens & Loeff, Professor Niek Zaman and Philip van Verschuer, who supported my wish to commence with PhD research. I am most grateful to Penny Simmers, Yulia Levashova, Marie-Ève Rancourt, Bas Köhler, Michiel Brandt and Irene Heemskerk for our stimulating brainstorm sessions, and - on an individual basis - for their valuable cooperation, contribution in editing, assistance in the research projects and their, comments and support in the structuring and the finalisation of this book. Furthermore, I would like to thank my colleagues of the Molengraaff Instituut, especially Professor Adriaan Dorresteijn (at that time the Dean of the Law School), Professor Wilco Oostwouder and dr. Sonja Kruisinga, who offered me the possibility to start an international LLM programme at Utrecht University, *i.e.* International Business Law and Globalisation, in which corporate social responsibility and sustainable development play an equal role next to international business law. The programme was developed together with them as well as with my colleague dr. Antoinette Hildering of Utrecht University and with dr. Eva Nieuwenhuys of Leyden University. Setting up this programme in 2006, and working with students from all over the world as of 2007, has brought me valuable knowledge and perspectives on the legal aspects of corporate social responsibility from an international perspective. I would further like to mention my colleagues at the Molengraaff Institute with whom I could often exchange views regarding the legal aspects of corporate social responsibility, *i.e.* Liesbeth Enneking, Professor Ivo Giesen, Professor Marie-Louise Lennarts, Professor

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Abbreviations

ABB	Asean Brown Bovery
ACCA	Association of Chartered Certified Accountants
ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Covention on Human Rights
AFM	Authority Financial Markets (the Netherlands)
AHRC	African Human Rights Commission
APN	African Parks Network
ASEAN	Association of Southeast Asian Nations
ATCA	Alien Tort Claim Act (US)
BBOP	Business and Biodiversity Offsets Programme
BIAC	Business and Industry Advisory Committee (OECD)
BES	Biodiversity and eco-system services
BMC	Bangalore Mediation Centre
BSCI	Business Social Compliance Initiative (EU)
BWF	Business Water Footprint
CBD	Convention on Biological Diversity
CCBA	Climate, Community and Biodiversity Alliance
CCB Standards	Climate, Community and Biodiversity Project Design Standards (CCBA)
CCC	Clean Clothes Campaign
CCX	Chicago Climate Exchange
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CERES	Coalition for Environmentally Responsible Economies (US)
CESR	Centre for Economic and Social Rights (US)

CfS	Center for Sustainability, Nyenrode Business University (the Netherlands)
CIF	Investment Climate Facility
CIPE	Center for International Private Enterprise
CITES	Convention of the International Trade of Endangered Species
Clean Water Act	Federal Clean Water Act 1972 of the US Army Corps of Engineers
CNOOC	China National Offshore Oil Company
CNPC	China National Petroleum Corporation
CoE	Council of Europe
Combined Code	Corporate governance code for listed companies 2003 (UK)
COMESA	Common Market of Eastern and Southern Africa
Commission	European Commission
Consumer Directive	Proposal for the Directive of 8 October 2008, 2008/0196/COD (EU)
COSO	Committee of Sponsoring Organisations of the Treadway Commission (US)
COSO Addendum 1994	Addendum to Reporting to External Parties issued by COSO (1994)
COSO Report 1992	Internal Control Integrated Framework Report issued by COSO (1992)
CPI	Corruption Perception Index
CRC	Committe on the Rights of the Child (UN)
CSR	Corporate Social Responsibility
CSR EMS Forum	Multi-stakeholder forum on CSR (EU)
CSR-SC	Corporate Social Responsibility-Social Commitment
CSSF	Commission de Surveillance du Secteur Financier (Luxembourg)
Caudex Timber	Caudex Timber Investments GmbH (Germany)
DCC	Dutch Civil Code
DCrC	Dutch Criminal Code
DFID	Department for International Development (UK)
DJSI	Dow Jones Sustainability Group Indexes
DMDC	Dutch Ministry for Development Cooperation
DTI	Department of Trade and Industry (UK)
EC	European Community

EC Treaty	European Community Treaty
ECHA	European Chemicals Agency
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
Economic Offences Act	*Wet Economische Delicten* (the Netherlands)
EFSA	European Food Safety Authority
EFTA	European Free Trade Association
EIA	Environmental Impact Assessment
EIP	Ecosystem Investment Partners
EITI	Extractive Industries Transparency Initiative
EKN	Export Credit Guarantee Board (Sweden)
EMA	Environmental Management Act (*Wet Milieubeheer;* the Netherlands)
EMAS	Eco-Management and Audit Scheme
EP	European Parliament
ESG	Environmental, social and governance
ETI	Ethical Trading Initiatives
EU	European Union
EU CSR Forum	European Multi-Stakeholder Forum on CSR
EU-OSHA	European Agency for Safety and Health at Work
FAO	Food and Agricultural Organisation
FCPA	Foreign Corrupt Practices Act of 1977 (US)
FFD	Forest Footprint Disclosure Project
FFI	Fibres & Fabrics International Private Limited
FINRA	Financial Industry Regulatory Authority
Fish Regulation	EC Council Regulation 104/2000, OJ 2001 L278/6
FLA	Fair Labour Association
Frijns Code	Dutch Corporate Governance Code for Listed Companies (2008)
FSA	Financial Services Act (UK)
FSC	Forest Stewardship Council
FTI	Fast Track Initiative
FWF	Fair Wear Foundation
GAAP	General Accepted Accounting Principles (US)
GATT	General Agreement on Tariffs and Trade
GATWU	Garment and Textile Workers Union
GAVI	Global Alliance for Vaccines and Immunisation

GCNL	Netherlands Network of the UN Global Compact
GFATM	Global Fund to Fight AIDS, Tuberculosis and Malaria
GLAAS	Global Annual Assessment of Sanitation and Drinking Water
Global Compact	UN Global Compact
GPSD	Directive 2001/95/EC on General Product Safety of 3 December 2001, OJ 2001 L11/4 (EU)
GRI	Global Reporting Initiative
GRI G3	Third Generation Sustainability Reporting Guidelines (2006)
GRI Guidelines	GRI Sustainability Reporting Guidelines
GSB	Growing Sustainable Business
GSK	GlaxoSmithKline plc
Guideline 400	Dutch Council for Annual Reporting Annual Report Guideline 400
HiiL	The Hague Institute for Internationalisation of Law
HRIA	Human Rights Impact Assessment
IAS	International Accounting Standards
ICC	International Chamber of Commerce
ICCPR	International Covenant on Civil and Political Rights
ICC Rules on Bribery	ICC Rules of Conduct and Recommendations: Extortion and Bribery in International Business Transactions (2005 revised version)
ICESCR	International Covenant on Economical, Social and Cultural Rights
ICGN	International Corporate Governance Network
ICN	India Committee Netherlands
IFAI	*Instituto Federal de Acceso a la Información* [Federal Information Institute] (Mexico)
IFC	International Finance Co-operation
IFFI	International Finance Facility for Immunisation
IFRS	International Financial Reporting Standards
IFU	Industrialisation Fund for Developing Countries
IGGN	International Corporate Governance Network

ILO	International Labour Organisation
IMF	International Monetary Fund
IPIECA	International Petroleum Industry Environmental Conservation Association
IPO	Initial Public Offering
ISP	Internet Service Provider
IUCN-NL	International Union for the Conservation of Nature – Netherlands Committee
JKPL	Jeans Knit Private Limited
Malua Bio Bank	Malua Wildlife Habitat Conservation Bank
MBO	Management Buy-out
MDGs	Millennium Development Goals
MEND	Movement for the Emancipation of the Niger Delta
MERCOSUR	The Southern Common Market
MNCs	Multinational companies
MP	Member of Parliament
Modernisation Directive	Directive 2003/51/EG on the annual and consolidated accounts of 18 June 2003, OJ 2003 L 178/16 (EU)
Monitoring Committee	Corporate Governance Code Monitoring Committee (the Netherlands)
MOSOP	Movement for the Survival of the Ogoni People
MSC	Mixed Credits Scheme (Denmark)
MSI	Multi-stakeholder-initiative
NAFTA	North American Free Trade Agreement
NCP	National Contact Point (OECD)
NGO	Non-Governmental Organisation
NICAM	Netherlands' Institute for the Classification of Audiovisual Media
NIVRA	*Koninklijk Nederlands Instituut van Registeraccountants* (Royal Netherlands Institute of Registered Accountants)
NNPC	Nigerian National Petroleum Corporation
NOSDRA	National Oil Spill Detection and Response Agency (Nigeria)
NPC	Nigerian People's Congress
NTFP	Non-Timber Forest Products
NTUI	New Trade Union Initiative
OECD	Organisation for Economic Co-operation and Development

OECD Corruption Convention	OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions
OECD Principles	OECD Principles of Corporate Governance 2004
OECD MNE Guidelines	OECD Guidelines for Multinational Enterprises
OEEC	Organisation for European Economic Co-operation
ÖTI	Austrian Textile Research Institute
PBT	Persistent, Bio-accumulative and Toxic
PES	Payment for Ecosystem Services
PFP	Partnership Facility Programme (Denmark)
PPP	Public Private Partnerships
PRI	Principles for Responsible Investment
PSDP	Private Sector Development Programme (Denmark)
PWYP	Publish What You Pay initiative
REACH	Regulation on Registration, Evaluation, Authorisation and Restriction of Chemical Substances (EU)
REDD	Reducing Emissions through Deforestation and Forest Degradation
RICO	Racketeer Influenced and Corrupt Organisations Act (US)
RBM	Roll Back Malaria Partnership
RND	*Raad Nederlandse Detailhandel* (Dutch Council for the Retail Sector)
RoHS	Directive 2002/95/EC on the Restriction of the Use of certain Hazardous Substances in Electrical and Electronic Equipment of 27 January 2003, OJ 2002 L0095.
RSISTF	Rivers State Internal Security Task Force (Nigeria)
RTA	Regional Free Trade Agreement
RTW	Round Table of Worldconnectors
Ruggie Report	UN GA Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, "Protect, Respect and Remedy: a Framework for Business and Human Rights"'(7 April 2008) UN Doc A/HRC/8/5

SDS	Safety Data Sheet
SEC	Securities and Exchange Commission (US)
SEC Rule on Internal Control	Final Rule on Management's Reports on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports
SER	*Sociaal-Economische Raad* (Dutch Social-Economic Council)
SERAC	Social and Economic Rights Action Centre (Nigeria)
Shell	Royal Dutch Shell
SID	Society for International Development
SIDA	Sweden International Development Cooperation Agency
SIF	Specialised Investment Fund
SLAPP	Strategic Law Suit against Public Participation
SOMO	Stichting Onderzoek Multinationale Ondernemingen
SOX	Sarbanes-Oxley Act of 2002 (US)
SPDC	Shell Petroleum Development Company of Nigeria
SRI	Socially Responsible Investment
SUFYR	NGO Stand Up For Your Rights
SVHC	Substance of Very High Concern
Tabaksblat Code	Dutch corporate governance code for listed companies
Talisman	Talisman Energy, Inc. (Canada)
TCF	The Conservation Fund
TEEB	The Economics of Ecosystems and Biodiversity
TFD	The Forest Dialogue
TFF	Tropical Forest Fund
TI	Transparency International
TIES	The International Ecotourism Society
Tobacco Directive	Directive 2001/37/EC of 5 June 2001, OJ 2001 L194 (EU)
TOF	Timber Opportunities Fund
Transparency International	NGO Transparency International
TRIPS	Trade-Related Aspects of Intellectual Property Rights
TUAC	Trade Union Advisory Committee (OECD)
TVPA	Tort Victim Protection Act (US)

UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCAC	UN Convention against Corruption
UNCTAD	UN Conference on Trade and Development
UNDP	UN Development Programme
UN Draft Norms	Norms on the Responsibility of Transnational Companies and Other Business Enterprises with regard to Human Rights (2003)
UNDRIP	UN Declaration on the Rights of Indigenous People
UNEP	UN Environment Programme
UNESCO	UN Educational, Scientific and Cultural Organisation
UNFCCC	UN Framework Convention on Climate Change
UNGA	UN General Assembly
UN Global Compact Principles	Global Compact CSR Code of Conduct
UNHCR	UN High Commissioner for Refugees
UNPRI	UN Principles for Responsible Investment
UK	United Kingdom
US	United States
USAID	United States Agency for International Development
US Securities Exchange Act	US Securities Exchange Act 1934
VBDO	*Vereniging van Beleggers voor Duurzame Ontwikkeling* (Dutch Association of Investors for Sustainable Development)
VCS	Voluntary Carbon Standard
VCU	Voluntary Carbon Unit
VNO-NCW	Confederation of Netherlands Industry and Employers
VPSHR	Voluntary Principles on Security and Human Rights
vPvB	Very Persistent, Very Bioaccumulable
VROM	Dutch Ministry of Housing, Spatial Planning and the Environment
Water Framework Directive	Directive 2000/60/EC of 23 October 2000, OJL 2000, 327 (EU)
WBCSD	Word Business Council for Sustainable Development
WCA	Works Council Act *(Wet op de Ondernemingsraden)* (the Netherlands)
WDPA	World Database on Protected Areas

WEEE	Directive 2002/96/EC on Waste Electrical and Electronic Equipment of 27 January 2003, OJ 2002 L0096 (EU)
WFP	World Food Programme
WHO	World Health Organisation
WOK	*Wet Openbaarheid productie en Ketens* (Act on the transparency of supply chains) (the Netherlands)
WOL	World Online
WOP	*Wet Openbaarheid Productieketens* (Act on the Transparency of Supply Chains) (the Netherlands)
WRAP	Worldwide Responsible Production and Certification Programme
WRC	Workers Rights Consortium
WTO	World Trade Organisation

Chapter 1. Introduction

You must be the change you want to see in the world.
Mahatma Gandhi (Indian political and spiritual leader (1869 – 1948))

1.1 Background of globalisation and consequences

1.1.1 Economic globalisation

During the few last decades, national economic markets have become increasingly a part of an international market. This has been stimulated by the emergence of the European Union (EU) and other regional economic free trade unions.[1] Pressure to open up domestic markets has also been exerted by international organisations such as the World Trade Organisation (WTO), the World Bank and the International Monetary Fund (IMF).[2] In general, politicians in most countries support the concept of free trade on an international scale and free competition between companies from any part of the world.

Indeed, today, local shops in India, Ghana, Argentina and the Netherlands evidence the fact that we live in a truly international market place: all of them stock foreign products or products produced from foreign ingredients. Not only is Nutricia baby milk powder widely available, also rice and mobile telephones move around the world, as does waste. Financial markets are also heavily interwoven, *e.g.* Chinese sovereign funds back the American deficit, the

1. The surge in regional free-trade agreements (RTA) has continued unabated since the early 1990s. Some 462 RTAs have been notified to the GATT/WTO up to February 2010. On that same date, 271 agreements were in force. See: at http://www.wto.org/english/tratop_e/region_e/region_e.htm, accessed on 2 June 2010. Besides the EU, among the best known RTAs are: The European Free Trade Association (EFTA), The North American Free Trade Agreement (NAFTA), The Southern Common Market (MERCOSUR), The Association of Southeast Asian Nations (ASEAN) Free Trade Area (AFTA), and The Common Market of Eastern and Southern Africa (COMESA).
2. J. Stiglitz, *Globalisation and its discontents* (Penguin Group: London 2002); R. Peet, *Unholy trinity. The IMF, World Bank and WTO* (Zed Books: London 2003); J. De Kort, 'What's in it for us? Globalisation, international institutions and the less developed countries' and T.E. Lambooy, 'Sustainability Reporting by Companies is Necessary for Sustainable Globalisation' (pp. 215-237), both in: E. Nieuwenhuys (ed.), *Neo-Liberal Globalism and Social Sustainable Globalisation* (Brill: Leiden/Boston 2006).

EURONEXT and NYSE stock exchanges have merged, and Dutch banks finance the diamond industry in Africa and are involved in Greek state bonds. The financial crisis which started in 2008 is only one of the features of international financial entanglement.

The internationalisation of markets has been supported by technical developments in transport and communication. As air transport became faster and cheaper, it has become feasible to order fruit and flowers in Africa and sell them as 'fresh' products in Europe. The rapid emergence of the online world has facilitated companies in placing orders abroad. Hence, cargo volumes travelling by air, sea, road or railways have increased exponentially. Within the same framework, outsourcing has become a trend.

International competition between private actors has also increased because of privatisation, which has proved to be a persistent phenomenon. Electricity generation and distribution in Europe, airports in Africa, State companies in China and Russia, telecom in Indonesia, prisons in the United States and corporate private security forces everywhere, all have been sold off to private parties. Companies from everywhere have stepped into areas of activities that used to be locally managed.[3]

Globalisation incites the drive for companies to merge with foreign companies, *e.g.* to get an easy introduction into a new market, or to bring the products closer to the buyers. In the last century, European banks, insurance companies and food companies acquired large retail chains in the United States (US).[4] Oil and gas and mining companies such as Exxon, Rio Tinto and Chinese State companies absorbed local companies in many of the world's countries in order to get closer to their resources. Google set foot in China. Mergers and acquisitions of an international dimension also included the takeovers by the Indian companies TATA and Mittal of the European steel companies Arcelor and Corus. Investments also come from all parts of the world: Middle-Eastern sovereign wealth funds hold stakes in the German car industry and some European banks.[5] On an international scale we see that

3. T.E. Lambooy, *supra* note 2, pp. 216-217; S.H. Safri Nugraha, *Privatisation of state enterprises in the 20th century a step forwards or backwards? A comparative analysis of privatisation schemes in selected welfare states* (2002). This study compares certain privatisation processes in the United Kingdom, the US and Indonesia, http://irs.ub.rug.nl/ppn/241140757, accessed on 26 June 2010.
4. *E.g.* ABNAmro, Aegon, Ahold, respectively, a Dutch based bank, insurer and a food company. By 2010 parts of the US retail chains have been sold.
5. In August 2009, the state of Qatar'- Qatar Holding LLC has invested in the German automotive companies Volkswagen AG and Porsche SE (it owns 17 per cent of the ordinary shares). It also owns 7 per cent of Barclays Bank and Harrods in London. See Volkswagen's Annual Report 2009, at http://annualreport2009.volkswagenag.com/managementreport/sharesandbonds/sharepricedevelopment.html; and Zawya Business Development, 'Qatar Holding signs MoU with VW and Porsche', 16 March 2010, at http://www.zawya.com/Story.cfm/sidZAWYA20100316042211/Qatar%20Holding% →

mammoth conglomerates have come into existence. International merger waves alternate with periods in which forces dominate to break up companies and to sell off non-core business parts. Economists have identified five merger waves during the last century, of which the last one took place between 1995-2000. Each subsequent one appeared to lead to bigger corporate conglomerates.[6]

The resulting extensive international corporate networks and supply chains necessitate international tax planning. Tax specialists advise companies on how to structure their conglomerates in order to reduce their overall tax burden. This often leads to the incorporation of new corporate entities in tax free zones or low tax regions via which money flows circulate around the world. For outsiders, transnational corporate structures have become very impossible to understand.[7] As companies operating internationally tend to become bigger and bigger, and to operate virtually in any country of the world, they are commonly referred to as 'multinational companies' (MNCs).

Statistics evidence that many MNCs can be ranked alongside States in the top 100 largest economies.[8] These MNCs encompass large international networks with very strong economic bargaining power,[9] and are consequentially capable of influencing local economies and even politics. MNCs use their

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20signs%20MoU%20with%20VW%20and%20Porsche%20; Beurs.nl, 'Barclays onder druk door verkoop aandelen Qatar Holding', 20 October 2009, at http://www.beurs.nl/nieuws/buitenland/3014462/barclays-onder-druk-door-verkoop-aandelen-qatar-holding; sites visited on 2 June 2010.

6. H. Schenk, 'Mergers and concentration policies', in: Patrizio Bianchi, Sandrine Labory, *International handbook on industrial policy* (Edward Elgar Publishing: Northampton, Mass., 2006), pp. 153-155.

7. See *e.g.* F. Weyzig and M. van Dijk, Tax Haven and Incoherence in Dutch Government Policies? Stichting Onderzoek Multinationale Ondernemingen (SOMO), Centre for Research on Multinational Corporations, (Amsterdam, 2007), at: www.somo.nl, accessed on 4 June 2010.

8. Research carried out in 2000 showed that of the world's 100 largest economic entities, 51 are corporations and 49 are countries. The figures were based on the following sources: Sales: Fortune, 31 July 2000; GDP: World Bank, World Development Report 2000. See S. Anderson and J. Cavanagh, Report on the Top 200 corporations (Institute for Policy Studies 2000), at http://s3.amazonaws.com/corpwatch.org/downloads/top200.pdf, visited on 2 June 2010.

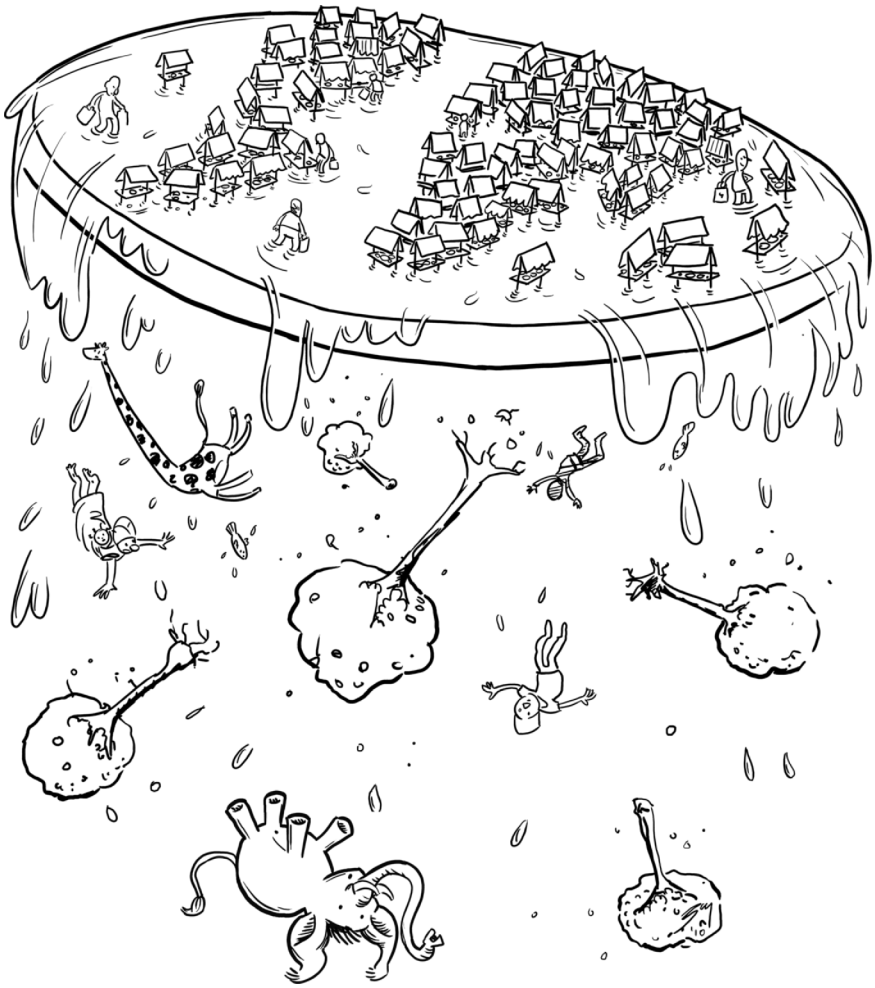
9. See *e.g.* W. Robinson and J. Harris, 'Towards A Global Ruling Class? Globalisation and the Transnational Capitalist Class', *Science & Society*, Vol. 64, No. 1, Spring 2000, 11-5411. Based on information by the ILO, they point out that the increased flows of direct investment have been accompanied by the growth of globally integrated production systems characterised by the rapid expansion of intra-firm trade in intermediate products and of subcontracting, licensing and franchising arrangements, including new forms of outsourcing of work across national frontiers. This phenomenal spread since the late 1970s is linked to diverse new economic arrangements, such as outsourcing, subcontracting, transnational inter-corporate alliances, licensing agreements, local representation, mergers and acquisitions. This resulted in vast transnational production chains and complex webs of vertical and horizontal integration across the globe.

economic power to sway local legislative powers (through lobbyists) and the administration, *e.g.* for obtaining an operational licence or agreeing on a favourable tax regime.

1.1.2 Globalisation as a societal phenomenon and its consequences

Economic globalisation has made some believe that the Earth is flat, meaning that through economic development we all want the same and follow the same path.[10] History has been there before. Gray disputed the reflections of Friedman and brought his readers back to the scientific notion that the world is round.[11] Indeed, except for the fact that Coca-Cola and Shell products are available nearly everywhere, and that aircraft bring us around the globe in a night and a day, local economies and cultures are still very different. Islamic bankers make different calculations than Western bankers due to different underlying values, Chinese businessmen attach other values to written contracts than American businessmen. Local education varies greatly as is the level on which people resort to corruption.[12] Environmental ethics and social legal standards diverge enormously and so do doctors' and religious' prescriptions.

10. The concept is from T. Friedman, *The world is flat. The globalized world in the twenty-first century*, (Penguin Group: London, England, 2005).
11. J. Gray, 'The world is round', in *The New York Review of Books*, Vol. 52, no.13, 2005.
12. See: the country overviews provided by the NGO Transparency International at http://www.transparency.org/, visited on 2 June 2010.



As pointed out above, the Internet is one of the key factors through which economic globalisation took place at an ever increasing speed because it connects people on a global scale. However, it has also created global transparency regarding government and corporate conduct. It made visible that standards and norms vary, *e.g.* that the salary level of a Dutch employee differs substantially from that of a Vietnamese employee. Undeniably, differences in the cost of labour have always been one of the very reasons for outsourcing production. To a certain extent these differences can be explained by pointing to the fact that also the cost of living differs greatly. Nonetheless, the international emailing societies incubated by non-governmental organisations (NGOs) have made it clear that – besides paying different levels of salaries – MNCs also apply different standards in respect of personnel safety measures, environmental precautionary standards and the compliance with law including anti-corruption laws.[13] The dissemination of this type of information produced quite some turbulence among consumers in Western markets. Through signing campaigns petitions and boycotting certain products, consumers have made it clear that they want their favourite brands to behave 'well'.[14]

Not only did NGOs circulate information about social wrong doings, they also engaged with companies. Firstly, to denounce abuses in an anecdotal way, later to collaborate with the corporate sector in order to find structural solutions.[15] This has led to the emergence of the terms 'stakeholder management' and 'multi-stakeholder initiatives' (MSIs). Companies have been challenged to take into consideration not only the concerns of in-company stakeholders such as employees, shareholders and – to a certain extent – creditors, but also those of outside stakeholders. This group includes people

13. See *e.g.* http://www.business-humanrights.org/ and www.somo.nl, an NGO which publishes overviews of controversial business practices concerning some large listed Dutch companies, in collaboration with the Vereniging van Beleggers voor Duurzame Ontwikkeling (VBDO), Association of Investors for Sustainable Development; see *e.g.* their overviews published in May 2010; Greenpeace International, 'Greenpeace protests against Nestle's double standards on genetically engineered food. World's largest food producer must change ways', 6 June 2002, at: http://www.greenpeace.org/international/en/news/features/nestle-double-standards/; 'Exporting Pollution: Double Standards in UK Energy Exports', Greenpeace, Canonbury Villas, London: 2002, at www.greenpeace.org.uk, visited on 2 June 2010.
14. R. van Tulder and A. van der Zwart, *International Business-Society Management – Linking Corporate Responsibility and Globalisation* (Routledge: Abingdon, UK 2006). This study analyses societal interface management and provides rich case examples (Nike, Shell, Triumph International, GlaxoSmithKline, ExxonMobil). It investigates the conflicts surrounding Burma, blood diamonds, child labour, oil spills, food safety, patents on HIV/AIDS medication and labour rights. See also the accompanying website: www.ib-sm.org.
15. Examples of collaborative certification of production processes concern FSC timber, MSC fish, Round Tables on Soy and Palm Oil, Voluntary Principles on Security and Human Rights, Social Accounting 8000.

who do not participate in the corporate activities but are impacted by them, and organisations representing the 'common goods' such as nature conservation and human rights defenders.

Why would companies take nature conservation into account? The reason is that companies are discovering that their very livelihood depends on the well-functioning of biodiversity and ecosystem services. For instance, without a healthy fish stock, the market for fish products disappears. Were it not because of the services of bees, apple juice would not exist. And Coca-Cola is based 100 per cent based on water.[16] Over the years, companies, side by side with governments and individuals, have been polluting eco-systems and overusing ecosystem services such as water and timber. Furthermore, mainly due to land conversion, biodiversity has dramatically decreased. Natural regions are often sacrificed for the development of economic activities, even high-biodiversity or protected areas frequently face this destiny. For all of these reasons, conservation NGOs currently actively engage with the business sector to find mutually beneficial solutions.[17]

How could companies be involved in human rights intrusions? Companies often pursue business for which cooperation with the local authorities is necessary, *e.g.* in obtaining a licence for exploration or the exploitation of natural resources, to buy or lease land, to build roads or ports, or to sell products to governments including weapons. If local authorities do not protect human rights, or even worse, transgress those rights, the chances are high that a company collaborating with such authorities will become caught up in spiteful situations. To make companies aware of these risks, NGOs and knowledge institutes have developed so-called 'Human Rights Impact Assessments' (HRIAs), targeted at clarifying corporate impact on human rights.[18]

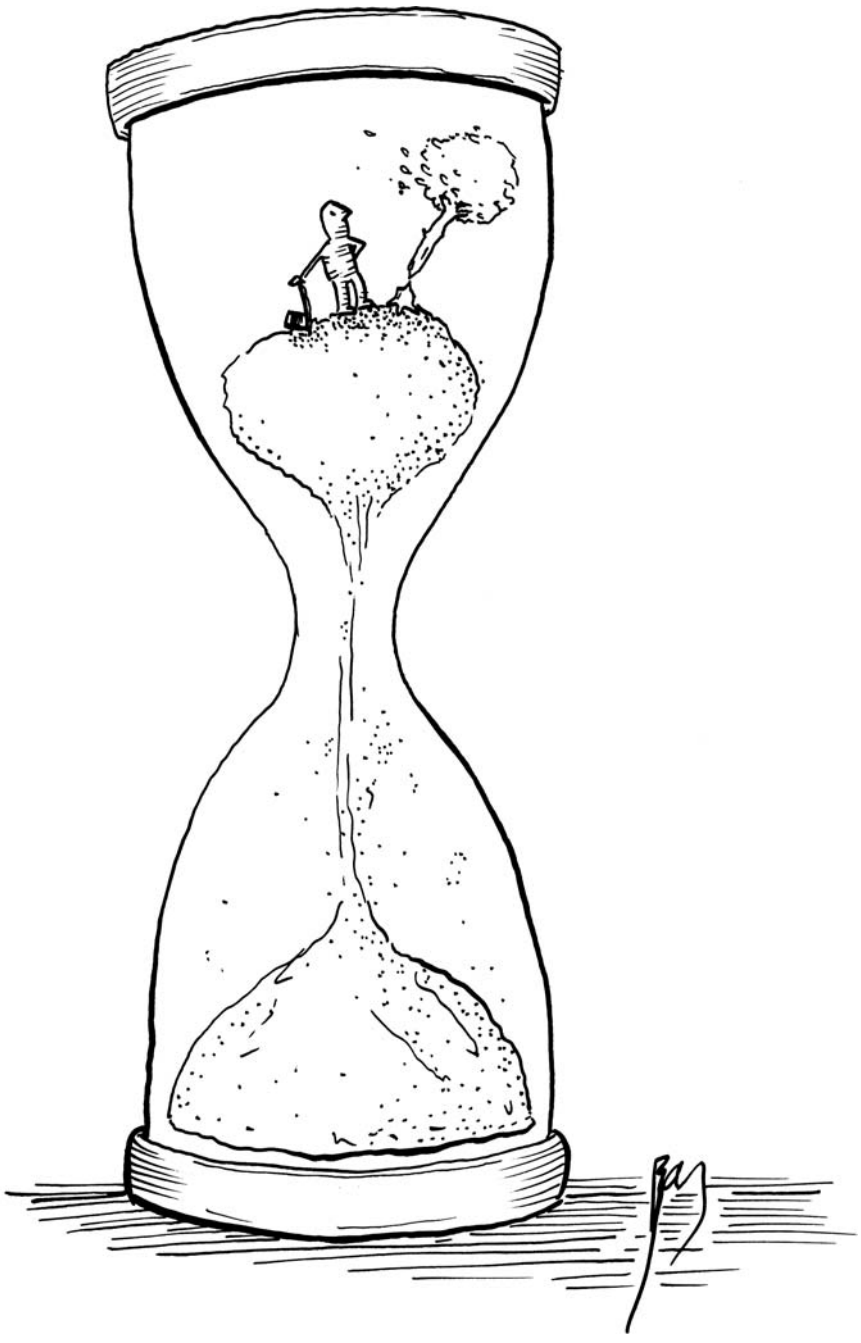
Globalisation and outsourcing have also contributed to employment opportunities in many developing countries. People in Indonesia and Bangladesh are now making T-shirts and skiwear for famous American or Italian brands, whereas no more than one or two decades ago these products were produced in Europe and the United States, on the doorstep of the users of those products. Producing cotton as the raw product for textiles was the only service deployed in Pakistan and India. Because of the transfer of the production process from Europe and North America to this region, textile manufacturing processes were

16. P. Senge, 'Unconventional Allies: Coke and WWF Partner for Sustainable Water', in: *The Necessary Revolution. How Individuals and Organisations are Working Together to Create a Sustainable World* (Doubleday: NY 2008), pp. 77-95.
17. *Idem.* Senge. See also: IUCN – Shell Relationship, http://www.iucn.org/about/work/programmes/business/bbp_our_work/bbp_shell/; Key Features of the Agreement between Shell and IUCN, Signed on October 05, 2007, at http://liveassets.iucn.getunik.net/downloads/shell_iucn_agreement_key_features.pdf, sites visited on 2 June 2010. See also chapter 13 on Investments in pro-biodiversity business.
18. See section 7.6 of this study concerning HRIA tools and sector approaches.

set up which contribute extra economic value to the local communities. Mangos and papayas were not common products in the Northern hemisphere markets; now they are. Tropical fruit growers in Africa have found new export markets. Consumer choices have expanded tremendously.

A consequence however, is that the increase in transport implies an extra burden for the environment: shrimp are flown in from Thailand to the Netherlands, Dutch shrimp are transported to Morocco for the peeling process, and back to the Netherlands from where they are transported by road throughout Europe; The Dutch are flown into Thailand for two weeks of sunbathing on the Thai beaches or fly to Morocco to see their families; potatoes are harvested in the North of Italy and are carried by van to the South of Italy where they are mashed, and then transported back to the North from where distribution starts around Europe.[19] The increased transportation in cargo and people transport adds to the climate change resulting from an ever increasing world population, a rapidly computerising economy, and an increasing standard of living. Considering the faster pace in which forests and other natural areas ubiquitously are converted into areas put to economical use, the mounting economic globalisation will make it even more difficult to reduce the effects of climate change.

19. The film 'The age of stupid', at http://www.ageofstupid.net/, visited on 1 June 2010.



1.2 Corporate Social Responsibility (CSR)

1.2.1 CSR as a societal phenomenon

Economic globalisation and its seemingly uncontrollable consequences have led governments, international organisations and civil society to call upon companies to contribute to solving the present challenges. The role of business has become vital in integrating the sustainable development perspective into the process of economic globalisation, because business decisions have a direct impact on all levels of society: economic, social, environmental and cultural. The private actors have thus been encouraged to conduct their business in a 'socially responsible way' and to pursue best practices that enhance value in three dimensions: 'Planet, People, Profit'. The expectations for the business sector to contribute at all levels will continue to grow.[20]

The business community has taken up the gauntlet, and this phenomenon has gained foothold as 'corporate social responsibility' (CSR – internationally), 'corporate responsibility' (CR – UK), 'corporate citizenship' (US), '*maatschappelijk verantwoord ondernemen'* (MVO – the Netherlands), '*responsabilité social des enterprises*' (RSE – France), '*responsabilidad social empresarial'* (RSE – Spain), '*Responsabilità Sociale delle Imprese*' (RSI – Italy), and '*Unternehmerische Gesellschaftsverantwortung'* (Germany). In the last decade, many companies – small and large – have developed CSR policies and strategies, and put them into practice.

1.2.2 Defining CSR

CSR refers to a wide array of issues and themes. Besides certain general themes that can be said to apply to all types of companies, such as respecting human rights, many sectors of industry have special concerns that need to be taken into account. For example, as a CSR strategy, the fishing industry has to make sure that fish stocks will not be depleted, whereas a grocery chain may well prioritise its employee diversity policy to create a direct connection with its customers and attract potential customers. As CSR is a subject of research in many disciplines, it is difficult to find one single and concrete definition. Moreover, various cultures set different priorities. In the Middle-East, creating jobs and providing education and training to youngsters is the highest priority,[21] whereas

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20. OECD-ILO, 'Overview of Selected Initiatives and Instruments Relevant to Corporate Social Responsibility', (OECD-ILO Conference on CSR, Employment and Industrial Relations: Promoting Responsible Conduct in a Globalising Economy, Paris, 23-24 June 2008), pp. 5-6.
21. 'Queen Rania Announces Arab Sustainability Leadership Group', 13 May 2008, at: http://www.sustainablebusiness.com/index.cfm/go/news.display/id/16005, accessed on 30 May 2010. As keynote address to the 2008 Global Reporting Initiative conference in →

CSR in Canada and Australia pays considerable attention to indigenous peoples' interests.[22] Furthermore, ethical standards may differ per cultural environment. For example, 'ethical banking' or 'ethical investment' has a different meaning for a Dutch banker and a banker who follows the *Sharia*. For the two bankers, certain ethical principles may coincide such as the ambition not to invest in or finance companies that produce or trade in weapons or pornography. However, they will have different opinions on whether or not to make interest payments part of the loan agreement. *Sharia* provisions generally prohibit the charging of interest. Consequently, where a Dutch banker will not see any ethical problem in agreeing on interest, this aspect will be a key issue for the *Sharia* banker. CSR is also an evolving concept that is in a continuous process of being redefined.

The European Commission (Commission) has defined CSR as "a concept whereby companies decide voluntarily to contribute to a better society and a cleaner environment"[23] and as "a concept whereby companies integrate social and environmental concerns into their business operations and in their interaction with their stakeholders on a voluntary basis".[24] CSR has also been described as business' contribution to sustainable development, *i.e.* 'meeting the needs of today without compromising the needs of future generations'.[25] The idea is that business has a duty to its wider community – beyond staying within the law and satisfying stakeholders.

The International Chamber of Commerce (ICC) prefers the terms 'responsible business conduct or voluntary corporate initiatives'. The ICC proposes the following definition of corporate responsibility from a business perspective: "the voluntary commitment by business to manage its activities in a responsible way".[26] The World Business Council for Sustainable Development (WBCSD)

Amsterdam, Queen Rania Al Abdullah of Jordan announced the formation of the Arab Sustainability Leadership Group (ASLG), the first of its kind from the region to commit to sustainability and reporting. Al Abdullah also appealed to the audience of global business leaders to make Arab youth part of their social equity agenda.

22. Corporate Social Responsibility, DFAIT Supports CSR Projects, at http://www.international.gc.ca/trade-agreements-accords-commerciaux/ds/fund_summary-resume_fonds.aspx, accessed on 30 May 2010. B. Harvey and S. Nish, 'Rio Tinto and Indigenous Community Agreement Making in Australia', in *Journal of Energy and Natural Resources Law*, 23(4), 2005, pp. 499-511.
23. European Commission, 'Promoting a European Framework for Corporate Social Responsibility', Green Paper, 2001, COM (2001)366 final.
24. European Commission, Corporate Social Responsibility: Encouraging best behaviour, 15 June 2006, at: http://ec.europa.eu/enterprise/library/ee_online/art11_en.htm, accessed on 30 May 2010.
25. Description of sustainable development by G. H. Brundtland, *Our Common Future* (Oxford University Press: Oxford 1987), p. 43. At that time Norway's Prime Minister, Mrs Brundtland, was the Chairman of the World Commission on Environment and Development.
26. ICC, Business in society, March 2002, p. 4, at: http://www.iccwbo.org/uploadedFiles/ICC/static/B_in_Society_Booklet.pdf, accessed on 30 May 2010.

states: "Corporate social responsibility is the continuing commitment by business to contribute to economic development while improving the quality of life of the workforce and their families as well as of the community and society at large".[27]

In 2006, an Indonesian law was adopted which prescribes that natural resource companies should practice CSR.[28] Article 1 of this act defines CSR as follows: "The company's commitment to participate in sustainable economic development in order to improve the quality of life and beneficial environment, both for the company itself, the local community, and society in general".

The Dutch corporate governance code for listed companies (Frijns Code) refers to CSR ('*maatschappelijk verantwoord ondernemen', i.e.* socially responsible entrepreneurship), but does not define this term. Legal experts on CSR such as the British corporate law professor Charlotte Villiers and Ramon Mullerat, a practitioner and professor in Spain, indicate that they cannot provide a clear definition of CSR. They assert that the term has not yet 'settled'.[29] The question can be posed whether basing research on one single definition will improve that research. Finding such a definition in itself probably constitutes a lengthy research project.

As a starting point for the research for this book, the concept of CSR as described by the Dutch Social Economic Council (SER, *Sociaal-Economische Raad*) was taken into account. In 2000, the Dutch Cabinet had requested the SER to report on the subject. The SER contended that CSR means balancing the interests of different stakeholders in order to realise a value increase in three dimensions: People, Planet, Profit.[30] In this book, this concept of a simultaneous value augmentation both in an economic sense and with regard to people and planet concerns has also been referred to as 'the fusion of interests'.[31]

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27. WBCSD, CSR: Meeting changing expectations, 2000, p.3, at http://www.wbcsd.ch/templates/TemplateWBCSD5/layout.asp?type=p&MenuId=MTE0OQ, accessed on 30 May 2010. The WBCSD is a coalition of 120 international companies united by a shared commitment to the environment and to the principles of economic growth and sustainable development. Its members are drawn from 30 countries and more than 20 major industrial sectors.
28. Indonesian Company Law no. 40/2007.
29. N. Boeger, R. Murray, C. Villiers (eds), *Perspectives on corporate social responsibility. Corporations, globalisation and the law*, (Edward Elgar Publishing: Cheltenham, 2008), p. 1; R. Mullerat, *Corporate Social Responsibility. The Corporate Governance of the 21st Century*, (Kluwer Law International: The Hague/International Bar Association, 2005), p. 3.
30. SER, SER Advisory Report on Corporate Social Responsibility: a Dutch Approach (De winst van waarden), No. 11, 15 December 2000, pp. 17-18 (section 2.3.1), http://www.SER.nl.
31. This is the paradigm on which the Center for Sustainability of Nyenrode Business University, the Netherlands, bases its research in the field of CSR. The author is one of their researchers.

1.2.3 Voluntary or binding?

The discourse on the legal aspects of CSR often narrows itself down to the question whether CSR is voluntary or binding.

In 2001, the Commission published a Green Paper on CSR, in which it also emphasised the importance of companies 'voluntarily' taking on commitments. On the other hand, the European Parliament (EP) has always been a clear advocate of mandatory CSR regulation rather than voluntary rules. Many resolutions have been adopted over the last decade instructing the Commission to include clauses on mandatory social and environmental reporting in the Accounting Directives, *i.e.* to oblige businesses to include in their annual reports information on the environmental standards they observe outside the EU. The EP also called upon the Commission to include additional obligations regarding the disclosure of corporate information on CSR in its Prospective Directive.

In 2000, in keeping up with the business community stance of rejecting binding rules, the SER advised the Dutch Cabinet to exercise caution when it came to the role of the Dutch government in this matter. Over the course of the last decade, the Dutch government position has evolved to its position today namely, that 'CSR is voluntary but not noncommittal'.[32] Moreover, the current Dutch corporate governance code prescribes that directors should formulate a CSR policy, submit it for approval to the supervisory board and report on it to the general meeting of shareholders.

Not an accepted scientific source of information, but illustrative of the confusion that governs the general debate about the binding or non-binding character of CSR, is the definition provided by Wikipedia:

> 'CSR is a form of corporate self-regulation integrated into a business model. Ideally, CSR policy would function as a built-in, self-regulating mechanism whereby business would monitor and ensure its adherence to law, ethical standards, and international norms. Business would embrace responsibility for the impact of their activities on the environment, consumers, employees, communities, stakeholders and all other members of the public sphere. Furthermore, business would proactively promote the public interest by encouraging community growth and development, and voluntarily eliminating practices that harm the public sphere, regardless of legality. Essentially, CSR is the deliberate inclusion of public interest into corporate decision-making, and the honoring of a triple bottom line: People, Planet, Profit'.[33]

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32. Speech by F. Heemskerk, State Secretary for Foreign Trade and CSR, at MVO Nederland, CSR Netherlands Association, at http://www.rijksoverheid.nl/documenten-en-publicaties/toespraken/2010/01/20/nieuwjaarsevenement-mvo-nederland.html, accessed on 2 June 2010.
33. See: http://en.wikipedia.org/wiki/Social_responsibility, accessed on 1 June 2010.

Clearly, the definition causes confusion by placing emphasis on self-regulation, but at the same time referring to compliance with laws and international norms.

Firstly, according to the author, the fact that CSR comprises so many themes makes it difficult to determine in a general manner whether or not 'CSR' as a whole is, or should be, included in law. Some CSR themes are already regulated by law, such as the prohibition on paying bribes and the prohibition on discriminating between employees on the basis of gender or race. Other themes are more difficult to capture in uniform legislation, *e.g.* how much water a company may extract from a river or an aquifer. This particular issue could for instance be regulated by way of imposing the requirement on each company to obtain a licence for water use. This has indeed been done in many jurisdictions. Each licence can then be different in order to balance public watershed protection goals and the company's needs. Compliance with the licence falls within the legal arena. However, in a year of extreme drought, civil society may expect a water-using company to use less water than legally permitted by the licence.[34] Today, CSR even seems to evolve into the situation in which society looks forward to seeing that business assist in keeping water sources healthy, because water is an ecosystem service on which everyone depends.[35] One best practice example is that companies pay communities upstream for not logging the forest which is essential for the water sourcing downstream.[36] In that case, the corporate motive to do so is based on a long-term business plan rather than being incentivised by strictly legal means. This could change however, meaning that future laws might well institute such payment obligations for companies in order to safeguard future water provision. Other issues are not at all suitable for mandatory rules. For example, a company cannot be forced to collaborate with a government of an African State, *e.g.* to jointly establish a public-private partnership (PPP) aimed at contributing to the Millennium Development Goals (MDG; MDG-PPP).[37] However, if a pharmaceutical company chooses to enter a new market in Africa, it can be advantageous to start that business project with an MDG-PPP aimed for instance at combating HIV. In that way, the company obtains knowledge about the local market, establishes relationships

34. See section 11.2.2.3 of this study (Coca Cola in India).
35. See the EU studies: 'The Economics of Ecosystems and Biodiversity (TEEB)': TEEB for Policy Makers Report (13 November 2009); The TEEB Climate Issues (2 September 2009); The Economics of Ecosystems and Biodiversity Interim Report (2008). These studies are available at: http://www.teebweb.org/InformationMaterial/TEEBReports/tabid/1278/language/en-US/Default.aspx, accessed on 12 April 2010.
36. See section 13.3.4 of this study (watershed protection).
37. UN Millennium Declaration, 18 September 2000, A/RES/55/2, at: http://www.un.org/millennium/declaration/ares552e.pdf, visited on 27 June 2010. The MDGs are eight international development goals that all 192 UN Member States and at least 23 international organisations have agreed to achieve by the year 2015. They include reducing extreme poverty, reducing child mortality rates, fighting disease epidemics such as AIDS, and developing a global partnership for development.

with relevant actors, creates opportunities for new R&D, and the PPP can add a positive boost to its reputation.

Secondly, merely judging CSR along the legal compass limits the capacity to observe. CSR is a concept that has legal aspects, ethical aspects, economic aspects, operational aspects, marketing aspects, and sociological and cultural aspects. These dimensions interrelate and mutually influence each other. For instance, although a pharmaceutical company cannot be forced in any legal way to enter into an MDG-PPP, if it does decide to do so such a partnership can have such a positive effect on the company's reputation that – from a marketing perspective – it will be difficult to terminate the partnership. In certain situations, a legal argument can probably also be made, *i.e.* that the company has created expectations with its local partners and would not act carefully by suddenly terminating the project. Moreover, when the decision has been taken to set up the partnership, legal commitments will very likely form part of the partnership structure, which will then also be enforceable when tried before a court of law. Hence, a theoretical discussion about CSR being voluntary or mandatory has little value. In contrast, examining real developments in the world may bring forward very interesting new legal issues to deliberate on as well as ideas that may ground the direction of future legislation and case law. In that respect, an analysis of best practices and new developments in the legal field can contribute to the public policy perspective and provide suggestions on how to approach private actors. At the same time, it can inspire private actors and assist them in framing and implementing CSR.

For these reasons, the study contained in this book will consider CSR from a legal perspective but does not stop there, as the broader perspective of assessing best practices and new developments also brings forward very interesting new solutions and dilemmas. Occasionally, the question will be posed whether a legal approach would be preferable when compared to other available alternatives.

1.2.4 Pros and cons?

The practice of CSR is subject to much debate and criticism. Proponents argue that there is a strong business case for CSR, in that companies benefit in multiple ways by operating with a perspective that is broader and lasts longer than their own immediate, short-term profits.[38] It has been stated that it is difficult to distinguish between CSR and good business practice, as CSR's

38. See *e.g.* the websites of the United Nations General Assembly (UNGA), the United Nations Environment Programme Finance Initiative (UNEP FI), the International Chamber of Commerce (ICC), the World Business Council for Sustainable Development, the Organisation for Economic Cooperation and Development (OECD), the Dutch Ministry for Economic Affairs, the Global Reporting Initiative, and numerous other organisations and networks, which indicate that they adhere to CSR and wish to promote it. Scientists' opinions can also be found for and against, *i.e.* experts from many disciplines.

holistic approach aligns with building and safeguarding corporate reputation for the future. Responsible business practice could help protect a company from consumer boycotts. A deeper perspective is offered by the American professor Michael Porter and the academic fellow and practitioner Mark Kramer. Their view is:

> CSR has emerged as an inescapable priority for business leaders in every country. Many companies have already done much to improve the social and environmental consequences of their activities, yet these efforts have not been nearly as productive as they could be – for two reasons. First, they pit business against society, when clearly the two are interdependent. Second, they pressure companies to think of corporate social responsibility in generic ways instead of in the way most appropriate to each firm's strategy. The fact is, the prevailing approaches to CSR are so fragmented and so disconnected from business and strategy as to obscure many of the greatest opportunities for companies to benefit society. If, instead, corporations were to analyze their prospects for social responsibility using the same frameworks that guide their core business choices, they would discover that CSR can be much more than a cost, a constraint, or a charitable deed – it can be a source of opportunity, innovation, and competitive advantage.

And: "When looked at [it] strategically, corporate social responsibility can become a source of tremendous social progress, as the business applies its considerable resources, expertise, and insights to activities that benefit society".[39] The frameworks to which Porter refers are in the first place business models, but he also mentions legal and semi-legal frameworks, amongst which are corporate governance, CSR reporting, and the rating and ranking of companies.[40] The focal point of his studies, and of many other studies on CSR, is the business strategy perspective.[41]

By contrast, critics argue that CSR bears no value because it cannot be legally enforced. In a more subtle way, others state that without a regulatory approach, CSR will not have sufficient impact on solving the problems to the solution of which it is expected to contribute.[42] The Dutch Professor Oosterhout also belongs to the criticasters of CSR. He claims:[43]

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39. M.E. Porter and M.R. Kramer, 'Strategy and Society: The Link between Competitive Advantage and Corporate Social Responsibility', in *Harvard Business Review*, December 2006, p. 3, at: http://www.exed.hbs.edu/assets/strategy-society.pdf, visited on 30 May 2010.
40. *Ibidem*, pp. 3-16.
41. See *e.g.* M.E. Porter, *Competitive Advantage: Creating and Sustaining Superior Performance* (The Free Press: New York, 1985); Van Tulder and Van der Zwart (note 14 *supra*).
42. C. Villiers, 'Enforcement of CSR standards with incentives or sanctions?' Paper presented at HiiL Law of the Future Conference: Globalisation, the Nation-State and Private Actors: Rethinking Public-Private Cooperation in Shaping Law and Governance, (The Hague, 8 and 9 October 2009). Paper and Conference Report available at www.hill.org, accessed on 31 March 2010.
43. J. Van Oosterhout, P.P.M.A.R. Heugens, 'Much Ado about Nothing: A Conceptual Critique of CSR', Erasmus University Rotterdam – School of Management, 14 August 2006, last revised on 18 August 2009, ERIM Report Series Reference No. ERS-2006-040-ORG.

> Corporate social responsibility (CSR) as a nominal term clearly resonates with scholars and practitioners alike. As a scientific concept, however, it has often been criticized for its lack of definitional precision and poor measurement. […] The upshot of this analysis is that since the CSR concept adds nothing of value to existing frameworks in the field of management and organisation, such as the economizing and legitimizing perspectives, it is best to discard it altogether.

Generally, criticasters have also contended that CSR distracts from the fundamental economic role of businesses.[44] From a different perspective, CSR has been criticised as being nothing more than superficial window-dressing. Along those lines, as one of the downsides, it has been asserted that CSR could become the victim of its own popularity. For example, the campaign group Friends of the Earth sees some companies' interest in CSR as a cynical 'PR exercise'.[45] Hence, in their view, 'greenwashing' – self-styled ethical brands – could suffer a backlash from their own CSR spin. Another critical argument often disseminated is that CSR is an attempt to pre-empt the role of governments as a watchdog over powerful multinational corporations.

Clearly, the CSR phenomenon has attracted strong positive and negative opinions from both scientists and society. On the one hand, the author agrees with the criticisms conversed; they provide a realistic view and certainly contain an element of truth. However, as will be demonstrated throughout this study, she also agrees with the view of Porter and Kramer. If businesses were to use the same frameworks that guide their core business, CSR could be effectively incorporated into the core operations and could become a source of opportunity, innovation, and competitive advantage for business, as well as a source of social progress. As will be explained *infra*, the author has chosen to direct her research towards legal and semi-legal frameworks that support and guide business organisations and to examine how these frameworks interact with CSR.

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44. Donald Kalff, *Modern kapitalisme. Alternatieve grondslagen voor grote ondernemingen* (e-book, Business Contact, 2009). He argues that the economic value should be positioned in the middle because it constitutes a clear way of measuring the success of the management and entrepreneurship of large companies. At the same time, he does include a long-term perspective in the calculation method for determining the economic value of a company.
45. Friends of the Earth, 'Greenwash Oscars', News item, 23 Augustus 2002. It stated: "Oil companies – Shell, BP and Esso (Exxon Mobil) – swept the Greenwash Academy Awards beating biotech giants – Monsanto, Novartis and Aventis – in a glittering award ceremony"; see http://www.foe.co.uk/campaigns/economy/news/earth_summit_23_august.html, accessed on 30 May 2010. R. Mcguinness, 'World: Friends of the Earth fire back at corporate 'greenwashing'', Metro World News, 6 April 2010, at http://www.corpwatch.org/article.php?id=15563, accessed on 30 May 2010, states: "Paul de Clerk, Coordinator of the Corporate Campaign at Friends of the Earth International, describes greenwashing as 'the practice of companies disingenuously spinning their products and policies as environmentally friendly'".

1.3 Problem statement

1.3.1 Legal aspects of CSR

The phenomenon of CSR has presented itself as an interesting topic for academic research in multiple disciplines: business administration, accounting, public governance and development studies, social studies, law and human rights studies. It has triggered the author to start researching this subject matter.

The study contained in this book concentrates first and foremost on the legal aspects of CSR but also deals with the theme in the broader perspective of assessing international developments in regulation and best practices in corporate conduct. It elaborates on developments in this field during the decade 2000-2010.

Regarding the legal aspects of CSR, certain recurring patterns can be discerned: new forms of regulation have emerged to assist companies in formulating new substantive standards for conducting business in a responsible way. The implementation of new responsibilities requires an extra effort by companies' boards as well as by the employees throughout the organisation. It has been suggested to employ 'due diligence' to create awareness concerning potential irresponsible impacts of business activities, thereby instituting a methodology aimed at prevention. From the same perspective, the issue of how to establish (legal) accountability for corporate misconduct receives generous attention. Furthermore, legislation and the accounting profession have moved companies forward in creating transparency concerning corporate conduct, also concerning extra-financial aspects of doing business. In addition, consumers have challenged companies to provide information to consumers about the characteristics and production methods of goods.[46] Another question that surfaced was how to embed the participation of new stakeholders in the corporate decision-making process. In this respect, stakeholder engagement and mediation appear to play an important role. It is also fascinating to see that the cooperation between companies and non-usual suspects such as international organisations or NGOs has triggered the appearance of innovative business models. MSIs which define responsible business standards and monitor the implementation thereof are an example hereof. Another interesting new model can be found in MDG-PPPs. Furthermore, innovative market approaches have resulted in the creation of new markets targeting nature conservation.

46. In 2002, the Dutch Consumer Organisation proposed to legislate this subject in a so-called *'Wet Openbaarheid productie en Ketens'* (*WOK, i.e.* 'Act on the transparency of supply chains'); available at http://www.consumentenbond.nl/actueel/nieuws/nieuwsoverzicht_2008/wij_willen_wok, accessed on 1 June 2010.

1.3.2 Research questions

Interesting research questions presented themselves, such as: how did the concept of CSR develop and what does it entail? Is CSR a regional or an international phenomenon? Which actors are involved? Which legal notions are being influenced by CSR? How is it connected to corporate law, environmental law, sustainable development, international law and international politics? Which legal and semi-legal frameworks support CSR and how does that work in practice? Which legal tools and mechanisms are available to companies to assist them in implementing CSR? What instructions or standards apply to companies? Do existing legal structures need to be expanded or amended in order to facilitate the implementation of CSR? Furthermore, how does CSR influence legislative developments and impact legal notions? How do companies approach CSR? What are the developments around certain specific CSR themes such as corruption, human rights, international supply chain management, water and other ecosystem services? How can CSR be encouraged? By legislation, tax incentives, reputation impacts, additional profits? Which dilemmas and barriers prevent the immediate and full implementation of CSR? What are the directions for solutions?

The author has elected to examine CSR by first and foremost looking at tools and processes that facilitate CSR implementation. The questions concerning the background and the positioning of CSR are addressed in chapter 2 of this study. A discussion on the legal and semi-legal configurations that are relevant for CSR constitute the central part of the study (chapters 3-8). The last part of the book (chapters 9-13) comprises case studies to demonstrate how CSR works in practice.

The author has identified the following legal and semi-legal frameworks which are relevant for the development and implementation of CSR (section 1.8 *infra* will introduce them in more detail):

– corporate governance;
– annual reporting;
– internal control and management information processes;
– private regulatory regimes;
– due diligence assessments; and
– providing information to consumers about products.

Following Porter's line of reasoning, it will be assessed whether these frameworks can be effectively used by companies for the CSR implementation process, or whether the frameworks need to be expanded in order to encompass CSR themes. Additionally, it will be explored whether these frameworks provide practical tools and mechanisms to companies to help them in their pursuit to operate in a sustainable fashion. A second focus of the research has

been on developments in the law pertaining to these frameworks and on corporate best practices: how is the (legal) position of CSR developing, and how are companies practising CSR? The results thereof have been interwoven into the central part of the study.

This study has also mapped the developments around certain specific CSR themes such as corruption, human rights, international supply chain management, water, biodiversity and other ecosystem services. The first three subjects are first examined in relation to the corporate mechanisms listed above, respectively, internal control and management information processes, due diligence assessments, and providing information to consumers. They then re-surface in the case studies. The developments surrounding water and BES lie at the heart of the case studies in the last three chapters.

1.4 Methodology

1.4.1 Part I: Chapters 2-8 – Corporate tools and approaches

Part I of this book (chapters 2-8) elaborates on the legal frameworks and the tools and processes that companies can draw upon to become a socially responsible company (corporate governance, annual reporting, internal control and management information processes, private regulatory regimes, due diligence assessments, and providing information to consumers about products).

The research methodology mainly comprised desk research, which included the examination of traditional sources for legal research as well as the websites of companies, international organisations, NGOs and governments to keep track of developments and progress. In addition, views were exchanged with academics and practitioners in expert meetings and conferences.

The legal perspective of these chapters is primarily Dutch corporate and private law, and additionally – when constructive – reference is made to legal developments in the EU, the US, the UK and other European jurisdictions. Perspectives from an international law, environmental law, labour law and criminal law perspective have been included where this is functional. The discussion is not limited to positive law, legislative proposals and fresh ideas have also been subjected to the research. All sources that have been used are accounted for through footnotes in the chapters, and have been included in the Bibliography.

1.4.2 Part II: Chapters 9-13 – Case studies

Part II (chapters 9-13) contains five case studies. They illustrate which tools and methods can bring success but they also identify dilemmas and obstacles that may emerge when implementing CSR.

Chapters 9 and 10 assess international CSR conflicts, one regarding the oil industry in Nigeria, the second the textile industry in India. The legal perspective of these chapters draws on international human rights law, international soft law standards, and Nigerian and Indian law respectively. The sources can be found in the footnotes in the chapters, and they have also been included in the Bibliography. Concerning the methodology, these chapters have been prepared on the basis of desk research and interviews. Chapter 10 is based on the author's participation in a mediation process regarding an international CSR-dispute.

Chapters 11-13 do not provide a legal analysis as they concentrate on specific CSR themes. The relationship between such a theme and the business community is assessed. Chapter 12 examines the roles of companies with regard to water. Chapter 12 presents the results of a research project concerning how capital markets can integrate the issue of 'biodiversity and ecosystem services' (BES) in their operations. It provides a perspective from practice which can supplement the theoretical perspective submitted in chapter 4 on integrating information on environmental matters in corporate annual accounts. Chapter 13 finally offers an insight into new markets that are developing for entrepreneurs and investors for investing in pro-biodiversity businesses.

The methodology utilised in the chapters 11-13 consisted of desk research and participation in experts' meetings and thematic conferences. In addition, in respect of chapters 12 and 13, the research entailed action research, which included interviewing private actors, NGOs and government officials, and organising a workshop and a conference concerning the respective themes of these chapters. Section 12.3 consists of an account of the action research technique employed. The literature and other sources that have been used are accounted for in 'in-text' references. All sources have been included in the Bibliography.

In the following sections, the relevant terminology in relation to CSR (section 1.5), the actors involved (sections 1.6 and 1.7), and the legal and semi-legal frameworks listed in section 1.3.2 will be discussed (1.8). The chapter will end with a note on certain themes that are discussed in the case studies such as dispute resolution (section 1.9) and innovative partnerships (section 1.10).

1.5 Terminology, framing CSR, international norms and private actors

The subject matter of CSR has to do with the governance of companies, especially MNCs, which are often claimed to be uncontrollable. Hence, a brief look at the applicability of laws to MNCs will be of use.

The international legal system consists of international law applicable to States and national law that governs the subjects and activities within those States. International legal norms can be found in case law issued by international courts of law, customary law, and treaties concluded between States. National sources of law can differ per country. The international legal system reflects the so-called 'Westphalian' legal system which bases legal authority on geographical territories.[47] Basically, within such a territory, the State is sovereign. This implies that a State generally cannot regulate – at least cannot control – the activities of a company registered in its jurisdiction to the extent that its activities are undertaken in another jurisdiction. Exceptions can however be pinpointed in the field of criminal offences, which sometimes fall within the penalising power of a State even when the offence was committed outside of its territory ('extra-territoriality'). Examples are war crimes, murder, child pornography crimes and corruption.

As many of the governance subject matters are of a global nature, States can only solve these by cooperating with each other or by attributing effective legislative and enforcement powers to a supra-national organisation. For example, with the aim of reducing wars and armed conflicts, the United Nations (UN) Security Council was established. Also, the UN as well as regional international organisations adopted several human rights treaties and established supra-national human rights courts and bodies for their enforcement. For the reduction of poverty, States instituted the UN Development Programme (UNDP) and regularly make funds available to it to initiate programmes. Monitoring threats of food scarcity and managing food programmes is the task of the Food and Agricultural Organisation (FAO). Collective efforts to reduce climate change have been made through concluding the Kyoto Protocol,[48] and attempts to stop the loss of biodiversity have been made through agreeing on the Convention on Biological Diversity (CBD) and the Convention on the International Trade in Endangered Species (CITES). Corruption is the subject of various treaties: the UN Convention Against Corruption (UNCAC), the OECD Convention on Combating Bribery of

47. The term 'Peace of Westphalia' denotes the two peace treaties of Osnabrück (15 May 1648) and Münster (24 October 1648) that ended the Thirty Years' War (1618-1648) in the Holy Roman Empire, and the Eighty Years' War (1568-1648) between Spain and the Republic of the Seven United Netherlands. It marks the beginning when States recognised each other's independence (in theory). It legitimised a patchwork quilt of independence in Europe. The 'Principle of internal sovereignty' began to take form as well as a new concept of international law and diplomacy.

48. UN Kyoto Protocol to the UN Framework Convention on Climate Change, 1998, at: http://unfccc.int/resource/docs/convkp/kpeng.pdf, accessed on 30 May 2010.

Foreign Public Officials in International Business Transactions[49] (OECD Corruption Convention); and the Criminal Law Convention on Corruption and the Civil Law Convention on Corruption, both adopted by the Council of Europe.[50] They all align State efforts to fight corruption.

International agreements firstly address the parties to such a treaty, *i.e.* States and sometimes international organisations. Subsequently, States have to comply with the standards agreed in the treaties, and where applicable, have to pass them on to their legal subjects, among which the business sector.[51] An illustrative example is the Kyoto Protocol in which the States Parties, including the EU, also on behalf of its Member States, concurred to reduce carbon emissions in their territories. The EU Council's approval of the Kyoto Protocol was followed by the EU Directive on carbon emissions trading establishing a so-called 'cap-and-trade' plan. Since carbon emissions are partly caused by industry, national EU governments had to allocate maximum levels of carbon emissions to their industries.[52]

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49. The OECD is an international organisation of 30 countries. It originated in 1948 as the Organisation for European Economic Co-operation (OEEC) for the reconstruction of Europe after World War II. Later, its membership was extended to non-European States. In 1961, it was reformed into the 'Organisation for Economic Co-operation and Development' by the Convention on the Organisation for Economic Co-operation and Development. Its mission is to help its member countries to achieve sustainable economic growth and employment, and to raise the standard of living in member countries while maintaining financial stability – all this in order to contribute to the development of the world economy. See: www.oecd.org/pages/0,3417,en_36734052_36761800_1_1_1_1_1,00.htm, accessed on 2 May 2009.
50. The Council of Europe is an international organisation, founded in 1949, that seeks to develop throughout Europe common and democratic principles based on the European Convention on Human Rights and other reference texts on the protection of individuals. See: http://www.coe.int/DefaultEN.asp, visited on 1 June 2010.
51. Although various authors have tried to argue that MNCs should be considered direct subjects of international law (subject to rights and subject to duties), so far, the general opinion is that – although companies are certainly expected to comply with certain international *ius cogens* norms because of their peremptory character – companies cannot be regarded as a subject upon which international law can be directly enforced, with due regard to a few exceptions, see *e.g.* N. Jägers, *Corporate Human Rights Obligations: in Search of Accountability*, (Intersentia: Antwerp, 2002), p. 27, who explains that MNCs can be considered subjects of procedural rights under international law, *i.e.* companies can bring a claim to enforce their substantive rights. She points to the Convention establishing the International Centre for the Settlement of Investment Disputes (ICSID), drawn up under auspices of the World Bank, which recognises companies as subject of international law (see article 25(1) and (2) b ICSID. See also R. Lubbers, W. van Genugten, T.E. Lambooy, *Inspiration for Global Governance – The Universal Declaration of Human Rights and the Earth Charter* (Kluwer: Deventer, 2008), pp. 55-56. Further, reference is made to chapter 9.3 which contains a discussion on the discourse of some of the leading authors in this field.
52. The ultimate objective of the UN Framework Convention on Climate Change, which was approved by the EU Council Decision 94/69/EC, is to achieve stabilisation of greenhouse gas concentrations in the atmosphere at a level which prevents dangerous anthropogenic interference with the climate system. The Kyoto Protocol was approved by EU Council →

Exceptionally, international documents directly point to business actors as the actors that should comply with the norms. An example is the OECD Corruption Convention.[53] The same approach can be observed in anti-terrorism agreements.[54] Still, governments have to make these internationally agreed norms directly applicable to their inhabitants and companies within their jurisdiction. An exception hereto is EU Regulations such as the REACH Regulation, which regulates the use of chemicals in the EU.[55] EU Regulations have direct application to EU Member States' subjects and need not be converted into national law.

One of the main challenges today is to make our society and economic model ecologically and socially sustainable in order to fulfil well defined human rights ambitions, to achieve the MDGs, to counter cultural tensions, imminent water shortages,[56] loss of biodiversity and ecosystems services[57] and global warming, and to avoid these threats from causing new armed conflicts and/or massive migration.[58] Governments, international organisations, international law and national law have so far not succeeded in successfully addressing these fundamental issues. Without being able to legally mandate a meaningful participation of companies in order to play their part in addressing these issues, civil society, international organisations and national governments have put

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Decision 2002/358/EC including the commitment thereunder by the EU and its Member States to jointly reducing their aggregate anthropogenic emissions of greenhouse gases listed in Annex A to the Protocol by 8 per cent compared to 1990 levels in the period 2008 to 2012. EU Directive 2003/78/EC on carbon emission trading aims to contribute to fulfilling this commitment more effectively, through establishing an efficient European market in greenhouse gas emission allowances. In January 2005 the EU Greenhouse Gas Emission Trading System commenced operation.

53. Articles 8.1 and 8.2 refer to companies.
54. A. Clapham, 'MNCs under International Criminal Law', in Kamminga, M.T. and Zia-Zarifi, S. (eds.) (2000), *Liability of Multinational Corporations under International Law*, Kluwer: The Hague, p. 241; A. Clapham, *Human Rights Obligations of Non-State Actors*, Oxford University Press: Oxford, p. 241.
55. See *e.g.* EU Regulation (1907/2006) which, amongst other things, obliges companies to supply product information to consumers. See chapter 8 on this subject matter.
56. WHO, The Global Annual Assessment of Sanitation and Drinking-Water, 2010 (GLAAS) and WHO, Fact files on water, at http://www.who.int/features/factfiles/water/water_facts/en/index2.html, accessed on 28 April 2010.
57. See: The Third Global Biodiversity Outlook (GBO-3, 2010), which warned that some ecosystems may soon reach 'tipping points' where they rapidly become less useful to humanity, *e.g.* rapid dieback of forest, algal takeover of watercourses and mass coral reef death. The GBO is a publication of the CBD. Drawing on a range of information sources, including National Reports, biodiversity indicators information, scientific literature, and a study assessing biodiversity scenarios for the future, it summarises the latest data on status and trends in biodiversity and draws conclusions for the future strategy of the Convention, available at: http://gbo3.cbd.int/, accessed on 23 May 2010.
58. Stand Up For Your Rights, Report – The Human Side of Climate Change, at www.sufyr.org, accessed on 30 May 2010.

faith in CSR as a means to involve business.[59] As the emergence of the conception of CSR developed gradually and organically, sections 1.6 and 1.7 will describe how various actors have contributed.

1.6 New responsibilities attributed to private actors

1.6.1 By governments

Governments have enacted many laws addressing the roles of business actors. Besides traditional environmental, labour and criminal laws, there are also laws inspired by CSR. For example, in Indonesia natural resources companies are required by law required to apply 'CSR' to their activities and to assess the potential environmental and social impacts.[60]

The trade in illegally harvested timber is one of the urgent concerns of the EU and the US government. In the US, in 2008, a prohibition on the import, trade and sale of illegally harvested timber was enacted in the Lacey Act including a due diligence duty for companies to ascertain that they do not source timber from illegal sources.[61] In the EU, the EP and the Commission are deliberating a Directive concerning illegal timber, also including a similar due diligence obligation for companies.[62]

Another example is the EU Directive on sustainable energy, which prescribes targets to governments thereby stating that biofuels only count towards

59. R. Lubbers, W. van Genugten, T.E. Lambooy, *supra* note 51, pp. 25-26, 55-56.
60. See also the definition of CSR quoted in section 1.2.2 *supra*. On CSR, Article 74 of the Indonesian Company Law no. 40/2007 states: "Companies conducting business activities in the field of and/or related to natural resources have the obligation to carry out Social and Environmental Responsibility. Social and Environmental Responsibility as referred to in paragraph (1) is the company's obligation, which is budgeted for and calculated as a cost of the company, and which is implemented with attention to appropriateness. Companies which do not carry out their obligation as referred to in paragraph (1) shall be subject to sanctions according to the provisions of laws and regulations." This provision is in line with the new Indonesian Investment Law No. 25/2007. Article 15B states: "Every investors is obliged to: "apply good corporate governance; conduct the Corporate Social Responsibility; make a report of their investment activities and send the report to Investment Coordinating Board; respect all the cultural tradition in the society in the area of the investment activities; comply with all the rules of law."
61. The Farm Bill re Food, Conservation and Energy Act of 2008 amended the Lacey Act (Pub. L. 110-234, 122 Stat. 923, enacted on 22 May 2008, H.R. 2419, also known as the '2008 U.S. Farm Bill'.
62. Draft EU Directive COM (2008) 644 final; EU News, Policy Positions & EU Actions online, at www.euroactiv.com, visited on 15 December 2009.

compliance with the target if they are produced in a sustainable way.[63] As neither biofuel production nor the import thereof is a government task, this clearly implies an obligation on companies to ensure the sustainability factor in the production thereof. Furthermore, in the US, the Waxman-Markey Bill has been approved by the House of Representatives. It will – if the Senate approves it – establish a cap-and-trade plan for carbon to address climate change similar to the EU plan.[64]

On another subject, anti-corruption legislation has been introduced in many countries over the last decade pursuant to the anti-corruption treaties mentioned in section 1.5, usually by qualifying the paying of bribes as a criminal offence. Finally, many States have adopted legislation prescribing companies to disclose information in annual reports about environmental and social aspects of their international activities.[65]

1.6.2 By international organisations

The UN adopted the MDGs in 2000. Not only are these directed at States, they also address the corporate world and encourage companies to contribute to the achievement of the goals by 2015.

International organisations have also promulgated concrete guidelines for businesses in order to stimulate corporate socially responsible behaviour. In 2000, the UN set up the Global Compact Network, including the Global Compact Principles, and the OECD updated its MNE Guidelines.[66] The Sub-Commission of the former UN Commission on Human Rights unanimously adopted the 'Norms on the Responsibility of Transnational Companies and Other Business Enterprises with Regard to Human Rights' in 2003.[67] Another example is the Global Reporting Initiative (GRI), initiated in 1997 by the UN

63. Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC Text with EEA relevance, Official Journal L 140, 05/06/2009 P. 0016-0062. Article 17 concerns sustainability criteria for biofuels and bioliquids.
64. The American Clean Energy and Security Act of 2009 is an energy bill. It was approved on 26 June 2009 and is being considered in the Senate. See: http://www.opencongress.org/bill/111-h2454/actions_votes, accessed on 23 May 2010. See also the explanation of the EU Greenhouse Gas Emission Trading System, *supra*, note 52.
65. This subject will be addressed in chapters 4 and 6 of this study.
66. OECD Guidelines for Multinational Enterprises, at www.oecd.org/dataoecd/56/36/1922428.pdf.
67. 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', UN Doc. E/CN.4/Sub.2/2003/12Rev; Sub-Commission Res. 2003/16, UN Doc. E/CN.4/Sub.2/2003/L.11 at 52 (2003).

Environmental Program (UNEP) and CERES.[68] GRI has developed reporting guidelines for companies to assist them in disclosing non-financial information about the way they pursue their activities. The guidelines address environmental and social conduct, but also include other subjects, *e.g.* corruption and human rights (GRI Guidelines). The ethical standards communicated in all of these international documents contributed to the building of an international normative framework.

Another international approach to business was the following. In 2005, the UN General Assembly appointed Professor John Ruggie as the Special Representative of the UN Secretary General on human rights and business, to define a position on business and human rights. After extensive consultation rounds with international organisations, scientists, business actors and NGOs, he issued some relevant reports on the theme. They set out a framework 'Protect, Respect and Remedy' on how to approach the different and intermingled roles of governments and companies regarding human rights.[69] Ruggie's approach stipulates that companies should apply due diligence to human rights compliance in conducting their own activities, and in particular when pursuing business opportunities in countries where the Rule of Law is not well established.

1.6.3 By civil society

Civil society has also approached business in order to promote corporate social behaviour. In 2000, as a joint effort by many civil society organisations in the world, the 'Earth Charter' was published and put into practice. It is a charter that establishes an ethical framework. It addresses individuals, business organisations, NGOs, international organisations and governments.[70]

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68. CERES is a national network of investors, environmental organisations and other public interest groups working with companies and investors to address sustainability challenges such as global climate change. Its mission is to integrate sustainability into capital markets for the health of the planet and its people. See: http://www.ceres.org/page.aspx?pid=705, accessed on 2 June 2010.
69. UN HRC (General Assembly), Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, "Protect, Respect and Remedy: a Framework for Business and Human Rights", 7 April 2008, UN Doc. A/HRC/8/5.
70. The text of the Earth Charter is available at: The Earth Charter Initiative, http://www.earthcharterinaction.org/content/pages/Read-the-Charter.html, visited on 28 June 2010. The Earth Charter is a widely recognised, global consensus statement on ethics and values for a sustainable future. Developed over a period of ten years, in what has been called the most extensive global consultation process ever associated with an international declaration, the Earth Charter has been formally endorsed by over 2,500 organisations, including global institutions such as UNESCO and the International Union for Conservation of Nature (IUCN).

The engagement of civil society with business sometimes led to drawn out legal battles and/or media campaigns. Due to environmental and human rights problems, Shell was approached by Nigerian environmental activists in the 1990s. This turned out to be the beginning of more than 15 years of campaigning and litigation.[71] Another interesting example of a prolonged fight between NGOs and companies concerned an international supply chain conflict involving the Dutch jeans brand G-Star, its Indian supplier, the Dutch campaigning organisations Clean Clothes Campaigns and the India Committee Netherlands, their Dutch Internet Providers and a number of Indian unions and NGOs.[72]

Research into civil society campaigns conducted by Alex van der Zwart and Professor Rob van Tulder of the Rotterdam Erasmus University provides an interesting depiction of the tangible effects of campaigning.[73] First of all, companies that sell consumer products are more susceptible to these types of campaigns than companies selling 'business-to-business'. Secondly, companies that have been 'under fire', usually transform themselves into frontrunners in their business sector in so far as CSR is concerned. Thirdly, campaigns not only impacted the willingness of consumers to buy the targeted company's products, they also negatively influenced the attractiveness of the company on the employment market. And finally, the researchers considered the moves in stock prices during reputation damaging campaigns. The evolvement of the American footwear brand Nike also followed the course of first being heavily targeted in litigation and media campaigns and currently being a 'model CSR company' that discloses on its website the names of all its suppliers and challenges its customers and suppliers' employees to report any labour abuse.[74]

Today, civil society involvement is moving in a new direction, *i.e.* away from the anecdotal discussions with companies and shifting to a more permanent and constructive collaboration with companies. Interesting initiatives are CSR standards developed by civil society, often together with business actors, such as the sustainable timber certificate FSC, the fish label MSC and the Fair Wear textile standard. Collaborative partnerships can be found between WNF and Coca-Cola focussing on sustainable water use, and between Shell and IUCN aimed at avoiding or mitigating biodiversity impacts of the oil business.[75]

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71. Chapter 9 will give an account of this conflict.
72. Chapter 10 will address this conflict.
73. R. Van Tulder and A. Van der Zwart, *supra* note 14. A. Vedder, 'Morality and the legitimacy of non governmental organisations' involvement in international politics and policy making', in Nieuwenhuys, *supra* note 2, pp. 181-194.
74. Nike Contract Factory Disclosure List. Current as of 28 April 2008, at http://www.nikebiz.com/responsibility/documents/Nike_CRR_Factory_List_C.pdf, accessed on 30 May 2010.
75. Senge and IUCN – Shell Relationship, *supra* notes 16 and 17. See also chapter 13 on Investments in pro-biodiversity business.

1.7 New roles claimed by private actors

As Albert Einstein observed, 'Life is like riding a bicycle – in order to keep your balance, you must keep moving'. Indeed, society is continuously changing and business always has to search for a *modus operandus* in a changing environment. Consumers change their preferences, resources may become depleted, legislation regarding a certain product might change, and one day it might be difficult to find skilled personnel. New problems and challenges emerge, others are being solved. Where international conflicts previously concerned the chosen domestic economic and political model, they now concern religious notions and the search for resources, energy and water.[76] The internet brought global connection and transparency. New ethical standards are in progress, as ethics always have been. Companies consist of people and these people are influenced by the changes around them. Consequentialy, companies are also in motion at all times and adjust to changing environments. One of the adjustments of the last decade is the embracing of CSR by many European and American companies,[77] *i.e.* they indicate in their annual reports or sustainability reports, on their websites or on product labels that they endeavour to be or to become a sustainable operating company. Sustainability is truely a buzz word. Some companies mean that they organise their business in a way that it does not harm people or the environment, others explain that they wish to be good for people and the environment and even aim at contributing to solving the world's major challenges, and a third category indicates that they put the continuity of the company in the first place and consider that to be sustainable behaviour. Nonetheless, any public communication by a company that it pursues sustainability sets employees and consumers in motion.

The corporate motivation for embracing sustainability is fourfold: (i) compliance with (new) regulations, public as well as private regulation; (ii) reputation, which is essential for the company's profit-generating capacity; reputation includes the perspective of consumers or customers, employees and future talents, financiers and investors; (iii) cost reduction, *e.g.* a reduction in

76. 'Rwanda: Dialogue Will Resolve the Nile Water Dispute', *The New Times*, 24 May 2010, at http://allafrica.com/stories/201005240516.html, visited on 30 May 2010. In May 2010, Kenya, Uganda, Rwanda, Tanzania and Ethiopia signed the Nile River Cooperative Framework Agreement (CFA) in Entebbe, which seeks to ensure equitable use of the Nile waters among the basin countries. Egypt, however, declined to sign or entertain any discussions that are meant to change the colonial agreements that guaranteed the country more control over the waters. 'Chinese companies ink[ed] US$1.9b deals with Africa', AP/chinadaily, 11 May 2006, at http://www.chinadaily.com.cn/china/2006-11/05/content_724944.htm, visited on 30 May 2010. The Chinese state media reported that China's state oil companies are expanding in Africa, signing deals in Nigeria, Angola, Sudan and elsewhere. Manufacturers are trying to expand exports to African markets.

77. As the study did not include companies from other continents, no clear statements can be made here in that respect.

water, energy, resources, packaging or traveling immediately translates into lower production costs; and (iv) new opportunities, *i.e.* a sustainable world needs new products and processes, and will include new markets, geographically and product-wise.

However, as has been argued above, CSR is not a defined term and has no fixed meaning. Various questions emerge: what will change and is changing in doing business when taking on CSR? How does it work to implement ethical standards in an MNC that operates in very different cultural environments? Will there be one set of standards or multiple sets? Do these standards have to concur with local standards or could there be deviations? Since legal systems differ around the globe, another question that emerges is whether a company pursues responsible conduct if it 'just' complies with the local laws of the country in which it does business? Or should it always adhere to the standards which it has to apply in its home country? These types of questions make it rather difficult to concretely establish what CSR exactly entails for a single company. However, companies themselves seem to have an understanding of what they can do and how they can contribute, maybe not a clear understanding but at least a practical modus in which to operate and from which to further build best practices in this field. Nonetheless, the author points at Porter's recommendation: if business would develop this practical modus into an embedded structural modus, the implementation of CSR can generate 'opportunities, innovation, and competitive advantage'. The following sections will introduce the main discussion themes of this book, *i.e.* the legal and semi-legal frameworks and processes that can assist business in implementing CSR.

1.8 Legal and non-legal frameworks that can assist business to implement CSR

1.8.1 Corporate governance – the decision-making process

The term corporate governance is usually used to assess the quality of the management control of listed companies. CSR is a concept that is not limited to listed companies, as many small and medium-sized enterprises are also engaging with CSR. Chapter 2, which was written in 2004-2005, offers a comparison between corporate governance and CSR. With regard to each concept – corporate governance and CSR – the discussion addresses the history, the relevant treaties and international guidelines, the objectives, the instruments, the initiators, the interested parties, the key-notions, the legal embedding and enforcement. Clearly, there are three premises which are common to both corporate governance and CSR: transparency, accountability and the participation of stakeholders in the decision-making process. Nonetheless, it is argued

that traditionally the subject matters of corporate governance and CSR are divergent.

It is contended that corporate governance focuses first and foremost on the division of power within a company, *i.e.* between the bodies that comprise a company: the board of directors, the supervisory board and the shareholders meeting. For example, transparency primarily concerns the decision-making process with an aim to avoiding potential conflicts of interest. As regards accountability, the emphasis is put on creating a model in which management's strategic decisions can be effectively supervised by the supervisory board and the shareholders meeting. The premise of the participation of stakeholders stresses that shareholders can influence important decisions. Furthermore, employees constitute a recognised stakeholder group. In corporate governance, a 'Code of Ethics' commonly contains provisions regulating potential conflict of interest situations. By contrast, notions such as the conservation of bio-diversity, respecting human rights and 'cradle-to-cradle'[78] were generally not associated with good corporate governance but with CSR. Good corporate governance was mainly expected to produce a continuous increase in share-holder value.

CSR is aimed at an increase of value in three dimensions: People, Planet and Profit.[79] Paramount would be not to compromise any of these dimensions to the benefit of one of the others. The fusion of interests is the ultimate goal. Like corporate governance, CSR promotes transparency, accountability and participation. However, the transparency aimed at by CSR concerns different topics than the aforementioned corporate governance themes. For example, CSR transparency relates to the standards of conduct which a company employs regarding labour and safety conditions and whether the company applies a gender and diversity neutral personnel policy (People). Whether it takes precautionary measures to avoid environmental damage and in which way it improves an efficient use of raw materials, water and energy (Planet). Corruption is also a subject in connection with which CSR stimulates corporate transparency: the initiative 'publish what you pay' to local governments[80] is

78. W. McDonough and M. Braungart, *Cradle to Cradle: Remaking the Way We Make Things* (Vintage Books 2002).
79. SER Report 2000, *supra* note 30.
80. Publish What You Pay (PWYP) is a global civil society coalition that helps citizens of resource-rich developing countries to hold their governments accountable for the management of revenues from the oil, gas and mining industries. Natural resource revenues are an important source of income for the governments of over 50 developing countries. When properly managed these revenues should serve as a basis for poverty reduction, economic growth and development rather than exacerbating corruption, conflict and social divisiveness. If companies publish what they pay for oil, gas and minerals, this information assists in fighting tax evasion and corruption; see: http://www.publishwhatyoupay.org/, accessed on 4 June 2010.

assumed to reduce corruption because locals then have the means to trace sums paid to their governments. Transparency on the P of Profit concerns the manner in which the profit is obtained and how it is distributed among the stakeholders.[81] Accountability in CSR concerns the question whether a company that has adopted a CSR code of conduct takes the blame for anything that goes wrong, *i.e.* any conduct not in line with this code. Does the company offer redress to victims? Does it try to solve problems, either through mediation or damage payments? Does the company repair environmental damage? The premise of the participation of stakeholders typically includes a broader group than just shareholders and employees. Also other people affected by the business activities are considered stakeholders as understood from a CSR perspective. Interesting examples have been developed in the mining industry in Australia.[82]

The three key concepts – transparency, accountability and participation – are delineated in chapter 3, which was written in 2010. It reveals, that over the last five years, corporate governance has repositioned itself; *i.e.* a shift is noticeable from defining the 'rules of the game' to a more holistic perspective including CSR values. For example, in the Netherlands, the revised corporate governance code, the Frijns Code of 2008, explicitly states that the directors' duties include defining a CSR policy and considering the material CSR aspects in relation to the business, and that the board has to report hereon to the general meeting.[83] Directing a business is meant to create 'long term shareholder value' as the Preface of the Frijns Code records, thereby balancing the interests of different stakeholder groups within and outside the company. In the United Kingdom, section 172 of the Company Act was introduced in 2006. It also refers to CSR-concerns in its corporate governance provisions: it requires boards to employ a broader and long-term perspective in their management.[84] When exercising this duty, the director is required to take into consideration a non-exhaustive list of factors including the long term consequences of the decisions as well as the interests of the employees; the relationships with suppliers and customers; and the impact of the decision on the community and

81. See *e.g.* Guideline 400 (Annual Report), version 2009 and the Explanatory Guide [*Handreiking Maatschappelijke verslaggeving*], which were both developed and first published in 2003. They recommend companies to provide an overview of the distribution of profits. See also OECD MNE Guidelines under X on local tax payments.
82. B. Harvey and S. Nish, 'Rio Tinto and Indigenous Community Agreement Making in Australia', in *Journal of Energy and Natural Resources Law*, 23(4), 2005, p. 499; also, the examples mentioned above concerning MNCs like Unilever and Shell collaborating with NGOs.
83. Dutch corporate governance code 2008; www.commissiecorporategovernance.nl/page/downloads/DEC_2008_ UK_Code_DEF__uk_.pdf, accessed on 3 January 2010.
84. See *e.g.* 'Companies Act 2006 and Directors Duties. Overview', at: http://www.bytestart.co.uk/content/legal/35_2/companies-act-directors-duties.shtml; and UK Department of Trade and Industry (DTI) guidance to the Bill, at: www.dti.co.uk, sites accessed on 6 March 2010.

the environment; the desirability of maintaining a reputation for high standards of business conduct; and the need to act fairly as between members of the company. It can be seen that among other things, this duty introduces wider corporate social responsibility into a director's decision making process.

In view of furthering CSR, corporate governance is a relevant legal framework. As governing a company concerns the corporate strategy and means, embedding CSR therein definitively puts CSR in a better position. The institutionalisation of CSR in the Dutch corporate governance code is an interesting development.

1.8.2 Annual reporting – transparency of corporate conduct

One of the central themes of CSR is transparency. This concerns the transparency of corporate conduct and the transparency of product characteristics, in particular in which manner the product has been produced.

On the subject of corporate information, it is notable that financial information has been increasingly supplemented with 'non-financial' or 'extra-financial' information on CSR themes. Since the end of the last decade, civil society and legislators have pressured companies to report on extra-financial information.[85] Voluntary disclosure tools such as the GRI Guidelines, the carbon disclosure project and the water footprint tool have been developed in this period. While the first sustainability reports at the beginning of this decade (2000-2010) were merely published by companies to engage with their stakeholders on a voluntary basis, by 2010 certain European jurisdictions have imposed on large companies or state companies an obligation to publish a full sustainability report.[86] Sustainability reporting is slowly moving away from private regulatory regimes towards public regulation.

On a more limited scale of disclosure, the EU Modernisation Directive 2003/51/EC prescribes that large companies are to provide in their annual reports extra-financial information relevant to the company's performance. They are to report on "non-financial key performance indicators, among others environmental and employee matters" relating to their worldwide business

85. T.E. Lambooy, 'Maatschappelijk verantwoord ondernemen in de jaarverslaggeving', in *Vennootschap en Onderneming*, 12, 2003, p. 194. T.E. Lambooy, 'Duurzaamheidsverslaggeving door bedrijven als onderdeel van het jaarverslag?', in *Ondernemingsrecht*, 16, 2004, p. 629. T.E. Lambooy, 'Aspecten maatschappelijk verantwoord ondernemen in jaarverslag; Transparantie over MVO op Europees niveau', in *Ondernemingsrecht*, 3 2006, p. 93. T.E. Lambooy, *supra* note 2; T.E. Lambooy and T.P. Flokstra, 'Kleur bekennen middels jaarverslag', in *De Naamlooze Vennootschap*, 06, 1997, p. 159.

86. Denmark and Sweden, see further section 6.4 of this study.

activities. Chapter 4 will discuss the legislative history of this Directive and provide an overview of the status of implementation in the EU Member States.

In chapter 4, the Netherlands is taken as a case study for a discussion on other existing extra-financial reporting requirements and the relevant legal consequences of the implementation of the Modernisation Directive. Attention is also paid to the Dutch Council for Annual Accounting that has issued a guideline and a practical tool on how to include CSR aspects in annual reports. It proclaims that defining concrete ambitions will help to measure the results.[87] For illustrative purposes, this chapter ends with a quick scan of the annual reports of twenty-five large Dutch companies to demonstrate the application of the new rule in practice.

Above and beyond annual reports and sustainability reports, transparency concerning corporate practices has also been increasingly provided by companies on their websites. These websites nowadays generally contain a statement on CSR and some nice examples of CSR projects or strategies. Updates are frequently provided. Some academics contend that from an investor perspective, sustainability reports have 'zero' value because the information is too superficial and outdated.[88] They recommend to primarily disseminate corporate sustainability information through daily updates of company websites. Desk research and interviews, conducted by the author in the course of 2009, confirm this view and confirm that sustainability rating agencies which prepare advice on extra-financial information for institutional investors, generally use both, *i.e.* sustainability reports and website contents.[89]

Preparing and publishing a sustainability report appears to be an effective CSR tool. The process of collecting the information for compiling the report aids the company in gaining an insight into the actual CSR performance throughout the company. The report can connect the employees by clearly establishing the CSR direction whilst providing concrete information on projects and explaining the changes that have been implemented. Furthermore, the publication of a sustainability report can assist the company in maintaining the relations with its external stakeholders, including investors.

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87. Guideline 400, *supra* note 81. See for a study on tangible corporate ambitions: A. Kamp-Roelands and T.E. Lambooy, 'Maatschappelijk verantwoord ondernemen' [Corporate Social Responsibility] in *Het jaar 2007 verslagen: onderzoek jaarverslaggeving ondernemingen* [The annual reports on the year 2007: study on corporate annual reporting], NIVRA-geschrift 78 (Kluwer, Deventer, 2008), pp. 119-21.
88. Discussions during the Global Challenge Sustainable Development international conference, Utrecht July 2009, track 4 F, chaired by Professor R. Welford (University of Hong Kong) and Dr. H. Bos-Brouwer (Nyenrode University), in which the author participated.
89. Reference is made to Chapter 12.

1.8.3 Internal control and management information processes – avoiding corruption

Avoiding corruption is another CSR theme. Corruption is currently one of the world's greatest challenges. According to the World Bank, corruption is "The single greatest obstacle to economic and social development in realising public goals".[90] It creates economic and social disproportion, and damages the very essence of society. Corruption also has a severe impact on the private sector, because it distorts competition and creates obstacles to market expansion. It can seriously harm the reputation of a company and expose it to substantial legal risks. Corrupt practices are expensive for business, *i.e.* estimates show that corruption adds at least ten per cent to the day-to-day costs of doing business in many parts of the world. The World Bank has stated that "bribery has become a USD 1 trillion industry".[91]

Corruption has two sides: a supply side and a demand side. The supply side involves those parties that provide monetary payments, gifts or any other forms of expressing gratitude for services, and is usually represented by the private sector. Particularly in weak governance zones – countries where law enforcement is poor – there are increased possibilities that company employees are susceptible to paying bribes. The demand side of corruption, in turn, is represented by those who accept different forms of payment and consequently provide some form of service or favour in return, *i.e.* typically, government officials who have a great deal of discretionary power and operate in those environments where the system of checks and balances is weak or non-existent.[92]

In two well published cases concerning Siemens and ABB, illicit payments (bribes) were improperly accounted for in the books and records, and were not timely detected by the directors. This failure demonstrates that these companies lacked effective internal management information and control systems to prevent corruption. Both companies subsequently admitted in their annual and sustainability reports that many mistakes had been made and that they are now implementing anti-corruption programmes to prevent future problems.

Companies can no longer defend their mistakes by stating that they were not aware of these risks. They should have been alerted to the fact that a number of countries or industries in which they are operating are perceived as being 'high risk corruption' regions or sectors as this type of information is publicly

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90. Iuris Valls Abogados, 'Internal Controls to Avoid Corruption', 51 Paris Congress of the International Association of Lawyers, October-November 2007.
91. UN Global Compact, 'Transparency and Anti-Corruption', at http://www.unglobalcompact.org/AbouttheGC/ TheTENPrinciples/anti-corruption.html, accessed on 4 March 2009.
92. An interesting analysis can be found in the Center for International Private Enterprise (CIPE) 2002, 'Corporate Governance: an Antidote for Corruption', at: http://www.cipe.org/programs/corp_gov/pdf/CGANTIDOTE.pdf, accessed on 26 November 2008.

available. NGO Transparency International (TI) publishes a 'Country Corruption Perception Index' on an annual basis.[93] Consequently, when doing business in risky zones or sectors, it becomes imperative that a company performs due diligence to avoid corruption.[94] Moreover, a company is increasingly expected to address this issue in a structural way by implementing an in-house compliance programme to reduce the risk of corruption. Indeed, an interesting feature of our digitalised world is that any illegal act will most certainly be divulged one day due to the massive volume of emails that every employee generates. Agreements, services and meetings are usually initiated or confirmed by email, and will thus be traceable for a long time thereafter. It has become difficult to keep things out of the company data systems, which explains the increased attention of prosecutors around the globe for corruption.

The question arises whether *not* putting an anti-corruption programme in place – almost by definition – results in not being 'in control' and, consequently, in poor corporate governance and a bad CSR profile. This key question will be addressed in chapter 5. In addition, best practices on the topic of corporate corruption avoidance will be presented and discussed both as a means to fulfil legal obligations and to enhance CSR.

1.8.4 Private regulation – defining desired conduct

Mostly, in order to implement CSR, a company or a sector will start by defining CSR standards. It will draft a company code of conduct or adopt an internationally accepted code of conduct such as the OECD MNE Guidelines or the Global Compact Principles. Increasingly, we see that industries use a sector specific code of conduct.[95] The purpose of a code of conduct is to make clear to all involved what standards and norms this company or sector has

93. The annual Corruption Perception Index (CPI), first released in 1995, is the best known of Transparency International's tools. It has been widely credited with putting Transparency International and the issue of corruption on the international policy agenda. The CPI ranks 180 countries by their perceived levels of corruption, as determined by expert assessments and opinion surveys; Transparency International, 'Corruption Perceptions Index', at http://www.transparency.org/policy_research/surveys_indices/cpi, accessed on 3 May 2009.
94. This is also the line of the US Department of Justice. See J. Spinelli (Daylight Forensic & Advisory), 'Foreign Corrupt Practices Act Due Diligence in Mergers & Acquisitions', Ethishere™ Institute, 13 May 2009, at http://ethisphere.com/foreign-corrupt-practices-act-due-diligence-in-mergers-acquisitions/, visited on 4 June 2010. He discusses the Opinion Release No. 0802- Pre-Acquisition FCPA Due Diligence regarding the Halliburton Company in seeking to acquire the assets of Expro, a UK company on the London Stock Exchange (The Target) that provides well flow management for the oil and gas industry. It was determined that it needed to conduct extensive FCPA due diligence, because Expro operates in a high-risk industry, in high-risk countries and deals directly with government-owned customers.
95. Chapter 7 on due diligence provides examples hereof in section 7.6.

committed itself to. Communication flows first of all to the company's employees, customers, suppliers and shareholders, and in the second place to the community at large, which also includes stakeholders such as financiers, investors, public authorities, civil society organisations. A code of conduct also constitutes a useful measuringstick for a company's CSR 'performance'.

From another viewpoint, one could consider adopting a code of conduct to be the second step in the CSR implementation process. Deeper than the conduct itself is the level of the mission and ambition of a person. However, a business organisation is different from a person. A company for example, is a 'legal person' and as such has not a 'single conscience' like a human being.[96] The fact that an organisation consists of many human beings in various temporary roles, such as founders, shareholders, directors or employees, allows it to escape from having one single conscience or mission. Moreover, companies are created and designed to do business, and most are intended to make a profit. From that perspective, it is interesting to note that certain companies have formulated a mission in a so-called 'mission statement'. Some thereby refer to the civil society document the Earth Charter.[97] The mission or ambition constitutes the basis for standards of a more practical nature which can in turn be contained in a code of conduct.

A variation on adopting a code of conduct, or in addition thereto, is to obtain a defined sustainability certificate for the production process, or to only use products that have been awarded a certified sustainability label. A certification process is usually based on private regulation, and is often developed by MSIs. Examples of such labels are MSC (Marine Stewardship Council – sustainably caught fish) and FSC (Forest Stewardship Council – sustainably harvested timber). A Social Accounting 8000 or a Fair Wear Certificate can be obtained if a production process complies with, amongst other requirements, specific decent work standards.

Sector codes espoused by the financial sector, such as the Equator Principles, the Principles for Responsible Investment, the International Finance Corporation and World Bank standards, have an indirect but potentially strong influence on the behaviour of companies that wish to obtain external financing or are looking for institutional investors. Today, CSR standards, *e.g.* respecting human rights or performing an environmental assessment before commencing a project, are often included in loan agreements, and investors have formulated exclusion policies and engagement policies in respect of the companies in

96. See: 'Living dangerously. A survey of risk', in *The Economist*, 24 January 2004, p. 20.
97. The Earth Charter Initiative states as its mission: 'to promote the transition to sustainable ways of living and a global society founded on a shared ethical framework that includes respect and care for the community of life, ecological integrity, universal human rights, respect for diversity, economic justice, democracy, and a culture of peace'. See about endorsements, at: http://www.earthcharterinaction.org/content/pages/Endorsement%20Form, visited on 2 June 2010.

which they invest. As a new development, in the last decade, capital markets have seen the appearance of 'sustainability indices'. MNCs increasingly aspire to belong to them. Some Dutch multinationals have linked bonus entitlements to the position the company occupies in the Dow Jones Sustainability Index.[98]

Mission statements, codes of conduct and sustainability labels can be used by any type of company, from a small or medium-sized company to a MNC. They have been qualified as 'private regulation'. It is interesting to assess the spectrum of CSR private regulation and the reasons behind the emergence thereof. Chapter 6 will define this concept and elaborate on it. It will also investigate the role of private regulation in contracts. It will become apparent that a number of large multinationals impose their code of conduct on their worldwide supplier network, in this way effectively establishing higher CSR standards on a worldwide scale.[99] An interesting issue is the question of compliance. Why would a company comply with private regulation? It has often been asserted that codes of conduct concern voluntary standards and that they are not binding. What is the point then in adopting them and disseminating the content thereof around the world? In chapter 6, a theoretical model will be presented to test the probability of compliance with private regulation. The model encompasses four elements: the quality of the regulation, its legitimacy, the enforcement thereof and its effectiveness. The model is applied to three important private regulatory regimes: the OECD MNE Guidelines, the Global Compact Principles and the GRI Guidelines. The linkage between private regulation and public legislation is part of the examination.

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98. M. aan de Brugh, 'New tool for sustainable policy: big bonus', in *NRC Handelsblad,* 10 March 2010, at http://www.nrc.nl/international/Features/article2500556.ece/New_tool_for_sustainable_policy_big_bonus, accessed on 2 June 2010. This has been remarked upon as a new trend amongst Dutch multinationals (a Netherlands-based paint and chemical company AkzoNobel and the chemical manufacturer DSM), *i.e.* some executive remuneration is now based on meeting sustainability targets. The postal company TNT and the energy goliath Shell are already announcing similar policies. But the criteria are not always clear.

99. See section 6.8 of this study.The nexus of CSR initiatives with internationally agreed norms is essential to guarantee that the instrument has solid foundations and provides a basis for 'level playing field' operations across supply chains and investment relations worldwide. Caution should also be exercised to ensure that CSR instruments and initiatives do not ignore or confuse governmentaly-agreed principles, which remain authoritative. Consistency should always be sought. See OECD/ILO report, *supra* note 20. See on private regulation: F. Cafaggi, 'Private Regulation, Supply Chain and Contractual Networks: The Case of Food Safety', EUI RSCAS 2010/10 Private Regulation Series n. 03, at: http://cadmus.eui.eu/dspace/bitstream/1814/13219/1/RSCAS_2010_10.pdf; C. Scott 'Regulatory governance and the challenge of constitutionalism', EUI RSCAS 2010/07 Private Regulation Series n. 02, at: http://cadmus.eui.eu/dspace/bitstream/1814/13218/1/RSCAS_2010_07.pdf, both articles accessed on 24 June 2010.

1.8.5 Due diligence in business operations – human rights compliance

In order to test company conduct against (the new) CSR standards, a company can perform a due diligence investigation, *i.e.* a type of audit. The audit can be done throughout the whole organisation and can be extended towards its international supply chain. What we see with CSR evolving is a shift from using due diligence as a means to purely manage financial risks to a means for reputation management including human rights and corruption issues.

The term 'due diligence' is used for all sorts of processes, sometimes comprising an investigation pursuant to a legal duty, at other times because it is good business practice to do so. Due diligence basically refers to the level of effort and the quality of the investigation employed. The meaning originates from the American legal notion of applying all possible means to avoid non-compliance with legislation. It is a mature method in the securities law practice where a bank has to demonstrate that it has done its utmost to investigate the affairs of the company whose shares will be offered by the bank on the capital market. The ultimate purpose of the investigation is to ensure that a true and accurate (not-misleading) description of the company's business is presented to the market in the prospectus, *i.e.* the sales pamphlet.

Generally speaking, corporate and commercial law codes do not impose upon companies a duty to perform a due diligence assessment prior to entering into a transaction. However, it is common that commercial law requires a seller to disclose material information about the object of the sale to a potential buyer. Having said this, a buyer is also usually expected to actively solicit the seller for all information that he, as prospective buyer, considers to be of relevance to the transaction at hand. There is a large body of case law on disclosure and enquiry duties.[100]

In the corporate practice of mergers and acquisitions, due diligence also plays an important role. Buyers conduct a due diligence investigation into the target company's business activities in order to understand how and where this target company does business, and to uncover the potential for synergies. In addition, due diligence aims to detect any undisclosed risks or liabilities. Due diligence examinations are conducted by professionals trained in different disciplines, *e.g.* lawyers and tax lawyers, accountants and bankers, environmental experts, actuaries and pension specialists, and experts with a technical or commercial background. They usually work as a team. Performing a (full) due diligence assessment when managing a corporate deal is considered 'best practice'. Acquiring a company without following this route can raise questions in respect of good business judgment.[101]

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100. See section 7.3 of this study.
101. *Idem.*

In international human rights law, courts and human rights bodies have applied the 'due diligence test' to judge the level of effort a State has put in: has the State enacted relevant laws and undertaken the necessary action to effectively protect the human rights of the people in its territory? The concept has been utterly stretched, *i.e.* a State is expected to actively protect the life of people by all means possible.

Regarding CSR, the Ruggie framework, mentioned in section 1.6.2 *supra*, also calls for due diligence by businesses in order to ensure adequate respect for human rights. In chapter 7, the Ruggie approach is explained and linked to existing corporate due diligence practices. The chapter aims to show that the human rights theme can be relatively easily embedded in corporate practice. The American Lacey Act banning the import, the trade in and the sale of illegal timber in the US and the draft EU Directive on illegal timber, both referred to in section 1.6.1 *supra*, also utilise the due diligence concept. Due diligence seems to be appropriate as a proactive means to fulfil new CSR standards and to prevent irresponsible corporate behaviour.

1.8.6 Providing product information to consumers

Information about a company and the way in which it runs its operations is useful for investors, financiers and other parties directly involved and impacted, such as employees. Consumers, however, are less interested in overall strategies, and are more concerned about whether a product has been produced in a sustainable way and can likewise be disposed of. They expect a 'good' company to sell responsibly produced products.[102] As indicated by consumer representative organisations and NGOs, consumers prefer to find this type of information on the product itself (through labelling or certification) or on a company's website. It concerns information regarding the production methods of the company and its suppliers: has the company assured itself that no child labour or forced labour was used in the making of this product? Has the production of the product not violated any human rights? What about animal rights? Can the company confirm that no illegal timber has been used to make this table, and that no insecticides were utilised to produce this organically labelled cucumber? *Halal* consumers want to know whether the animal has been killed in the traditional way facing Mecca?

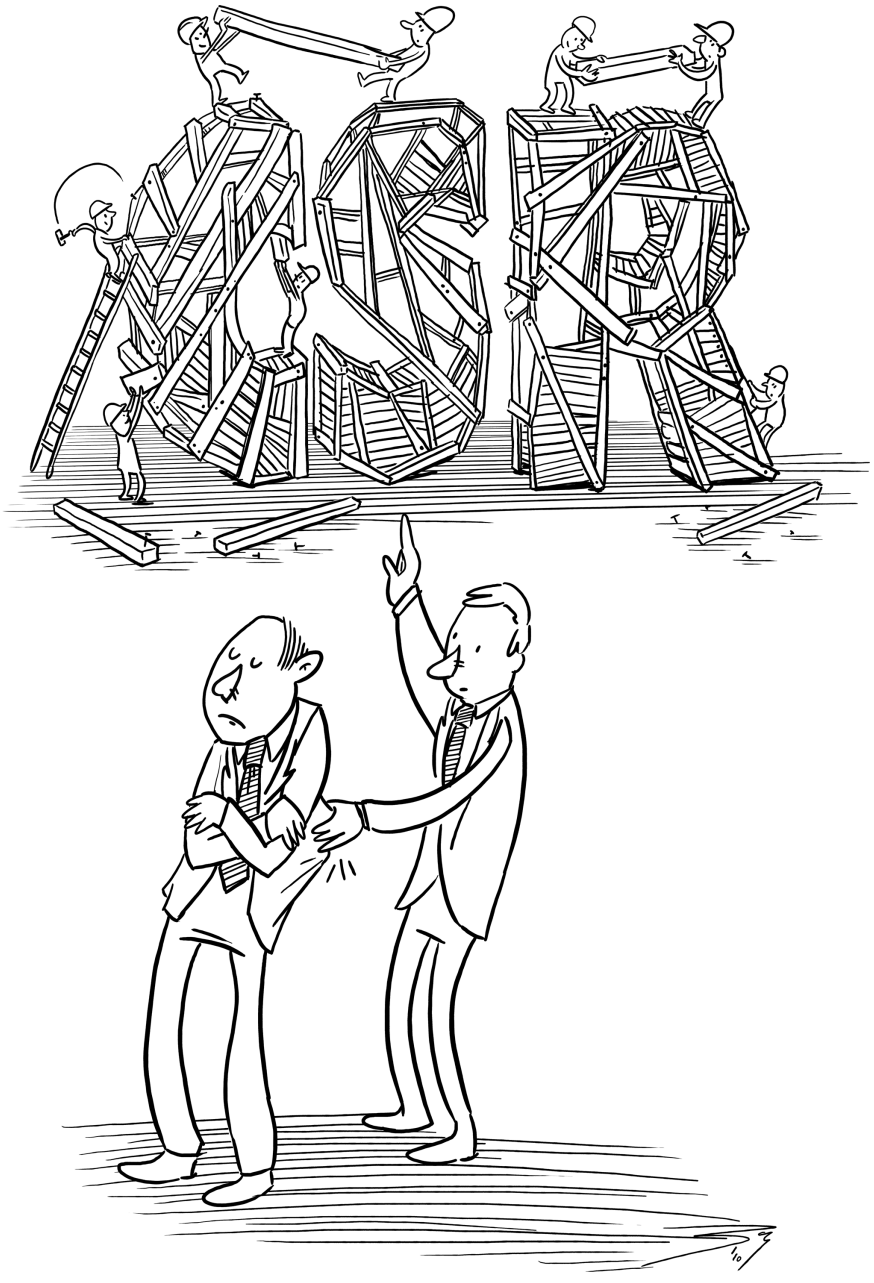
Companies are anticipating these questions in different ways. Some elect to only sell certified products such as FSC timber, MSC fish, Utz certified coffee and chocolate, and Demeter milk and eggs. For them it is easy to answer the consumers' questions: they can refer either to the website or to the organisation that manages the certification process, or they can respond with information obtained from the labelling organisation. Typically, to acquire such a certificate,

102. *WOK*, Act on the transparency of supply chains, *supra* note 46.

the producer has to assess its suppliers and assure transparent working methods. Consequently, information is usually readily available.

An interesting question is whether companies are more easily encouraged to set up internal systems to answer consumer questions about products when they are legally required to do so. Chapter 8 acquaints the reader with EU legislation that requires companies to disclose information concerning food, fish, tobacco and chemical products. For certain products, the company must provide detailed product information to the relevant authorities, in other cases, directly to consumers. For example, the EU REACH Regulation on chemicals demands that producers and importers in the EU provide consumers, at their request, with information about certain dangerous chemicals that may be contained in their products. To illustrate this, chapter 8 presents the results of a test requesting each of 32 MNCs based in the Netherlands whether a certain product sold by it contains any of the chemicals included in the REACH Regulation. Approximately 52 per cent replied within the permitted time; only 27.5 per cent gave a clear answer. A similar test was carried out by approaching the same companies in relation to the same product with three questions concerning CSR aspects of the production process. Only 38 per cent replied within the same time span, and of that 38 per cent only 17 per cent provided a full answer. Apparently, without a legal obligation, to do so it generally appears difficult for companies to allocate time to answer consumers' queries in relation to CSR concerns. Interestingly, in the Netherlands, Members of Parliament (MPs) from the Labour Party are preparing a legislative proposal on a consumer's right to request information regarding a product in respect of CSR.[103]

103. MP Mei Li Vos. Information as per June 2010.



1.9 Dispute resolution: mediation versus litigation

Business disputes are solved in different ways: terminating a business relationship, finding a solution in a consultation process, engaging in a mediation process, and fighting the dispute in court. CSR conflicts often attract wide media coverage due to public campaigns organised by NGOs or campaigning organisations. Resolving CSR conflicts is a new challenge. Gradually, companies and civil society have discovered the option of consulting each other on CSR issues. In first instance, consultation took place as an *ex post* approach to find a solution for claims of civil society that a company had acted irresponsibly. Today, consultation also takes place in an *ex ante* phase. A consultation process such as the one engaged in by Unilever and WNF concerning the subject of the depletion of fish stocks, frequently ends in a joint new initiative, *e.g.* the development of a certification process or the adoption of a new code of conduct. Consultation has even been institutionalised in various certification schemes, industry codes of conduct, and auditing methodologies.[104] Mediation is an accepted and respected approach therein. A prime example is the mediation offered by 'National Contact Points', set up in OECD countries pursuant to the OECD MNE Guidelines.[105]

Litigation against Shell that commenced after the execution of the Nigerian activist Ken Saro Wiwa in 1995 did not trigger change for a long time nor did it generate positive results for the Ogoni people in Nigeria. In 2009, however, one major case was settled and the Nigerian claimants contributed part of the settlement's funds to a foundation to assist the Ogoni people with education and employment.[106] It had taken at least one and a half decades before these concrete results could be achieved. And still, many disputes concerning environmental pollution in the region are being litigated in court.[107] One could ask oneself which would be the better way of solving these disputes with civil society: litigation which addresses the legal positions in the past or mediation which takes into account the various stakeholders' interests with an outlook for

104. See also: Social Accounting 8000, International Standard 2008, under 9.14, at: http://www.saintl.org/_data/n_0001/resources/live/2008StdEnglishFinal.pdf, accessed on 4 June 2010.
105. An NCP's primary responsibility is to promote the follow-up of the Guidelines in a national context and to ensure that the Guidelines are well known and understood by the national business community and other interested parties. NCPs also deal with 'specific instances', the term used for complaints. See: http://www.oecd.org/searchResult/0,3400,en_2649_34889_1_1_1_1_1,00.html, accessed on 4 June 2010.
106. Shell paid USD 15 million to the plaintiffs. The plaintiffs set up a trust for the benefit of the Ogoni people. The Settlement Agreement and Mutual Release and the Kiisi Trust Deed, all dated on 8 June 2009, can be accessed, at http://wiwavshell.org/documents/Wiwa_v_Shell_agreements_and_orders.pdf, visited on 10 May 2010.
107. *E.g.* Milieudefensie, The people of Nigeria versus Shell, tort case before a Dutch court. Case documents available at: http://www1.milieudefensie.nl/english/shell/documents-shell-courtcase, visited on 24 June 2010.

the future? Chapters 9 and 10 elaborate on this question, pointing out that CSR encourages companies to use alternative dispute settlement methods such as mediation.[108]

1.10 Innovative partnerships

As introduced above, MDG-PPPs constitute a new phenomenon, which entails an innovative business model linked to CSR. Partnerships concluded by MNCs with international organisations, local governments and/or NGOs signify a new approach from a reputational perspective. For example, the Netherlands-based MNC TNT, a mail and express services provider, has entered into an MDG-PPP with the international organisation, the World Food Programme (WFP).[109] TNT assists WFP by taking care of the transportation of food and medicines to crisis areas. TNT employees have indicated that they are very proud to be a part of this partnership. It adds positively to TNT's reputation.

MDG-PPPs concluded by pharmaceutical companies with the World Health Organisation (WHO) and African governments with an aim to contributing to the reduction of HIV serve two purposes from the perspective of the company: (i) gaining a foothold in the African market, and (ii) boosting its reputation.[110] Similar motives can be found behind an innovative partnership established by the Dutch government jointly with a number of Dutch MNCs with the goal of introducing health insurance to African countries.[111] It presents an interesting mix of development cooperation and business targets. The companies involved have a clear long-term perspective. Indeed, the new markets envisaged will not be there tomorrow, but they may grow as of today and will be there in the near

108. See for a discussion on the various options for the enforcement of CSR: T.E. Lambooy, Conference Report, HiiL Law of the Future 2009 Conference, 'Globalisation, the Nation-State and Private Actors: Rethinking Public-Private Cooperation in Shaping Law and Governance', (The Hague, 8 and 9 October 2009), in particular 'Workshop III – Enforcement of Corporate Social Responsibility Standards', pp. 27-33, available at www.hill.org, accessed on 24 June 2010. See also C. Rees, 'Mediation in Business-Related Human Rights Disputes: Objections, Opportunities and Challenges', Corporate Social Responsibility Initiative Working Paper No. 56, John F. Kennedy School of Government, Harvard University: Cambridge, MA 2010, at: http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_56_rees.pdf, accessed on 24 June 2010. See on the mediation of business conflicts: A.J.A.J. Eijsbouts and M.A. Schonewille, 'Zakelijke mediation' [business mediation], in: A.F.M. Brenninkmeijer, K. van Oyen, H.C.M. Prein, P. Walters, *Handboek mediation* [handbook on mediation], (SDU: The Hague, 2001), p. 348.
109. TNT & WFP website, at: http://www.movingtheworld.org/, accessed on 4 June 2010.
110. GlaxoSmithKline, Report: Partnerships and acquisitions, 2009, at: http://www.gsk.com/responsibility/access/partnerships-n-acquisitions.htm, accessed on 4 June 2010.
111. See on the Health Insurance Fund: http://www.hifund.org/index.php?page=partners, accessed on 4 June 2010.

future. Chapter 11 records about the activities of some MDG-PPPs in the field of water.

Another category of innovative partnerships emerges in the field of the pro-biodiversity business. Companies are collaborating with NGOs, communities and local governments in projects that are intended to protect biodiversity and ecosystems and at the same time generate profit for the private actors involved. Chapter 13 sets out a number of new markets that are developing.

MDG-PPPs structures look like business joint ventures as they are set up by multiple parties and (partly) have a business focus. However, in practice, they are only marginally similar. They are comparable on a number of issues which need to be arranged, such as governance models and exit provisions. However, they appear to be different in that respect that they are concluded with a new type of contract party, *i.e.* international organisations, governments and NGOs. They also differ from genuine business partnerships in their aims and the ways of measuring success.[112] Finally, these partnerships can often benefit from new sources of finance, *e.g.* including donations from charities, development assistance funds, and soft loans from development banks. For example, the GAVI Alliance[113] is a global health partnership comprised of large charities (Bill and Melinda Gates Foundation, Rockefeller Foundation), international organisations (UNICEF, WHO, World Bank), and some pharmaceutical companies.[114] The goal of the partnership is to improve the access to immunisation for people in poor countries by providing finance and medicine.

In conclusion, almost any MDG-PPP is unique in its set-up, financing, operations and goals. The new approach accounted for by MDG-PPPs is just one of the opportunities that CSR offers to business and the other stakeholders; it is meant to create a win-win situation.

1.11 Conclusion

This chapter has set out the perimeters of the study contained in this book. The study focuses on the roles and position of companies in realising sustainable globalisation. According to governments, international organisations, civil society and MNCs, CSR can contribute to this. The concept of CSR embraces the idea that MNCs should operate in a socially responsible manner with a long-term vision. In addition, companies are expected to publicly report on their

112. See: for an analysis of MDG-PPPs: T.E. Lambooy, HiiL Conference Report 2009*, supra* note 108, in particular 'Workshop IV – Public-Private Partnership and the Millennium Development Goals', pp. 35-43.
113. See further on the GAVI Alliance: http://www.gavialliance.org/, accessed on 26 November 2009.
114. See further on partners: http://www.gavialliance.org/about/in_partnership/index.php, accessed on 26 July 2010.

policies and behaviour to ensure that they can be held accountable by civil society at large. Stakeholder engagement and mediation rather than litigation can also be considered to be part of responsible business conduct.

The chapter has demonstrated that CSR has been promoted by governments through legislation, and by international organisations and civil society by providing codes of conduct containing ethical norms and values, *e.g.* the civil society document – the Earth Charter, the GRI Guidelines, the Global Compact Principles and the OECD MNE Guidelines. Companies themselves have also positively contributed to the acceptance of CSR over the last decade. They have formulated concrete ambitions concerning, for example, sustainable water use. They have agreed on industry codes of conduct and sustainability labels, often in collaboration with civil-society representatives. They have implemented anti-corruption programmes in their organisations, and have established PPPs to contribute to the MDGs.

In this chapter, it is pointed out that CSR relies on, and interacts with, certain legal and semi-legal frameworks, such as corporate governance, annual reporting, internal control and management information systems, private regulation, due diligence assessments, and the provision of information concerning products. The author asserts that these frameworks can support CSR, but that companies have to actively use them. It is argued that if they do, incorporating CSR in normal business practices will enhance their business position in various ways: from managing risks in a more comprehensive manner to having early access to new product and services markets. On a fundamental level, CSR will help safeguard their licence to operate because it encourages companies to firmly engage with the communities in which they operate.

Tineke Lambooy
27 June 2010

Annex 1.1 Overview of chapters and publications

Chapter no.	Title of publication	Publication/submission to journal	Peer review	Author(s)
1	Introduction (2010)	–	–	T.E. Lambooy
2	'De problematiek van het maatschappelijk ondernemen en corporate governance' [Corporate social responsibility and corporate governance issues][115]	Chapter 4 in: *Maatschappelijk Verantwoord Ondernemen: Corporate Social Responsibility in a Transnational Perspective* (Intersentia: Antwerpen-Oxford-New York 2005), pp. 53-103	Yes, approved	T.E. Lambooy
3	'Institutionalisation of Corporate Social Responsibility in the Corporate Governance Code: The new trend of the Dutch model'	Chapter 15 in: *Reframing Corporate Social Responsibility: Lessons from the Global Financial Crisis* (Leeds Business School and Emerald group Publishing: Bingley 2010), pp. 145-178	Yes, approved	T.E. Lambooy
4	'Transparency on Corporate Social Responsibility in Annual Reports'	*European Company Law* Vol. 5, 2008(3), pp. 127-135	Yes, approved	T.E. Lambooy and N. van Vliet
5	'Corruption and corporate governance: 'In control' of affairs requires setting-up an anti-corruption programme'	(submitted)	Not yet under review	T.E. Lambooy and V. Figueroa
6	'Private Regulation: Indispensable for Responsible Conduct in a Globalizing World?'	Chapter 4 in: *Law and Globalisation* (Bocconi School of Law, Milano and VDM Publishing: Saarbrücken 2009), pp. 90-133	Yes, approved	T.E. Lambooy and M-È Rancourt
7	'Corporate Due Diligence as a Tool to Respect Human Rights'[116]	*Netherlands Quarterly of Human Rights (NQHR)*, Vol. 28, 2010(3), pp. 404-448	Yes, approved	T.E. Lambooy
8	'To know or not to know? The consumer's right to information under Reach and other European Union legislation'	*Tijdschrift voor Consumentenrecht & handelspraktijken* [Journal for Consumer Law and trade practices] 2010(4), pp. 153-163	Yes, approved	T.E. Lambooy and J.L. Levashova

115. Chapter 2 in this book is the English translation of the originally published contribution in Dutch.
116. The published article is slightly shorter.

Chapter no.	Title of publication	Publication/submission to journal	Peer review	Author(s)
9	'*Shell* in Nigeria: From Human Rights Abuse to Corporate Social Responsibility'	*Human Rights & International Legal Discourse (HR&ILD)*, Vol. 2, 2008(2), pp. 229-275.	Yes, approved	T.E. Lambooy and M-È Rancourt
10	'Case Study: the international CSR conflict and mediation. Supply-chain responsibility: Western customers and the Indian textile industry'	*Nederlands-Vlaams tijdschrift voor Mediation en conflictmanagement* [Dutch-Flemish journal for Mediation and conflict management] Vol. 13, 2009 (2), p. 6-46; a sequence was published in Vol. 14, 2010 (1), pp. 50-67	Yes, approved	T.E. Lambooy
11	'Corporate social responsibility: sustainable water use'	*Journal of Cleaner Production* (2010, Special Issue on Utrecht Conference Global Challenge)	Yes, approved	T.E. Lambooy
12	'Integrating companies' impact and dependence on biodiversity and ecosystem services in investment decisions'[117] And 'Methodology and policy'. Stimulating information exchange on companies' links with biodiversity. Collaborative action – an action research approach	*Journal of Sustainable Finance & Investment* (submitted respectively on 10 May and 10 June 2010)	Under review	T.E. Lambooy and I.R. Jonkers
13	'Private investment in conservation of Biodiversity and Ecosystems'[118]	*International Journal of Biodiversity Science, Ecosystem Services & Management* (2010)	Yes, approved	T.E. Lambooy and J.L. Levashova

117. This chapter will be published in two parts: the first part of the chapter will be published as an article which elaborates on the research results of the study; a second part will be published in a short form as a 'research note' reflecting on a collaborative action process, which was undertaken on the basis of the research outcome.
118. The published article is substantially different and shorter than the chapter in this book.

Chapter 2.* Corporate social responsibility and corporate governance issues

2.1 Introduction

In recent years three parallel conceptual developments in the field of business ethics and integrity have become apparent: CSR; *corporate governance* and *fighting financial malpractice.* CSR refers to businesses incorporating certain matters of ethical and social welfare, such as care for the environment and the observance of human rights, into their business objectives. 'Corporate governance' is about power and influence: in what manner is the power in a business distributed, who plays a role in conveying this power, and how is this power used? 'Fighting financial malpractice' pertains to the use of financial channels for illegal or inequitable purposes *e.g.* money laundering, funding terrorist organisations, market manipulation, insider dealing, inadequate Chinese wall security within financial institutions and securities and investment institutions (financial economic crime).[1] These three developments have attracted worldwide attention from both public and private sectors. They have lead to new legislation and self-regulatory rules.

The globalisation of the private sector and its resulting excesses have given rise to a public call for business integrity and the incorporation of ethical standards into business practices. Businesses can no longer limit themselves to presenting (strong) financial results. Nowadays, the success of a business is also determined by the manner in which these results have been achieved.

As a result of developments in the field of business ethics and integrity it is no longer tenable nor advisable to invest or finance 'blindly'. A professional investor or financier should first investigate the activities and *modus operandi* of a business before deciding to purchase, finance or invest in it. Failure to carry out such investigation brings with it the risk of a blemished reputation when in hindsight it turns out that the business acted unfairly or unethically. Indeed,

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* This chapter is a translation of T.E. Lambooy, 'De problematiek van het maatschappelijk ondernemen en corporate governance' [Corporate social responsibility and corporate governance issues], which was published as Chapter 4 in: *Maatschappelijk Verantwoord Ondernemen: Corporate Social Responsibility in a Transnational Perspective* (Intersentia: Antwerpen-Oxford-New York 2005), pp. 53-103. The original publication was in Dutch. The research for this chapter ended in March 2005.

1. Communication from the Commission to the Council and the EP on Preventing and Combating Corporate Financial Malpractice, 6 October 2004, COM (2004) 611 final.

parent companies, professional investors and financiers will be easily linked with the business in question. Since loss of reputation cannot be insured nor easily remedied, it could ultimately ruin a business. For these reasons it is worth taking a closer look at the aforementioned developments.

CSR and corporate governance apply mainly to the conduct of companies, their executives and financiers. Statutory provisions on corporate conduct leave considerable margins of discretion commonly filled in by case law through reasonableness tests.

CSR and corporate governance contribute towards filling in these margins by introducing new standards for the conduct of businesses and their executives. These new standards have largely developed from initiatives taken by the business sector itself. They could be regarded as standards of behaviour or 'codes of conduct'.[2] Financial malpractice primarily pertains to criminal behaviour. In general, statutes and regulations deal with combating this behaviour and usually do not leave any margins of discretion to businesses.[3] Since combating financial malpractice is dealt with in a separate way, very different from the approach taken towards CSR and corporate governance, this subject will not be discussed in this chapter but in chapter 5 hereafter.

In this chapter an analysis will be given of the developments in the field of CSR and corporate governance. These concepts will be compared on key issues such as their ratios and objectives, initiators and interested parties, initiatives taken, voluntary versus compulsory standards, differences and parallels. The basis of this chapter's analysis is Dutch law.

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2. L. Timmerman, 'Vereenvoudiging en flexibilisering van het vennootschapsrecht' [Simplification and flexibility in company law], inaugural lecture, 23 November 2004, Leiden. It was published under the title of 'Gedragsrecht, belangenpluralisme en vereenvoudiging van het vennootschapsrecht' [Rules of conduct; diverging interests and simplification of company law], *Ondernemingsrecht*, in Company Law Review, 1, 2005, pp. 2-8, specifically § 2.d (the code of conduct approach).
3. See *e.g.* Articles 225 and 336 of Dutch Penal Code (on falsely preparing or falsifying documents and intentionally disclosing a false balance sheet, profit and loss account or public declarations); Securities Transactions (Supervision) Act 1995 (*Wet toezicht effectenverkeer)*, Securities Transactions (Supervision) Decree 1995 (*Besluit toezicht effectenverkeer 1995*); Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) OJ L96/16; Dutch implementation of this directive through the Bill on market abuse (wetsvoorstel Marktmisbruik), Kamerstukken II [Parliamentary Papers II], 2004/05, 29 827, no. 2, at http://www.overheid.nl. Draft directive: Investment Services Directive of 28 November 2003, document number 13421/03.

2.2 Background

2.2.1 Corporate social responsibility

2.2.1.1 Sustainable business practice: P for Planet

In terms of sustainable business practices the letter P for Planet stands for due care for the environment. As early as 1970 the Club of Rome drew particular attention to nature conservation.[4] They pointed out that the Earth's natural resources were not infinite and were being depleted at a frightening pace. In their report they introduced concepts such as 'sustainable consumption', 'sustainable use of natural resources' and 'sustainable development of developing countries'. The report queried the tendency to regard material progress as the main purpose in society. In those days the private sector was not concerned with the environment because environmental issues were seen to be a matter of public concern and thus the sole province of governments.

The 1973 oil crisis put the environment on the map. In the Netherlands the oil crisis represented the starting point of a government policy aimed at stimulating energy efficiency and of giving higher priority to the drawing up and enforcement of legislation on the environment.

In 1987, the World Commission on Environment and Development was established to examine global environmental issues. Following its examination the commission published the so-called 'Brundtland Report' which defined the environmental issue broadly as follows: 'Sustainable development seeks to meet the needs and aspirations of the present without compromising the ability to meet those of the future'.[5]

In 1992 the United Nations Conference on Environment and Development, also known as the 'Earth Summit', was held in Rio de Janeiro. It could be argued that environmental awareness has become mainstream since this summit. The 'Rio Declaration' resulting from this summit is a set of principles

4. D.L. Meadows (MIT) with comments by the Club of Rome, *Report of the Club of Rome*: '*The Limits to Growth'*, (Het Spectrum: Utrecht/Antwerp 1972). In 1970 a group of private individuals from all over the world who were concerned about the ever-increasing threat to humanity posed by the many inter-related problems commissioned a research project. The research project aimed to determine the physical limits to the procreation of man and economic activities on planet Earth and contained several long-term analyses. The report of this research is called 'The Limits to Growth: A report for the Club of Rome's Project on the Predicament of Mankind'. Its conclusion was that if the rapid population growth continued and economic growth was to remain the ultimate goal it would leave mankind in a predicament.
5. At the time, Norway's prime minister, G. H. Brundtland, was the Chairman of the World Commission on Environment and Development; *Our Common Future*, (Oxford University Press: Oxford 1987), p. 43.

defining rights and responsibilities of states and cooperation between those states.[6]

The Rio norms not only apply to fighting environmental problems but link environmental protection with eradicating poverty, and respect for the rights of indigenous people.

Over the course of time it has, however, become clear that in the absence of a global government, neither local authorities nor international organisations can effectively turn the tide.[7] This is partly due to the fact that international companies play an important part in the depletion of natural resources and the stimulation of overconsumption but are not under the control of one single local or national authority. Due to their size, international companies constitute a mighty force in negotiations with local authorities when, for example, obtaining permits for the exploitation of natural resources. They also play local authorities off against each other with economic arguments such as providing employment and paying taxes.[8] Moreover, business operations of international companies tend to be large in scale and may thus cause serious damage to the environment. This is why in recent years not only governments but also international businesses have been called upon to develop and promote sustainable production and consumption patterns.

Meanwhile, businesses have become more environmentally aware thanks to legislation. Many businesses have been called to account by the authorities for causing soil pollution; they need to have permits for discharging and emitting waste; as of 2005 European companies must not emit more greenhouse gasses than their emission permits allow;[9] and a number of large industrial firms must draw up environmental reports and submit these to the authorities and the public.[10] Moreover, a number of companies have experienced that ignoring the

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6. Rio Declaration on Environment and Development, Rio de Janeiro, June 3-14, 1992, at http://www.un.org/documents /ga/conf151/aconf15126-1annex1.htm.
7. See *e.g.* A. Hurrell and B. Kingsbury (eds.), *The International Politics of the Environment* (Clarendon Press: Oxford 1992).
8. See *e.g.* M. Woodin and C. Lucas, *Green Alternatives to Globalisation, A Manifesto* (Pluto Press: London 2004), pp. 10 and 73.
9. If they do exceed their limit, they need to buy emission rights from companies that emit less than their permits allow. Directive 2003/87 EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61 EC, OJ L 275; section 16.29 paragraph 1 of Wet Milieubeheer [Environmental Management Act]; Allocation scheme of 20 August 2004 for CO2 emission rights from 2005 to 2007.
10. Environmental Management Act, Chapter 12. See also T.E. Lambooy and T.P. Flokstra, 'Kleur bekennen middels jaarverslag', in *De Naamloze Vennootschap* ['Showing one's colours in the annual report', The Public Limited Company], 6,1997, pp. 159-166. See, also the long-term programme for revising the rules set by the Ministry of Housing, Spatial Planning and the Environment (VROM), Kamerstukken II 2003/04, 29383 no. 1, pp. 3 and 17 (letter of 23 December 2003 of the Dutch Minister of Housing, Spatial Planning and the Environment (VROM), in which it was suggested that the environmental report for the →

environment may come at a price: administrative sanctions may be imposed, civil law suits for soil pollution or other pollution may be instituted against them and they may suffer loss of reputation.[11]

In countries with no strict environmental legislation the risk of loss of reputation is also looming. A number of firms that have experienced loss of reputation have taken this to heart and have taken measures towards more sustainable business practices.[12]

2.2.1.2 Socially responsible business practice: P for People

In terms of CSR the letter P for People indicates due care for the people. This topic has also been on the agenda for quite some time.

The International Labour Organisation (ILO), trade unions and employees' rights organisations have continually exerted themselves to find the right balance between labour and capital within companies. They have made a case for minimum wages, a safe working environment, the establishment of trade unions, the prevention of discrimination at work and the fight against slavery and child labour. States that are party to the ILO conventions are obliged to implement the provisions of these conventions in their national laws. In states not party to the ILO conventions, or which have failed to bring their national law in accordance with the conventions, minimum legal social standards usually apply, or no standards at all, thus giving international companies the freedom to do as they please. As long as they abide by the local rules they are legally in the clear. Yet, international companies are now expected to act in a socially responsible manner towards their employees and other people involved. Those failing to do so have met with actions by NGOs.

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public be abolished and replaced by an environment report for a government body. See also the Bill to implement this proposal: Kamerstukken II 2004/05, 29 972, nos 1-4, Amendment to the Environmental Management Act relating to mandatory environmental reporting, abolition of obligation to draw up environmental reports for the public.

11. The Bhopal and Exxon Valdez disasters, for example, have given rise to an enormous amount of claims for damages. Another example which may well lead to loss of reputation is the funding of an oil pipeline of British Petroleum in the Caucasus, which runs right through the valuable nature reserve of Borjomi in Georgia. Examinations have shown that the pipe is of a poor quality, thus enhancing the risk of environmental damage. 'Milieuschandaal dreigt voor ABN-AMRO-pijpleiding in Kaukasus', [Imminent environmental scandal for ABN AMRO pipeline in the Caucasus], at http://www.duurzaam-ondernemen.nl/index, visited on 7 December 2004.
12. R. van Tulder and A. van der Zwart, *Reputaties op het spel*. *Maatschappelijk verantwoord ondernemen in een onderhandelingssamenleving*, [Reputations at stake. Corporate social responsibility in a negotiation society], (Het Spectrum: Utrecht 2003), *e.g.* Shell and the Brent Spar case, Nutreco and the dioxin salmon case, Unilever and the mercury thermometers case in India, pp. 203, 278 and 286 respectively.

Actions relating to human rights especially have led to fierce discussions and loss of reputation.[13]

Adding P for People to P for Planet has changed 'sustainable business practice' into 'corporate social responsibility'.

2.2.1.3 Running a business: P for Profit

In terms of CSR the letter P for Profit stands for due care for the continuity of the business.

As has been set out above, businesses are expected to assess environmental and social issues in their business operations. However, it should not be forgotten that a business is a form of co-operation usually aimed at making profit. Generally speaking, making a profit also benefits the continuity of a business and so the P for Profit must be included in the decision-making process of a business. CSR is therefore often referred to as 'Planet, People, Profit', 'PPP policy' or 'Triple P policy'.

2.2.2 Corporate governance

Corporate governance has gained attention since the early 1990s. The ever increasing internationalisation of the economy on the one hand and public attention for the added value of businesses and the position of financiers on the other hand, sparked the corporate governance debate. The (British) Maxwell case, concerning pension funds fraud in the early 1990s, was the first in a series of accounting scandals. The Maxwell case and a number of other large scandals catalysed the establishment of the *Cadbury Committee* in the UK. This Committee launched the first report on corporate governance in 1992.[14] Many European countries and the US showed interest in the report. Other surveys and reports containing recommendations for improving private business structures followed.[15] The subject was thrown into the public arena.

Shortly after the economy and stock market boom of the 1990s had ended, the Western world was faced with several large accounting scandals from the year 2000 onwards: *e.g.* Enron, Arthur Andersen, Parmalat, Bankgesellschaft Berlin, WorldCom, Tyco, BCCI, Ahold and Shell. The scandals were not confined to one country or one corporate governance model but occurred in various countries and with all sorts of businesses. It was for this reason that the issue of corporate governance (including the fight against

13. R. van Tulder and A. de Zwart, *supra* note 12, cases of PepsiCo, Heineken and Triumph in Myanmar (before: Burma), and the case of Shell and the Ogoni people, pp. 180, 187, 273 and 213 respectively.
14. See § 2.6.2.4.
15. See §§ 2.6.2.1–2.6.2.5.

financial malpractice) became acute. The accounting scandals established a pattern that pointed towards conflicts of interest within companies and professional organisations, poor supervision over boards of directors, inadequate accountability systems for boards of directors and a lack of adequate repercussions in case of mismanagement.

The legal structure of legal bodies with limited liability provides for a separation of ownership and management of a business. There are two sides to this separation.

The positive side is that businesses can attract professional board members and that shareholders can easily spread out their risks over various businesses. The negative side is that members of the board of directors do not run the business with their own capital. Consequently, an apparent risk of conflict of professional and private interests and careless management of the company's assets exists. In these kinds of situations members of the board of directors do not always act in accordance with the company's interests. They sometimes merely act in their own interest by awarding themselves huge remunerations or by concluding expensive takeovers, thinking that this augments their status. In this legal structure adequate supervision of the board of directors by members of the supervisory board is often lacking. Moreover, a commonly held belief is that there simply cannot be effective supervision of the board of directors by members of the supervisory board, often part of the same 'old boys' network', because they identify to a large extent with the board of directors. The net effect of the above is that the directors are left with too much scope to pursue their own interests. In addition, the supervision of the board of directors' company policy by the general meeting of shareholders leaves a lot to be desired. This is partly due to shareholders having been kept at bay by anti-takeover measures and the two-tier board system (Netherlands) and partly because of passive voting behaviour on the part of shareholders.[16] Indeed, even the supervision by independent auditors of the board of directors' company policy often seems to have been influenced by the board of directors.

The cases of abuse of power that came to light cast doubt on the ethics of members of the board of directors. Moreover, it led to dissatisfaction with the manner in which the power within listed companies was divided and with the dominant position of the board of directors. It has also affected confidence in the capital market, which in turn had a negative effect on the shareholder value in general.[17] As a result of this, nowadays, much attention is paid to 'corporate

16. 'Beyond shareholder value. Shareholder capitalism suffers from a vacuum of ownership', in *The Economist*, 26 June 2003.
17. J. Salacuse, 'Corporate governance in the new century', in *The Company Lawyer*, 25(3), 2004, pp. 69-83; R.H. Maatman, 'Tabaksblat en de botsende doelstellingen', [Tabaksblat and clashing objectives], in *Ondernemingsrecht*, 4 (2004), p. 116, adds to this that the development also led to pension funds experiencing solvency problems.

governance', literally meaning: controlling a business. Controlling a business is about the ability to direct processes and thus about exercising power. Corporate governance has to do with the manner in which the power within a company has been distributed (internal structure), who plays a role in conveying and supervising this power, and the manner in which this power is exercised (the decision-making process).[18] Although generally speaking the concept of corporate governance is more or less similarly interpreted internationally, its meaning is slightly different in Anglo-Saxon countries than in continental Europe.

In Anglo-Saxon countries corporate governance is mainly aimed at controlling the board of directors for the purposes of increasing shareholder value whereas in the European countries shareholders are considered to be not the only stakeholders. Aside from shareholders' interests, European businesses also need to take into account the interests of employees and creditors on the basis of the so-called 'stakeholder-model'. Corporate governance in European countries requires that the board of directors of a business keeps in mind the various interests involved.[19] It should be noted, however, that the long-term shareholder interest has also taken a prominent place in the recent corporate governance debate in the Netherlands.

The Dutch corporate governance structure for large companies has a few more peculiarities. The Dutch two-tier system, in which the supervisory board is separate from the board of directors, contributes to its independence and autonomy, at least in theory. In the Dutch system, the supervisory board fulfils an important role as a supervisor within the company. The two-tier system, the restricted two-tier system and the voluntary two-tier system in Dutch law are internationally unique.[20] In a two-tier company the supervisory board is awarded extra powers which, in other types of companies, usually belong to the general meeting of shareholders. In addition to the two-tier system other measures that limit shareholders' influence have been taken in the Netherlands, such as issuing depositary receipts for shares and conferring special powers on holders of priority shares.

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18. Governance – the activity of governing a country or an organisation; the way in which a country is governed or a company or institution is controlled; 'corporate': of the corporation, (Oxford Advanced Learner's Dictionary).
19. J. Salacuse, *supra* note 17, p. 72
20. Articles 2:152-164 and 262-274 of Dutch Civil Code (DCC), which were, however, recently amended by the Dual-Board Company Structure Reform Act, Act of 9 July 2004, *Staatsblad* [Bulletin of Acts, Orders and Decrees], 2004, p. 370, see also § 2.6.2.5.

2.3 Objective

2.3.1 Corporate social responsibility

The development of CSR is aimed at creating a stable balance between (i) environmental protection (original scenery and biodiversity), prevention of depletion of natural resources and tackling global environmental problems such as climate change and environmental pollution (Planet), (ii) ensuring a decent working environment, observance of human rights and the fight against child labour, slavery and corruption (People), and (iii) profit targets of businesses (Profit).

2.3.2 Corporate governance

The development of corporate governance is aimed at restoring investors' confidence in (i) the integrity of the board of directors of listed companies and (ii) the proper functioning of the capital market in general.[21] In addition, corporate governance intends to create shareholder value in the long term.[22]

2.4 Initiators

2.4.1 Corporate social responsibility

NGOs[23] and international organisations[24] were the first to introduce the Planet and People themes. Following this initiative, so-called green and left-wing politicians made a case for having these subjects regulated by law. Meanwhile, many Western countries have a long tradition of statutory protection of employees, human rights and combating corruption. Environmental law has developed more recently, but also goes back several decades. Environmental law usually only involves a company's national environmental or social

21. For a historical overview of the Dutch corporate governance situation, see A.W.A. Boot, *Corporate Governance: hoe verder* [Corporate Governance: Which way forward?], (University of Amsterdam, Finance Group 1999).
22. The Dutch corporate governance code (Tabaksblat Code), Kamerstukken II 2003-2004, 29 449, no 1 (letter of 1 March 2004 by the Dutch Minister for Finance, the Minister of Justice and the Minister of Economic Affairs), p.1.
23. Including Greenpeace, WWF, and the International Union for Conservation of Nature and the Club of Rome.
24. Such as the UNEP, the World Commission on Environment and Development, the World Business Council for Sustainable Development, the Coalition for Environmentally Responsible Economics, the United Nations Division for Sustainable Development, the United Nations High Commissioner for Human Rights and the International Labour Organisation. See further Hurrell and Kingsbury (eds.), *supra* note 7.

policy.[25] In (non-Western) countries where no such law or no detailed legislation exists, or is not enforced, international companies have to go by their own ethical standards. NGOs, green and left-wing politicians and a number of international organisations have urged international companies to also apply their homestate standards to their business operations in other countries.[26] Nowadays, CSR is no longer a topic reserved exclusively for NGOs and a small group of politicians.

The subject of CSR has become mainstream in that it now has the full attention of the Dutch government and the EU. The business community also actively participates in the debate on CSR. Some businesses have indicated that they support CSR for ethical reasons, others for risk management reasons, protection of their reputation, or marketing purposes.[27] In this respect, the term marketing is not merely limited to product markets but also pertains to popularity on the labour market and, last but not least, the capital market, in which sustainable investments have really taken off.[28] Businesses also

25. See: sections 1 and 2 of Labour Conditions Act 1998, which determine that this act applies to employment in the Netherlands and on Dutch vessels and aircraft. The Environmental Management Act (*Wet Milieubeheer*) also applies to locations in the Netherlands only.
26. In 2001 the Dutch Green Party and the Dutch Labour Party submitted a Private Member's bill to the Dutch House of Representatives for the amendment of Article 2: 391 of DCC, relating to the annual report. The bill suggested obliging corporations that operate on an international level to include their ecological, social and ethical policies and the measures taken to execute these policies in their annual reports, and to give information in their reports about any codes of conduct that they have adopted or subscribe to. This information would also include subsidiaries and group companies. Kamerstukken II 2000/01, 27 905 [Parliamentary documents], nos. 1-3. The Bill was still pending by 2010; see for the text (in Dutch): https://zoek.officielebekendmakingen.nl/kst-27905-3.html and for the status in the legislative process: http://www.vng.nl/smartsite.dws?id=92856#2, both sites visited on 7 September 2010. The EP made similar proposals to the European Commission. See § 2.6.1.2 and further Woodin and Lucas, *supra* note 8.
27. Until 1996 all shares in Royal Packaging Industries Van Leer NV were held by the Van Leer Foundation. In 1996 part of the shares were listed on the stock exchange. The Van Leer Foundation spends the paid dividend on projects for deprived children in the countries where the Van Leer business operates, see: http: //www.business.com/directory/industrial_goods_and_services/packaging_and_containers/metal_containers/royal_packaging_industries_van_leer_n_v/profile. Also see: the Body Shop, at http: //www.thebodyshopinternational.com /web/tbsgl/values.jsp, Organic shops at, http: //www.denatuurwinkel.com/nw. All sites are visited on 1 June 2010. Green butchers and organic farmers are examples of the first ethical perspective. A number of multinationals and large banks are examples of businesses that take a risk-management approach, see *e.g.* R. van Tulder and A. van der Zwart, *supra* note 12 and the CSR reports of ABN AMRO bank and ING bank for 2003.
28. See *e.g.* Fortis Investments and Deminor sign co-operation agreement on CSR proxy voting, Press release 24 March 2004; *Het Financieele Dagblad*, 25 March 2004. It stated that Fortis Investments will take into consideration the extent to which European firms stand the test of corporate social responsibility when deciding to invest. See further, *De Duurzaam Geld Gids* [the Sustainable Money Guide], 2002 edition, *Consumentenbond* [Consumers' Association], DHV [an international consulting engineers office] and VBDO [Associaton of Investors →

participate in the debate because in so doing they try to avoid CSR being forced upon them by way of mandatory rules. They hope that the government will not enact strict, detailed legislation if the business community observes certain self-imposed minimum standards of CSR. A recurring question is whether the businesses who were in the vanguard of the CSR movement are still of the same opinion now.

Indeed, legislation on the subject of CSR will strengthen their competitive position since all companies would then be obliged to spend time and effort on operating in accordance with CSR rules.[29]

2.4.2 Corporate governance

In various countries governments took the first steps to investigate the fading confidence in directors of listed companies and the capital market. In close consultation with listed companies, the stock exchange and investors associations, various committees have been established over time to investigate and give advice.[30] As part of the modernisation process of European corporate law the European institutions have also acquainted themselves with the subject of corporate governance. Taking into consideration the ever-increasing internationalisation of businesses, the growing integration of financial markets and the transnational nature of accounting scandals, most would agree that corporate governance needs to be dealt with at an international level. However, the rules on the distribution of powers among the components of a company and the rights and duties conferred on them differ for every jurisdiction. On a European level, too, there is no real harmonisation of these kinds of rules. This situation gave rise to the idea that each jurisdiction should take initiatives to restore the

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for Sustainable Development], *Groen Beleggen, Wegwijzer in groene financiering, groen-projecten en groenfondsen*, [Green investments, Guide to green investments, green projects and green funds], Ministry of Housing, Spatial Planning and the Environment (*VROM*), 2003; *Jaaroverzicht van de Bank voor de Wereld van Morgen* [Annual Review of the Bank for the World of Tomorrow], ASN Bank 2002; *ING in de Samenleving 2003* [ING in Society] 2003, p. 13. E. Goudswaard and J. Jansen, '*Duurzaam beleggen groeit vooral door inzet particuliere belegger'*, [Sustainable investments are on the rise thanks to efforts of private investors] in *Het Financieele Dagblad*, 18 November 2004; R. Wuijster, *'Duurzaam beleggen blijkt een blijvertje*' [Sustainable development is here to stay] in *Het Financieele Dagblad*, 25 September 2004; *VBDO Nieuwsbrief* [Newsletter] no. 6, 2004, 26 September 2004, at http://www.vbdo.nl/index.php?nl/sri, visited on 1 March 2010.

29. This was proposed by a number of representatives of large companies at the plenary session of the three-day European Conference on Corporate Social Responsibility in Maastricht, (8–10 November 2004) on 8 November 2004 (below: the Maastricht EUCSR in which the author participated). The aim of this conference was to formulate concrete steps to be taken within the European Union before 2010, http://www. csr2004.nl, visited on 2 December 2004.

30. See §§ 2.6.2.1–2.6.2.5.

confidence in the directors of companies within that particular jurisdiction. At a European level the corporate governance process can be advanced by extending the European rules on transparency of reporting.[31]

As is the case with CSR, the business community tries to avoid corporate governance being forced upon them through strict, detailed new rules. That is why they advocate self-regulation. The business community argues that the decision-making process within a company should be flexible and therefore not restricted by strict rules. Moreover, there may be situations in which a company decides to deviate from the general perception of what constitutes good corporate governance. Besides, views on corporate governance tend to change all the time, and a company may want to decide on the basis of the most recent developments in the field. It can be argued that this can be better realised by self-regulation.

2.5 Interested parties

2.5.1 Corporate social responsibility

Environmentally unfriendly production processes first and foremost affect the people living in the vicinity of a production plant and others who are dependent on the ecological quality of the soil and water near the production plant. All of us, however, benefit from clean and sustainable production processes on a global scale. That is why we are all interested parties where the Planet issue is concerned.

Sound employee policies are important to current and future employees of a company, and its suppliers alike. The interested parties of a business policy against corruption are citizens in the broader sense. Indeed, if corrupt (political) leaders are prevented from seizing money, this money can be spent on education, health care, environmental protection and other matters of public concern. Those benefitting from the observance of human rights by companies are the ones whose rights might otherwise be infringed. As far as the issue of People is concerned, employees as well as other groups in society stand to benefit.

2.5.2 Corporate governance

A betrayed confidence in the integrity of the board of directors and management procedures especially affects a company's capacity to attract capital, while a betrayed confidence in the integrity of the capital market leads to a shrinking

31. The High Level Group of Company Law Experts on a Modern Regulatory Framework for Company Law in Europe, chaired by J. Winter. See below § 2.6.2.2.

value of shares and thus affects all investors. Those benefitting from a well-functioning capital market are the stock markets, businesses that make use of the capital market, (institutional) investors, boards of directors and supervisory boards, and government authorities that are responsible for its regulation. It is no coincidence that the Dutch corporate goveranance code for listed companies (Tabaksblat Code)[32] was drafted upon the invitation of the Dutch Minister of Finance and the Minister for Economic Affairs at the request of Euronext Amsterdam, the Netherlands Centre of Executive and Supervisory Directors, the Foundation for Corporate Governance Research for Pension Funds, the Association of Stockholders, the Association of Securities Issuing Companies and the Confederation of Netherlands Industry and Employers (*VNO-NCW*).[33]

2.6 Initiatives

CSR and corporate governance have been the subject of many initiatives in recent years, both on a national and an international level and varying from legislative action to self-regulation. It would take too long to deal with all the initiatives taken in the areas of CSR and corporate governance in the following sections, therefore only a selection of the most important initiatives for the Netherlands will be discussed hereafter.[34] Other important initiatives include for example the Earth Charter (2000; not a special focus on CSR) and the Business Leaders Initiative on Human Rights (2003; no focus on the P of Planet).

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32. Corporate Governance Committee, 'The Dutch Corporate Governance Code'. 'Principles of Good Corporate Governance and Best Practice Provisions', 9 December 2003, in *Staatscourant* [Government Gazette], no. 250, 27 December 2004; http://www.commissiecorporategovernance.nl, visited on 3 June 2010, (below: Tabaksblat Code).
33. Tabaksblat Code, *supra* note 32, p. 3.
34. See for an overview of initiatives on CSR, D. Leipziger, *The Corporate Responsibility Code Book* (Greenleaf Publishing: Sheffield 2003). See also on this subject: J.A.A. Hamers, C.A. Schwarz and B.J.M. Steins Bisschop, 'Corporate Social Responsibility; Trends in The Netherlands and Europe', in J.A.A. Hamers, C.A. Schwarz and B.J.M. Steins Bisschop, *Maatschappelijk Verantwoord Ondernemen: Corporate Social Responsibility in a Transnational Perspective* (Intersentia: Antwerpen-Oxford-New York 2005), pp. 1-20; B.T.M. Steins Bisschop, '*Maatschappelijk verantwoord ondernemen en het ondernemingsrecht'* [Corporate social responsibility and company law], (Boom Juridische Uitgevers: The Hague 2004), pp. 27-36; UN, '*World Investment Report'*, 1999; International Chamber of Commerce, 'Business in Society'; G7, 'Evian Declaration', 2003. For further corporate governance initiatives, see: Viénot report, 1995; *Olivencia report*, 1998; *Cromme Code*, 2002/03; MEDEF/AFEF, 2003; Aldama report, 2003. According to the European Corporate Governance Institute, 28 countries have published codes of best practice recommendations in between 2002 and 2004, (N. Baker, 'Corporate Governance: Has it gone too far?', *International Bar News*, September 2004, p. 9).

2.6.1 Corporate social responsibility

2.6.1.1 International initiatives

The OECD MNE Guidelines were thoroughly revised in the year 2000 to emphasise that businesses must conduct their operations in a socially responsible way.[35] The OECD MNE Guidelines contain recommendations to multinational enterprises for responsible business conduct, particularly in foreign countries from, or in which, they operate (host countries). According to the OECD MNE Guidelines 'responsible business conduct' implies that businesses exercise due care for the environment, their employees, and others involved in these foreign countries. It also means fighting corruption and paying taxes *in situ*. In addition, responsible business conduct requires enterprises to provide training and pass on science and technology. Moreover, the OECD MNE Guidelines provide that multinational enterprises should report on their corporate strategy and conduct with respect to the non-financial topics mentioned in the Guidelines in addition to their periodic financial reporting. This kind of reporting on non-financial topics is often called 'sustainable reporting' or 'social reporting'. The Dutch government actively promotes corporate compliance with the OECD MNE Guidelines, and acts as a mediator in the case of complaints regarding non-compliance.[36]

The UN Global Compact (Global Compact) was an initiative taken by Kofi Annan, the former Secretary-General of the United Nations, in 1999. He listed ten principles for conducting business activities.[37] These principles cover the usual range of CSR categories. The UN Global Compact Principles, like the OECD MNE Guidelines, recommend that companies periodically publish transparent reports on their corporate strategy and conduct. The Global Compact seeks to advance its principles through the voluntary engagement of companies. The Global Impact initiative seems to be successful in that a large number of companies have joined as participants and associate being a participant with an element of prestige.[38]

The United Nations' Sub-Commission on the Promotion and Protection of Human Rights has also formulated rules of conduct relating to CSR.[39] These

35. Http://www.oesorichtlijnen.nl. These guidelines were drawn up in 1976, reviewed in 1979 and revised again in 2000 by the then 30 member countries of the OECD.
36. See § 2.8.1.1.
37. See: http://www.unglobalcompact.org, visited on 1 November 2004.
38. Speech by Kofi Annan on 24 June 2004. He states that by 2004 some 1500 international corporations had joined the UN Global Compact initiative. See: http://www.un.org/News/Press/docs/2004/sgsm9383.doc.htm, accessed on 10 July 2010.
39. 'Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003), decided by resolution on 13 August 2003, UN Doc. E/CN.4/Sub.2/2003/L.11 at 52 (2003).

rules aim to help advance the protection of human rights. These rules were intended to apply directly to enterprises, but have never been adopted by the international community (see section 7.4.3.). Moreover, it was unclear how the direct application could be achieved.

The first statute to make corporate bribery a criminal offence in a host country, was the United States' Foreign Corrupt Practices Act of 1977 (FCPA). This Act will be further elaborated upon in chapter 5.

In 1997, the OECD Member countries negotiated the OECD Corruption Convention.[40] This Convention contains recommendations for both governments and enterprises. From a CSR perspective, it is important to note that the bribery of public officials falls within the scope of the OECD Corruption Convention. The Convention recommends that governments make bribery of foreign officials a criminal offence.[41] In the Netherlands, this recommendation led to the Dutch Penal Code being amended.[42] By 2003, already 34 Western countries had incorporated the Convention's recommendation into their national laws. Consequently, nationals, including companies, involved in committing an act of bribery in a foreign country can now be prosecuted in these 34 countries.[43]

In this respect, the ICC Rules of Conduct: *Extortion and Bribery in International Business Transactions* (1999 revised version) (ICC Rules on Bribery) and *Fighting Bribery: a Corporate Practices Manual*, by the ICC are also worth mentioning. The ICC Rules on Bribery as well as the Manual have been drawn up by the business community itself.

Over the years, the ILO has drawn up many conventions aimed at improving the working conditions of employees on a global scale and eliminating slavery and child labour. The ILO conventions are international conventions and consequently need to be implemented in national laws. A selection of several important ILO conventions and recommendations has been integrated into the 1977 Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy. This document addresses not only governments but also

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40. The OECD Corruption Convention has been signed by 35 countries and became effective as of 15 February 1999. On this subject see F. Vincke and F. Heimann (eds.), '*Fighting Corruption*. *A Corporate Practices Manual'* (ICC Publication: Paris 2003), pp. 9 and 18.
41. F. Vincke and F. Heimann, *supra* note 40, p. 42.
42. Article 178a in conjunction with Articles 177, 177a and 178 Dutch Penal Code; article 364a in conjunction with Articles 361, 362, 363 and 364 of Dutch Penal Code.
43. F. Vincke and F. Heimann, *supra* note 40, p. 5. See also F. Meadows, 'OECD Bribery Convention Five Years On. How is it Working and how is it Monitored?' in *Business Law International*, 5(5), 2004, pp. 371-384.

workers' and employers' organisations and companies.[44] Codes of conduct and CSR standards frequently refer to it.

The GRI is an international organisation which draws up regulations for sustainability reporting. The GRI strives to improve sustainability reporting in order to match the quality of financial reporting, especially where comparability, verification and timeliness are concerned.[45] In 2002, the GRI published a revised version of the GRI Guidelines.[46] By the end of 2004, more than 600 international companies followed these guidelines in compiling their annual sustainability reports.[47]

2.6.1.2 The European Union

In Lisbon in March 2000 the Council set as a strategic goal for 2010 for the EU to become the most competitive knowledge-based economy in the world, capable of sustainable economic growth and greater social cohesion. The Council appealed to European companies' corporate sense of social responsibility to realise this goal.[48]

In 2001, the Commission published a Green Paper on CSR, which emphasised the importance of companies' voluntarily taking on commitments.[49] Its aim was to encourage a broad debate on how the EU could promote CSR at a European and global level and how this would contribute to the EU's strategic goal as adopted by the Lisbon Summit for 2010. In July 2002, the Commission issued a written communication as a 'follow-up' to the Green Paper, which set out the details of the EU strategy to promote CSR. In its communication, the Commission proposed to set up a Multi-Stakeholder Forum (EU CSR Forum) on CSR for making recommendations on reporting, accounting, auditing, codes of conduct, management standards and socially responsible investment.[50]

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44. See: http://actrav.itcilo.org/actrav-english/telearn/global/ilo/guide/triparti.htm, and http://www.ilo.org, for other ILO conventions.Websites visited on 3 July 2010.
45. Purpose clause of the Global Reporting Initiative Foundation, this Foundation is based in Amsterdam.
46. See: http://www.globalreporting.org/NR/rdonlyres/B52921DA-D802-406B-B067-4EA11CFED835/3882/G3_GuidelinesENU.pdf, visited on 15 October 2004.
47. 'Addition of New Reporters Results in New Landmark for GRI', press release of 24 November 2004, http://www.globalreporting.org, visited on 2 December 2004.
48. Lisbon European Council Decision, 24 March 2000, no. 100/1/00, sub 5, at http://eu.eu.int/cms3_applications/Applications/newsRoom/loadBook.asp?target=2000&bid=76&lang=3&cmsId=347, visited on 3 May 2010.
49. 'Promoting a European Framework for Corporate Social Responsibility', Green Paper (2001), issued by the Commission, COM (2001)366 final.
50. Commission Communication concerning CSR: A Business Contribution to Sustainable Development, COM (2002)347 final.

In October 2002, the Commission set up the EU CSR Forum. Within its set-up, representative organisations of employers, employees, professional associations as well as NGOs consult with each other on future CSR practices at a European level. The EU CSR Forum presented its final results and recommendations in June 2004.[51] Its recommendations were, however, rather general and non-committal. The European professional associations would have preferred more concrete recommendations providing guiding principles for CSR practices and reporting.[52] The EU CSR Forum in its Final Report does, however, not mention non-financial reporting, which is somewhat surprising given that in 2003 the Council and the EP drafted a new directive on annual reporting which did include certain CSR issues, such as the environment and human resources (see below). The Commission is expected to develop further CSR principles on the basis of the EU CSR Forum's report.

The EP has always been a clear advocate of mandatory CSR regulation rather than voluntary rules. Following the Commission's Green Paper, the EP in 2002 adopted a resolution in which it called for inclusion of a clause on mandatory social and environmental reporting[53] in the Fourth Accounting Directive.[54] The EP, in reaction to the Commission's communication of 2002, voted unanimously in favour of a resolution in which it calls upon the Council and the Commission to oblige businesses to include information on the environmental standards they observe outside the EU in their annual reports.[55] Moreover, in 2003 committees of the EP urged the Commission to draw up a directive on mandatory CSR reporting within three years and to include additional obligations for companies regarding the disclosure of information on CSR in its Prospective Directive.[56]

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51. European Multi-Stakeholder Forum on CSR: Final Results & Recommendations, 29 June 2004, Final Report. IP/04/814, Brussels 29 June 2004, at http://www.Europa.eu.int/comm/enterprise/csr/documents, accessed on 12 July 2010.
52. FNV, Europese stakeholders presenteren rapport over maatschappelijk verantwoord ondernemen [European Stakeholders present a report on corporate social responsibility], *News item*, http://www.fnv.nl, visited on 16 July 2004.
53. European Parliament Resolution of 30 May 2002, P5_TA-0278/2002, C187 07-AUG-03 035 180 (E), p. 5, sub 6.
54. Fourth Council Directive 78/660/EEC of 25 July 1978 on the annual accounts of certain types of companies, OJ 1978 L 222.
55. European Parliament Resolution of 24 April 2003, PE A5-0133/2003 final proposal, p. 11, sub 27; European Parliament Resolution of 13 May 2003, C067 17-MAR-04 028 (E); text available at: http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A5-2003-0133&language=MT and information about the voting available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+PRESS+DN-20030513-1+0+DOC+XML+V0//EN#SECTION5, visited on 6 September 2010.
56. Proposal European Parliament Resolution, *supra* note 55, pp. 17, 20 and 25. See also the Prospectus Directive 2003/71/EC of the EP and of the Council of 4 November 2003, OJ 2003 L 345/64, Article 7, paragraph 3 and Article 10, paragraph 1.

Environmental and human resources reporting now have become mandatory at the European level, owing to factors other than the European CSR debate.

In trying to establish a common integrated European capital market, the Council has insisted that the comparability of companies' financial statements should be improved.[57] In addition to the International Accounting Standards (IAS) regulations that apply to financial statements of listed companies,[58] the Council and the EP came up with a new directive on the annual reporting of other financial undertakings (Modernisation Directive) in 2003.[59] The Modernisation Directive amends four earlier accounting directives with respect to the content of annual reports.[60] It stipulates that annual reports and consolidated annual reports should also include 'non-financial key performance indicators relevant to the particular business, including information relating to environmental and employee matters'.[61] This information needs to be included to the extent it is 'necessary for an understanding of the company's development,

57. Lisbon European Council Decision of 24 March 2000, no. 100/1/00, sub. 21, at http://ue.eu.int/cms3_applications/Applications/newsRoom/loadBook.asp?target=2000&bid=76&lang=3&cmsId=347, accessed on 3 May 2010. EU Financial Reporting Strategy: The Way Forward, Communication from the Commission, 13 June 2000, COM (2000) 359 final.
58. Regulation (EC) No 1606/2002 of the EP and of the Council of 19 July 2002 on the application of international accounting standards, OJ 2002 L 243/1. See E.A. de Jong, Naar één mondiaal stelsel voor jaarrekeningstandaarden, [Towards one global system of accounting standards], in *Ondernemingsrecht*, 12, 2002. Also, see: H. Beckman, IAS-wetsvoorstel en richtlijnen voor de jaarverslaggeving, [IAS Bill and accounting guidelines], in *Ondernemingsrecht*, 14, 2003.
59. Directive 2003/51/EC of 18 June 2003, OJ 2003 L 178/16, (Modernisation Directive). The Modernisation Directive and the bill on its implementation are further discussed in H. Beckman, 'Wetsvoorstel uitvoering IAS-verordening, IAS 39-richtlijn en moderniseringsrichtlijn, (jaarrekening en jaarverslag)' [Bill on the implementation of the IAS-Regulation and IAS-39 Directive and the Modernisation Directive (annual account and annual report)', in *Ondernemingsrecht*, 16, 2004, p. 617 and T.E. Lambooy, 'Duurzaamheidsverslaggeving door bedrijven als onderdeel van het jaarverslag?'[Sustainability reporting by companies to be included in annual reports?], in *Ondernemingsrecht*, 16, 2004, p. 633.
60. The Fourth Council Directive, *supra* note 54, the Seventh Council Directive 83/349/EEC of 13 June 1983 on consolidated accounts, OJ 1983 L 193, Directive EU 86/635/EEC Council Directive of 8 December 1986 on the Annual Accounts and Consolidated Accounts of Banks and Other Financial Institutions (the Bank Account Directive), OJ 1986 L 372, and Directive EU 91/674/EEC Council Directive of 19 December 1991 on the Annual Accounts of insurance undertakings (the Insurance Account Directive), OJ 1991 L 374.
61. Article 1.14 of the Modernisation Directive amends Article 46 (content of annual account) of the Fourth European Annual Account Directive. Article 2.10 amends Article 36 (the consolidated annual account) of the Seventh European Annual Account Directive. Article 3.1 amends Article1, paragraphs 1 and 2 of the Bank Account Directive. Article 4.1 amends Articles 1.1 and 1.2 of the Insurance Account Directive.

performance or position.'[62] Since environmental and employee matters play an important part and represent considerable interests in most businesses, it is argued that companies readily fall within the scope of the new reporting requirements. In the Netherlands, the Modernisation Directive requirements have been implemented quite literally in the Dutch Modernisation Directive Implementation Bill implementing the IAS Regulation and IAS 39 Directive and the Modernisation Directive.[63]

Small and medium-sized enterprises are exempted from these reporting requirements.[64] Consolidated annual reports must include information pertaining to the entire commercial enterprise, including foreign subsidiaries. The Modernisation Directive should have been implemented into the national laws of the member states by 1 January 2005 at the latest.[65] Although the Netherlands failed to meet this implementation date, the Dutch Modernisation Directive Implementation Bill does determine that the new reporting requirements apply to annual reports from 2005 onwards.[66]

2.6.1.3 The Netherlands

In the year 2000, the SER advised the Cabinet on the subject of CSR.[67] In keeping with the business community stance of rejecting binding rules, the SER advised caution when it came to the role of the Dutch government in this matter.

In response to the SER advisory report, the Dutch Green Party and the Dutch Labour Party presented a Private Member's Bill on sustainability reporting to the Dutch House of Representatives in 2001. The Bill proposes that companies operating internationally must include their ecological, social and ethical strategies and the measures taken in pursuit thereof in their annual reports as well as provide information on any codes of conduct they have

62. *Ibid*. See also: N. Kamp-Roelands, 'Ontwikkelingen in maatschappelijke verslaggeving' [Developments in social reporting'], in *Maandblad voor Accountancy en Bedrijfseconomie*, [Monthly Review for Accounting and Business Economics], 77(11), 2003, pp. 482-488, § 3.
63. *Kamerstukken II*, 2003/04, 29 737, nos. 1-14 and amended Bill of 15 March 2005, adopted on the same date by the Dutch House of Representatives.
64. Article 2:396 DCC and section 1 N of the Dutch Modernisation Directive Implementation Bill, Article 2:397 DCC, new paragraph 7.
65. Article 5 of Modernisation Directive.
66. Article III of Dutch Modernisation Directive Implementation Bill.
67. SER Advisory Report on Corporate Social Responsibility: A Dutch Approach, (*De winst van waarden)*, 15 December 2000, at http://www.SER.nl, visited on 21 July 2010.

adopted or subscribe to. This information must also concern subsidiaries and group companies.[68] By 2010, the bill had not yet been adopted.[69]

Following the SER advisory report, the Cabinet in 2001 requested the Dutch Council for Annual reporting[70] to advise on the possible incompany of social aspects in companies' annual reports and to develop a framework for this.[71]

The Dutch Council for Annual Reporting advised positively on the subject in its revised Guideline 400 by the end of 2003.[72] This Guideline recommended that companies should include the environmental, social and economic aspects of their entire enterprise in the annual reports. In addition, the DCAR drew up a practical manual on social reporting.[73]

The Dutch government actively engaged in modernising the OECD MNE Guidelines and strongly supported the GRI in opting for domicile in the Netherlands. Moreover, the Dutch government stimulates companies to conduct their business operations responsibly by establishing knowledge centres and discussion forums.[74] In addition, the Dutch government has stated that it is

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68. *Supra* note 26. The Council of State (Raad van State) produced an advice on this Bill. Early 2005, however, this advice was not then made public. In addition, the Combined Comittee on Company Law (an advisory committee made up of representatives of the Dutch Bar Association and the Royal Association of Civil-Law Notaries) advised on the Bill: Advice on the Private Member's Bill on providing information on corporate social responsibility [Advies over het Initiatief-Wetsvoorstel in verband met het verschaffen van informatie omtrent maatschappelijk verantwoord Ondernemen Wetsvoorstel nr. 27905], Bill no 27 905, presented to the Standing Committee for Justice in the Dutch House of Representatives on 3 January 2002, at http://www.advocatenorde.nl/NOVA/NovWet.nsf/0/50c53d d0fa1c720-cc1256ac d00411f47?OpenDocument, accessed on 21 July 2010.
69. See: http://www.rijksoverheid.nl, visited on 7 September 2010. See: *Opmaat*, examined on 15 December 2004 and confirmed by Douma of the Dutch Labour Party in the Dutch House of Representatives early March 2005.
70. The Dutch Council for Annual Reporting is the executive body of the Foundation for Annual Reporting, responsible for preparing and publishing guidelines on annual accounting for Dutch enterprises and other financial organisations. In addition, the Dutch Council for Annual Reporting advises the government on regulation concerning external reporting.
71. CSR, *Kamerstukken II*, 2001/02, 26 485, no. 14, p. 26. no. 17 p. 10 no 18, p. 2. 'Request for Advice on Corporate Social Responsibility', [Adviesaanraag Verslaglegging maatschappelik Verantwoord Ondernemen], appendix to a letter of State secretary Ybema of 11 July 2001 to the Chairman of the Dutch House of Representatives.
72. Guideline 400, 2003, in *Guidelines for Annual Reporting (Richtlijnen voor de jaarverslaggeving)*, Council for Annual Reporting, (Kluwer: Deventer 2004), pp. 1077-1088. See also T.E. Lambooy, 'Maatschappelijk verantwoord ondernemen in de jaarverslaggeving' (Corporate social responsibility in annual reporting*)'*, in *Vennootschap en Onderneming*, 12, 2003, pp. 194-199.
73. '*Assistance on social reporting', [Handreiking voor Maatschappelijke verslaggeving]*, 2003 version, Council for Annual Reporting, (Kluwer: Deventer 2003).
74. Knowledge Centre: www.MVONederland.nl (before www.mvocentrum.nl), introduced at the symposium of 24 November 2004. Forum: The EU Conference on Corporate Social Responsibility (CSR) in Maastricht.

dedicated to keeping CSR on the European agenda. However, the Dutch government agrees with the SER advisory report and the stance taken by the business community that CSR should be on a voluntary basis.[75] Towards the end of 2004 the Dutch government had no intention of introducing rules on CSR other than those implementing the Modernisation Directive (see section 2.6.1.2).[76] However, there have been other initiatives such as setting up a platform for the exchange of information and best practices on CSR: *MVO Nederland* [CSR Netherlands].

2.6.2 Corporate governance

2.6.2.1 International initiatives

The OECD Principles of Corporate Governance 2004 (OECD Principles) are the result of a thorough revision of an earlier version of the same principles with reference to recent developments and experiences.[77] The OECD Principles focus on power problems that have come into existence due to the separation of ownership and control in companies. As regards the issue of CSR, which also affects the decision-making process of an enterprise, the OECD Principles refer to the OECD MNE Guidelines and the OECD Corruption Convention. The OECD Principles aim to support authorities, stock exchanges, investors and enterprises in their efforts to improve corporate governance. They set out objectives for good governance and provide methods to realise these objectives. They are primarily directed at listed companies, but they may also prove useful for unlisted companies. The OECD Principles are based on commonly held values of the OECD Member countries in relation to corporate governance. The Principles have been divided into six chapters: 1. Ensuring the Basis for an Effective Corporate Governance Framework; 2. The Rights of Shareholders and

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75. EU CSR Conference, Maastricht, the Netherlands, *supra* note 29, 'Closing Statement' by the Dutch State Secretary for Economic Affairs, Mrs. Van Gennip, at http://www.csrwire.com/press_releases/20169-European-Conference-on-Corporate-Social-Responsibility-Competing-For-a-Sustainable-Future-7-9-November-Mecc-Maastricht, accessed on 1 May 2010.
76. 'Corporate Social Responsibility continues on a voluntary basis', (Maatschappelijk verantwoord blijft vrijwillig), in *Staatscourant*, 18 November 2004, referring to a debate in the Dutch House of Representatives on 17 November 2004, with Dutch MPs Samson, Douma and Tjon- A-Tjen posing questions to the State Secretary for Economic Affairs Mrs Van Gennip (Parliamentary questions and responses 2004-2005, no. 412, Tweede Kamer, House of Representatives, reference number 2040501480), and the report on the EU Conference on CSR in Maastricht by M. de Visser, 'Corporate sustainable development increases profits', (Duurzaam ondernemen levert meer winst op), in *FEM Business – news selection*, 9 November 2004, at http://www.fem.nl/nieuwsbericht. asp?artnr=848234 &versie=1, accessed on 12 July 2010.
77. See: http://www.oecd.org. Document of 22 April 2004, visited on 12 November 2004. The first version of the OECD Principles was agreed in 1999.

Key Ownership Functions; 3. The Equitable Treatment of Shareholders; 4. The Role of Stakeholders in Corporate Governance; 5. Disclosure and Transparency; 6. The Responsibility of the Board.

The OECD Principles are non-binding and are not intended to be detailed prescriptions for national legislation. Rather, they suggest that authorities and private sectors develop their own best practice initiatives.

2.6.2.2 The European Union

In 2001 the Commission asked a number of experts to offer independent advice on a pan-European approach regarding takeover bids and also to indicate key priorities for modernising company law in the European Union. In 2002 the 'High Level Group of Company Law Experts' issued a report that had corporate governance as one of its main subjects.[78] In response to the report the Commission issued a communication in which it argued that company law and corporate governance rules within the EU should be modernised. It also provided a plan of action to achieve this aim (Action Plan).[79]

In the field of corporate governance the Commission proposed a fully integrated European approach which would improve business efficiency and competitiveness of EU based companies while strengthening shareholders' rights and legal protection for third parties. However, one single corporate governance code for all EU member states was not considered feasible. The national company law systems are widely divergent, thus precluding an overall agreement on the corporate governance structure and the distribution of powers among the various corporate bodies. Furthermore, the Commission claimed that binding rules on corporate governance would affect the competitiveness of European businesses. With these reasons in mind, the Commission proposed – in accordance with the recommendations of the report of the High Level Group of Company Law Experts – that each Member State should develop its own corporate governance code, with a strong involvement of market participants, on an 'apply or explain' basis, with which listed companies should comply. The 'apply or explain' rule means that companies are under an obligation (i) to include a corporate governance statement in their annual reports and (ii) to provide an explanation if they deviate from the code. The EU is to organise co-ordination of the actions of the Member States in this field. Moreover, at a European level, minimum standards have to be introduced with an aim to better

78. High Level Group of Company Law Experts (Winter Committee), 'A modern regulatory framework for company law in Europe', 4 November 2002, pp. 43-78. See: http://europa.eu.int/comm/internal_market/en/company/company/modern/ consult/report_en.pdf, accessed on 1 July 2010.

79. Communication from the Commission to the Council and the EP -Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward, COM(2003) 284 final, 21 May 2003.

information on corporate governance, the strengthening of shareholders' rights and modernisation of the role of directors and supervisory boards (composition, independence, remuneration and responsibility). The Commission has indicated that it expects that national codes and a series of Community measures will lead to a further convergence of the various corporate governance systems within the European Union. The OECD Principles will also contribute to this process of harmonisation.

By the end of 2004 the Commission issued a proposal for a directive amending the Fourth and Seventh European Annual Account Directives (Corporate Governance Amendment Directive).[80] The Corporate Governance Amendment Directive proposes that listed EU-companies should include a reference to the national corporate governance code in their annual report, as well as explaining any deviation from this code (the 'comply or explain' rule). In addition, they should disclose information about their risk management systems. The proposal also contains provisions on the collective responsibility of the managing and supervisory board members towards the company for correctly drawing up and publishing the annual account and the annual report.

Lack of adherence to the accounting rules must be discouraged by the Member States by introducing appropriate sanctions and civil liability rules regarding the collective responsibility of board members towards the company. Member States are not prevented from applying stricter sanctions and liability rules than those envisaged in the Corporate Governance Amendment Directive. For instance, they may extend civil liability of board members to liability towards shareholders or even other stakeholders and they may also introduce criminal liability. The requirements laid down in the Corporate Governance Amendment Directive also apply to consolidated (group) annual accounts. Finally, all enterprises are obliged to increase transparency in transactions that involve conflicting interests.

2.6.2.3 The United States of America

To prevent new accountancy scandals the US introduced voluminous federal legislation in 2002: the Sarbanes-Oxley Act of 2002 (SOX).[81] SOX has been the most far-reaching amendment to American securities laws since the introduction of securities regulations in the 1930s.[82] In principle SOX applies

80. Proposal for a Directive of the EP and of the Council amending Council Directives 78/660/EEC and 83/349/EEC concerning the annual accounts of certain types of companies and consolidated accounts of 27 October 2004, contains a proposal for a new section containing new Articles 46a, 50b, 50c and 60a in the Fourth European Annual Account Directive and a new section containing Articles 36(2)(f), 36a, 36b and 48 in the Seventh European Annual Account Directive.
81. Sarbanes-Oxley Act of 2002, PubL No 107-204, 116 Stat. 745.
82. J. Salacuse, *supra* note 17, p. 69.

to every company listed in the US, including forty large Dutch companies. SOX primarily aims to improve the reliability of financial reporting. Apart from provisions to promote good corporate governance SOX contains provisions pursuant to which board members can more easily be held responsible for untrue or incomplete financial statements and for the internal conduct of a business. If a board member wilfully acts contrary to SOX provisions, he risks a long term of imprisonment. Such provisions may also have consequences for the supply of information on corporate governance or CSR in the annual reports of Dutch companies listed on an American Stock Exchange. If they were purposely to provide such untrue or misleading information, directors and supervisory board members would run the risk of being prosecuted in the US. Furthermore, SOX provides for stricter supervision by external auditors.[83] Following SOX, the New York Stock Exchange and the NASDAQ introduced new corporate governance listing standards in 2003.[84] These dictate, *inter alia*, that companies listed on these stock exchanges adopt and disclose 'a code of business conduct and ethics for directors, officers and employees' and that listed foreign companies disclose any significant ways in which their corporate governance practices differ from those followed by American companies.[85]

2.6.2.4 The United Kingdom

The Cadbury Committee was set up following the Maxwell case and a few other large accounting scandals in the United Kingdom (UK). The Cadbury Committee published its report on corporate governance, financial reporting and accountability in 1992.[86] It was succeeded by the Greenbury Report (1995), the Hampel Report (1998), the Turnbull Report (1999), the Smith Review and the Higgs Review in early 2003. The Higgs Review contained a great number of recommendations on the composition, role and duties of executive and non-executive directors (similar to the Dutch board of directors and supervisory board), remuneration, audit and remuneration committees, responsibility of board members and the relationship with shareholders. Pursuant to the recommendations of the Smith Review and the Higgs Review, the Combined Code of Corporate Governance was amended early 2003

83. 'Aanhangsel Handelingen', [Appendix to Parliamentary Proceedings], II 2001/02, no. 1588, contains a synopsis comparing the SOX Act and Dutch legislation on accounting fraud, following parliamentary questions in the Dutch House of Representatives.
84. NYSE Final Corporate Governance Listing Standards, approved by the Securities and Exchange Commission on 4 November 2003 and amended on 3 November 2004. See: http://www.nyse.com/pdfs/finalcorpgovrules.pdf, visited on 1 December 2004.
85. Rules 10 and 11 NYSE respectively, *supra* note 84.
86. The Committee on the Financial Aspects of Corporate Governance, Report with Code of Best Practice (Cadbury Report), London, UK: Gee Publishing, 1 December 1992, at http://www.ecgi.org/codes/documents/cadbury.pdf, accessed on 21 July 2010.

(Combined Code).[87] The British business community was very much against the revisions to the Combined Code at first, and in particular reacted negatively to the number of detailed rules. It turned out a few months later, however, that after its coming into force on 1 November 2003, the revised Combined Code was generally applied by businesses.[88] The revised Combined Code has served as a source of inspiration for the Dutch Tabaksblat Committee in drawing up the Tabaksblat Code.[89]

2.6.2.5 The Netherlands

In 1997 the Peters Committee examined the subject of corporate governance in the Netherlands. The Committee's objective was to review the role played by capital in companies, since it believed that in the Dutch stakeholder-model, shareholders were deprived of exerting real influence. In its report it made forty recommendations for sound management, effective supervision and accountability.[90]

The Peters Committee recommendations concerned the composition and quality of the supervisory board, shares and options held by board members (should be for long-term investment), transparency in directors' remuneration policies, measures to avoid conflicting of interest between the company and its board members, an annual meeting of the supervisory board or the audit committee with the external auditor, corporate governance statements in annual accounts, and their implementation. The Peters Committee's recommendations also contained a proposal for introducing a proxy solicitation system (communication between shareholders about voting behaviour), a proposal for facilitating the right of the shareholder to place an item on the agenda and a proposal for making it compulsory for parties holding 50 per cent or more of a company's shares to bid for the remaining shares. The Peters Committee had limited itself to recommendations not requiring any legislative amendments and for this reason its recommendations mainly focussed on improving transparency in the board of directors' strategy and increasing accountability. The recommendations did not

87. FRC, 2003, The Combined Code on Corporate Governance July 2003, London, UK: Financial Reporting Council, at http://www.frc.org.uk/corporate/ukcgcode.cfm, accessed on 22 July 2010.
88. I. Jones, 'Understanding how issues in corporate governance develop: Cadbury Report to Higgs Review', in *Corporate Governance: An International Review*, 12(2), 2004, pp. 162-171.
89. Tabaksblat Code, *supra* note 32, pp. 42 and 54.
90. The Peters Committee, 'Corporate Governance in Nederland: De Veertig Aanbevelingen', [Corporate Governance in the Netherlands: Forty recommendations], Amsterdam 1997, at http://www.arkobv.nl/Downloads/CorporateGovernanceinNederland-deveertigaanbevelingen.pdf, accessed on 12 July 2010.

contain any specific measures that actually increased shareholders' influence, but they did indicate that finance and influence should be balanced properly.[91]

In 2002, the Dutch Corporate Governance Foundation measured compliance with the forty recommendations of the Peters Committee between 1997 and 2002.[92] It found that less than half of the listed companies were still concerned with the recommendations. One of the recommendations the Dutch Corporate Governance Foundation made was to formulate a new best practice code, and to monitor compliance with this code in practice. This recommendation was very similar to that of the High Level Group of Company Law Experts that each EU Member State should draw up its own national corporate governance code with which listed companies should comply. These recommendations as well as the Ahold accounting scandal in February 2003, sparked the establishment of a new Corporate Governance Committee in the Netherlands (the Tabaksblat Committee).[93] The Committee was installed in March 2003.[94]

This Committee was assigned the task of drawing up a code of best practices for corporate governance to provide a guide for listed companies in the Netherlands in improving their corporate governance.[95] Its terms of reference explicitly demanded the Tabaksblat Committee to focus on the capital market perspective, *i.e.* on the relationship between listed companies and providers of capital. According to the terms of reference, CSR was not a subject to be covered by the new code.

Two reasons were given for this: (i) the subject of CSR is not linked to a national corporate structure and (ii) CSR extends far beyond the development of a new code for the functioning of Dutch companies in the capital market. The terms of reference held, furthermore, that various codes of conduct for CSR had been or were being developed (such as the GRI Guidelines and the OECD MNE Guidelines).[96]

In July 2003, the Tabaksblat Committee presented a draft corporate governance code and called upon the Dutch business community to comment. After the closing of the consultation period the Tabaksblat Code was adopted in December 2003. The Code contains principles and best practice provisions which should be observed by those involved in a company (including members

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91. Recommendation 26 of the report by the Peters Committee.
92. Corporate Governance in Nederland; de stand van zaken [Corporate Governance in the Netherland; the present position], was presented to the Dutch Minister for Finance on 18 December 2002; Dutch Corporate Governance Foundation: Amsterdam 2002.
93. *Kamerstukken II* 2003/04, 29 449, no. 1, p. 8.
94. Tabaksblat Code, *supra* note 32, p. 3: The Tabaksblat Committee was established at the invitation of the Dutch Minister for Finance and the Dutch Minister for Economic Affairs. See § 2.5.2.
95. Tabaksblat Code, *supra* note 32, Subjects covered by terms of reference of the new Corporate Governance Committee, pp. 66-68.
96. *Ibid*, pp. 66 and 67. See also § 2.6.1.1.

of the board of directors and supervisory board members) and by stakeholders (including institutional investors) in relation to one another. According to the Code, its principles may be regarded as reflecting the latest general views on good corporate governance which now enjoy wide support. It also states that the principles have been translated into specific best practice provisions that reflect national and international 'best practices'; additionally they create a set of standards governing the conduct of directors, supervisory board members and shareholders.[97] An overview of the major principles and best practice provisions of the Tabaksblat Code is included in Annex 2.1 to this chapter. An important feature of the Tabaksblat Code is the 'comply or explain' rule: companies have to report on their corporate governance structure and compliance with the best practice provisions of the Tabaksblat Code in their annual reports. Deviation from the best practice provisions may be justified if the specific circumstances so require. The board of directors needs to explain to the shareholders, however, why the best practice provisions have not been not applied. If the general meeting of shareholders approves the deviation from the Code provisions, the company is deemed to comply with the Code as far as good corporate governance is concerned. What matters is that shareholders, the board of directors and the supervisory board enter into a dialogue regarding the reasons for non-application of the provisions of the Code. The preamble to the Tabaksblat Code states that the Code will come into force with effect from the financial year starting on or after 1 January 2004. According to the preamble, the Code applies to all companies whose registered office is in the Netherlands and whose shares or depository receipts for shares are officially listed on a government-recognised stock exchange.[98] Having regard to the self-regulatory nature of the Tabaksblat Code, section 2.8.2 will address the question whether listed companies are actually legally bound by it.

The starting point of the Tabaksblat Code is Dutch company law.[99] Owing to the divergent national systems of company law, foreign corporate governance initiatives differ as to content. The Tabaksblat Code does, however, mirror international developments in corporate governance. It takes into consideration SOX, the Combined Code, the EU Action Plan (see section 2.6.2.2), the OECD Principles and the new listing standards of the New York Stock Exchange and NASDAQ.[100]

In 2004, the Dutch government responded positively to the Tabakblat Code by stipulating that its entire unaltered content will serve as a code of conduct for

97. *Ibid*, p. 3.
98. *Ibid*.
99. *Ibid*.
100. *Ibid*, pp. 42, 43 and 67 (the second parameter for a renewed code was that the Tabaksblat Code should be in keeping with international developments).

listed companies.[101] The government also opted for introducing the 'comply or explain' rule. In accordance with the recommendations of the Tabaksblat Committee the government favours 'legally enshrined self-regulation' over the introduction of new legislation. The reasons given by the government for this are, firstly, the existing differences in corporate structure and corporate governance within companies, which they consider to be better served by a system of self-regulatory rules. Secondly, a code is more flexible than legislation, thus allowing companies to respond to rapid changes on international financial markets, which in turn may influence the public opinion on what constitutes good corporate governance. Moreover, unlike legislation, a code may contain best practice provisions that set an example for companies.

The government established the 'Dutch Corporate Governance Code Monitoring Committee' by the end of 2004. Its task is to annually review the operation of the Tabaksblat Code in the light of experiences gained with the code and new developments in corporate governance.[102] The government has also announced several legislative amendments as recommended by the Tabaksblat Code.[103] On 1 October 2004, the Dual-Board Company Structure Reform Act (*Wet Aanpassing Structuurregeling*) came into effect, amending Book 2 (Legal Entities) of the Dutch Civil Code (DCC). It introduced a new paragraph 5 to article 2: 391 DCC.[104] This new paragraph states that further requirements, with respect to the content of the annual report, may be set by governmental decree (*AmvB*). Such requirements may relate in particular to compliance with the codes of conduct designated in the decree. In this way the Tabaksblat Code was designated by Decree of 23 December 2004 as a code to which the 'comply or explain' rule applies. As per the financial year 2004-2005 the new reporting requirements had to be followed.[105]

The Dual-Board Company Structure Reform Act has brought about some significant changes to the Dutch two-tier board system. In addition, it has

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101. *Kamerstukken II* 2003/04, 29 449, no. 1, pp. 3, 4 and 8 and no. 2 (record of the parliamentary meeting on 11 August 2004).
102. News of 8 December 2004, at http://www.commissietabaksblat.nl/Nieuws, accessed on 3 May 2010.
103. The announced government policy document: 'Modernising Dutch Company Law' (*Modernisering Ondernemingsrecht*) will address the question what needs to be regulated by law or code, *Kamerstukken II* 2003/04, 29 449, no. 1.
104. Act of 9 July 2004, *Staatsblad* [Official Gazette], 2004, p. 370.
105. The new paragraph 5 of article 2:391 DCC was added through the ministerial Memorandum of Amendment to the Dual-Board Company Structure Reform Bill. *Kamerstukken II* 2002/03, 28 179, no. 31. *Kamerstukken I* 2002/2003, 28 179, no. 309. Decree of 23 December 2004, *Staatsblad* 2004, 747; See also L. Timmerman, 'Decree of 23 December 2004 on compliance with the Tabaksblat Code (Staatsblad 747)', in *Ondernemingsrecht*, 2, 2005, pp. 46-47. *Kamerstukken II* 2003/04, 29 449, no. 3 (letter by the Dutch Minister of Justice of 7 October 2004 with proposed Governmental Decree 'Decree on the adoption of further requirements with respect to the content of the annual report').

altered some aspects of the distribution of power among corporate bodies of companies not subject to the statutory two-tier board rules. Shareholders have been vested with extra powers *vis-à-vis* the board of directors. In Annex 2.2 to this chapter an outline will be given of the most important amendments introduced by the Dual-Board Company Structure Reform Act. By enacting the Dual-Board Company Structure Reform Act the Dutch legislator has taken the first steps in acting upon the Tabaksblat Committee recommendations.

As part of its duty to supervise the financial reporting of listed companies, the Netherlands Authority for the Financial Markets (AFM) can examine whether a listed company has indeed included a statement on its corporate governance structure and compliance with the Tabaksblat Code in its annual report.[106]

2.7 Concrete objectives

2.7.1 Corporate social responsibility

The ultimate aim of CSR (environmental protection, proper working conditions and respect for human rights) is both idealistic and abstract in nature. Consequently, it is necessary to transpose CSR aims to more concrete objectives.

The first concrete CSR objective is to bring about a change of corporate conduct so that businesses will incorporate environmental and human issues into their decision-making processes. The desired change of conduct requires a change in attitude; not only the short-term financial results count but also the manner in which these are realised and their long-term feasibility are important factors to be considered. To stimulate changes in corporate behaviour a number of international organisations have drawn up corporate codes of conduct (OECD, ICC, Global Compact).[107] A corporate code of conduct contains standards and instructions that provide a framework for balancing the interests involved in the decision-making process. Adopting a code of conduct formulated by international organisations, governments, the branch or the company itself, may help a company to change its conduct.

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106. The supervisory task of the AFM will be dealt with by the 'Annual Reporting Supervision Act' (*Wet Toezicht Financiële Verslaggeving*) and may later be governed by the 'Financial Supervision Act' (*Wet Financieel Toezicht*, which still in a preparatory stage in 2004). See, however, the parliamentary debate in the Dutch House of Representatives about the task of the AFM) with respect to the Tabaksblat Code: the news of 1 December 2004, at www.commissietabaksblat.nl/ Nieuws, accessed on 12 July 2010. See also the Explanatory Memorandum to the Governmental Decree, *supra* note 105, p. 8.
107. See § 2.6.1.1.

A second concrete objective of CSR is to improve corporate transparency. Companies should disclose information on corporate practices and be answerable to the public, especially when it comes to corporate behaviour in foreign countries in which regulation is less detailed, or applied less strictly than in the Netherlands. Sustainability reporting may contribute to achieving this objective. The external verification of sustainability reporting by independent auditors is a sub-objective within the objective of increased corporate transparency. In the absence of independent verification of sustainability reporting, companies could be tempted to issue favourable sustainability reports that are actually little more than window dressing. Another sub-objective is the harmonisation of standards and verification procedures for sustainability reporting, which is a prerequisite for the comparability of sustainability reports. Furthermore, benchmarking is a useful tool in creating a level playing field, necessary for a healthy competition environment and good quality levels. Several initiatives in the field of sustainability reporting have been taken by (international) organisations and governments (GRI, EU, Dutch Green Party, Dutch Labour Party).[108]

The business community itself has formulated objectives with respect to CSR, the first being ecological and social risk management in order to prevent loss of reputation. The introduction of internal risk management systems contributes towards the realisation of this objective. Initiating dialogue on delicate issues with stakeholders and including this kind of information in sustainability reporting is also part of reputation management. A second objective of the business community is to avoid legislation on these topics. As indicated earlier, the business community, by actively participating in the public debate on CSR and by self-regulatory action hopes to achieve this second objective.

2.7.2 Corporate governance

The ultimate goals of corporate governance, namely raising confidence in capital markets and increasing shareholder value in the long term, are broad and abstract. It is also necessary for these goals to be transformed into more concrete and practical objectives.

The first concrete objective of corporate governance is to create a solid corporate structure, designed to ensure the integrity of the parties involved. Realising a solid corporate structure requires a better distribution of powers among corporate bodies than at present. As noted earlier, the current company structure is characterised by a dominant position of the board of directors.

A better distribution of powers should lead to a system of ‘checks and balances’ that provides for corporate self-assessment and well-balanced decisions.

108. See §§ 2.6.1.1–2.6.1.3.

It is generally argued that a better balanced distribution of powers within listed companies requires: (i) limiting the dominant position of directors; (ii) reinforcing the position of the supervisory board;[109] (iii) increasing the powers and active engagement of the general meeting of shareholders; (iv) stepping up consultation procedures between the board of directors, supervisory board and general meeting of shareholders and (v) allowing accountant audits independently from the board of directors, and permitting the accountant to inform the supervisory board and the general meeting of shareholders of its findings.

The second objective of corporate governance is to increase corporate transparency. Companies should disclose information on their corporate governance structure and mutual accountability between corporate bodies should be increased. Moreover, it has been argued that the development of corporate governance in the Netherlands should be placed in a broader perspective as, in addition to the objectives mentioned earlier, corporate governance in the Netherlands is also aimed at a fundamental review of the corporate structure of Dutch listed companies with a view to making their corporate structure compatible with the corporate structures of global financial markets.[110]

Avoiding legislation on corporate governance is another obvious objective of the business community, besides those mentioned earlier. It is hoped that setting up self-regulatory rules may prevent the introduction of legislation.

2.8 Voluntary versus compulsory

When researching the enforceability of CSR and corporate governance, a distinction must be drawn between the enforceability of the desired corporate conduct on the one hand, and the enforceability of the possibility to examine that conduct on the other. First the enforceability of specific conduct will be discussed, after which the enforceability of transparency with respect to that conduct will be explored.

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109. 'Supervisory board members' includes 'non-executive directors' in an Anglo-Saxon type 'one-tier board'.

110. M.J.G.C. Raaijmakers, *'Zelfregulering' van corporate governance van beursondernemingen. Enkele kanttekeningen bij de Nederlandse Corporate Governance Code* [Corporate governance in listed companies on a self-regulatory basis.Some critical notes on the Dutch Corporate Governance Code], *WPNR* 6563, 2004, § 2.4, p. 71. M.W. den Boogert, '*De RvC onder de nieuwe corporate governance code*' [the supervisory board in the new corporate governance code], in *Ondernemingsrecht*, 4, 2004, p. 113.

2.8.1 Corporate social responsibility

2.8.1.1 Enforceability of desired conduct

Businesses must observe legal norms (including statutory standards of conduct) with regard to environmental protection, employees' rights, human rights, corruption, and other subjects associated with CSR.

This applies to Dutch rules as well as to the rules of any other country a business wishes to operate in. Such rules are enforced by the national government of the relevant country.

Norms with regard to CSR issues laid down in international conventions are, in principle, not directly applicable to businesses. They first need to be implemented in the contracting states through national legislation.[111]

In the Netherlands, the drawing up of a code of conduct on CSR to which, by analogy with the Tabaksblat Code, the 'comply or explain' principle could apply, has been advocated.[112] In the EP a European directive with regard to socially responsible conduct by businesses has been suggested.[113] So far, these pleas have not resulted in specific regulations for corporate conduct with regard to CSR.

Businesses are not only guided in their conduct by legal norms, but also by standards of conduct such as those laid down in codes of conduct drawn up by international organisations (OECD and Global Compact), by business sectors,[114] or by a business itself. The drawing up of a code of conduct on CSR, or the adoption of a code of conduct drawn up by an international organisation, is

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111. Report re. contribution H.G. Schermers, '*Internationale Ondernemingen en Mensenrechten*' [International corporations and human rights], in *Verslag van het symposium: Internationale Dimensies van Maatschappelijk Verantwoord Ondernemen* [Report of the symposium: International Dimensions of Corporate Social Responsibility], (University of Leiden, Law Faculty: Leiden 2002).
112. Modernisation Directive Implementation Bill (discussed in § 2.6.1.2), *supra*, note 63, no. 11, amendment by Dutch MP Douma, proposing to entrench the OECD MNE Guidelines in article 2:391 DCC, obliging corporations to report on their compliance with these guidelines in their annual report, and to justify any deviations, or plans to deviate, from such guidelines. See the amendment debate in the Dutch House of Representatives in TK 47-3031-3035, and the repeal of the amendment in TK 49-3187. See also '*Eerste reactie PvdA op definitieve gedragscode Commissie Tabaksblat*' [First Response of PvdA to Tabaksblat Code], PvdA, 9 December 2003, at http://www.or-online.nl/service/enieuwsbrief/2003/44/#4, accessed on 12 may 2010. See also: *'VBDO: code Tabaksblat behoeft aanvulling'* [VBDO: Tabaksblat Code needs to be supplemented], *VBDO Bericht*, 2003-6; M. Koelemeijer, *'Gedragscode: effectief instrument voor maatschappelijk verantwoord ondernemen?*' [Code of Conduct: Effective instrument to bring about corporate social responsibility?], in *Tijdschrift voor Ondernemingsbestuur*, (2004), pp. 11-23.
113. See § 2.6.1.2.
114. Examples of this are the codes of the coffee sector, banks, the clothing industry, and the quality mark FSC timber.

not a requirement of Dutch law.[115] Businesses adopt and adhere to such codes of conduct voluntarily. With regard to the OECD MNE Guidelines, it should be noted that these guidelines are based on the principle of 'voluntary commitment'.

This means that once a business has adopted these guidelines it must adhere to them. Complaints about non-compliance with the norms can be filed with the so-called National Contact Point (NCP), which all OECD Member countries have established in accordance with the OECD MNE Guidelines. Complaints are resolved through consultation between the complainant and the business. The NCP, however, may publish the results of a complaints procedure, which in turn could lead to loss of reputation.

The question remains whether a code of conduct that has been drawn up or adopted voluntarily has any force of law. If a company does not live up to the good intentions it has included in its code of conduct it may appear less than honest, or at the very least may create the impression of having an ambiguous policy. However, using such qualifications is not without legal complications. Codes of conduct seem to dwell in a legal 'no man's land'. Courts could use a code of conduct as a (supplementary) source of law when interpreting vague norms in our legal system, but norms in a code of conduct will not automatically have an effect on vague legal norms. A code of conduct entrenched in law, such as the Tabaksblat Code, and on the future compliance with which a business must report in its annual report, will probably have greater legal relevance than other codes of conduct. Such codes may, for example, be helpful where the interpretation of open norms such as unlawfulness, obviously incorrect cause of action, and reasonableness and fairness are concerned, as will be briefly discussed below:[116]

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115. However, the Tabaksblat Code, *supra* note 32, best practice provision II.1.3 (sub b) does recommend having a code of conduct and publishing such on the corporation's website. The SOX, *supra* note 81, sections 406/407-6 and the listing requirements for 'New York Stock Exchange, *supra* note 84, section 303A Corporate Governance Rules (§ 2.6.2.3), no. 10, p. 16 also require businesses to have a code of business conduct and ethics for directors, officers and employees.

116. L. Timmerman, '*De OECD-gedragscode voor multinationale ondernemingen*' [The OECD guideline for multinationals], in *TVVS Maandblad voor Ondernemingsrecht en Rechtspersonen*, 6, 1982, pp. 137- 143. Koelemeijer, *supra* note 112. T.E. Lambooy *'Maatschappelijk verantwoord ondernemen en compliance'* [Corporate social responsibility and compliance], in *Onderneming en Financiering*, 63, 2004. L. Timmerman indicates in '*Inleidende opmerkingen*' [Preliminary remarks], *Ondernemingsrecht*, 4, 2004, p. 108 and in L. Timmerman, '*Kroniek van het vennootschapsrecht'* [Chronicle of corporate law], in *Nederlands Juristenblad*, 31, 2004, § 1 (c) and 4 (b), to be of the same opinion with regard to the Tabaksblat Code. *Ibid* J. Winter *'In Nederland aanvaarde inzichten omtrent corporate governance'* [Generally held views on corporate governance in The Netherlands], H. Schutte-Veenstra, →

– actions pursuant to article 6:194 DCC (misleading advertising) and article 6:162 DCC (unlawful act) possibly in conjunction with article 3:305a DCC (concerted action). If a company acts contrary to its own published code of conduct, or to a general code of conduct it has publicly adopted, it could be argued that (the content of) that code of conduct qualifies as a misleading publication, that the public announcement about that code of conduct is misleading information, or that the conduct of that company is unlawful. However, it will not be easy to establish a causal connection between the publication of the code of conduct and the occurrence of the damage. Moreover, it may be difficult to quantify such damage if a company has caused damage to the environment or to a group of people. In the case of an action based on article 6:194 DCC it is furthermore of importance whether the court will deem the code of conduct to be aimed at the sale of goods or services;[117]
– actions pursuant to article 2:350 DCC (reasons to doubt a correct course of action) and article 2:355 DCC (incorrect course of action). A company acting contrary to its own code of conduct or to an adopted international organisation's code of conduct, can be accused of inconsistent conduct. The Enterprise Division of the Amsterdam Court of Appeal (*Ondernemingskamer*) will only allow an application for an inquiry if such inconsistent conduct provides a well-founded reason to doubt a correct course of action. If this proves to be the case, an inquiry will be conducted. The report on the outcome of the inquiry will subsequently establish whether or not the course of action can be qualified as obviously incorrect. The fact that a company has a large margin of discretionary power to conduct its affairs will be given due consideration in this respect. If a company can justify its inconsistent conduct, that conduct will not readily qualify as an obviously incorrect course of action. Nevertheless, in 1979 the Enterprise Division of the Amsterdam Court of Appeal held that *Batco Nederland's* course of action was obviously incorrect. One of the reasons for this decision was that the

'*Verzamelde 'Groninger' opstellen aangeboden aan Vino Timmerman'* (Kluwer: Deventer 2003), pp. 339-341; Raaijmakers, *supra* note 110, § 8; M. Das, *'Geldt de Code?'* [Is the Code applicable?], in *Ondernemingsrecht*, 4 (2004), p. 128 and Governmental Decree (AmvB), *supra* note 105, Explanatory Memorandum (Nota van Toelichting), p. 8.

117. See: *Kasky v. Nike*, at http:www.supremecourtus.gov/opinions/02pdf/02-575.pdf, accesed on 1 June 2010, opinion piece dated 26 June 2003. Kasky *et al.* rely on the California Unfair Competition Law and the False Advertisement Law, in order to obtain a conviction against Nike, for, contrary to their own code of conduct, poor working conditions and using child labour in the manufacturing of its products in South-East Asia. Nike invoked freedom of speech as a defence. The California Supreme Court ruled that Nike's code of conduct should be considered 'commercial speech' and that freedom of speech therefore cannot be invoked, which means that the code of conduct can be assessed in the context of unfair commercial practices. Due to legal-technical reasons the US Supreme Court has not (as yet) heard the case.

company's conduct was contrary to the OECD MNE Guidelines it had publicly endorsed. In a more recent case, *HBG v. the Dutch Association of Stockholders and Boskalis*, which dealt with non-compliance with a statement on corporate governance in the annual report rather than compliance with a code of conduct, the Dutch Supreme Court (*Hoge Raad*) ruled that an obvious incorrect course of action had not been established. The Dutch Supreme Court, however, did indicate in its judgement that repeatedly and systematically failing to demonstrate good conduct may constitute a violation of the fundamental principles of CSR. Furthermore, it can be inferred from this judgment that the Enterprise Division of the Amsterdam Court of Appeal may apply a rule or code of conduct when there is an obligation for the company to operate in accordance with that rule or code of conduct, provided that such an obligation is sufficiently supported by, for example, existing or future legislation or by 'notions about corporate governance accepted in the Netherlands';[118]

– actions pursuant to article 2:8 DCC, possibly in conjunction with article 2:15 DCC (reasonableness and fairness). A code of conduct may also play a role in the interpretation of the norm of reasonableness and fairness within a company's corporate organisation. According to this open norm, the legal entity and those involved with the organisation pursuant to the law and the Memorandum and Articles of Association, must behave towards each other in accordance with the principle of reasonableness and fairness.[119] Shareholders, and possibly the works council, might be able to invoke this principle if a legal entity, or its board of directors acts contrary to the code of conduct adopted by that legal entity and in so doing affects the interests of the shareholder or the works council. Other parties that have an interest in the legal entity's compliance with its code of conduct will not be able to invoke this provision.[120]

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118. Enterprise Division of the Amsterdam Court of Appeal, 21 June 1979, NJ 1980, 71 (*Batco Nederland*), with annotation Maeijer; Dutch Supreme Court, 21 February 2003, NJ 2003, 182 (*HBG/VEB, Boskalis*), *inter alia* legal ground 6.8.2 and legal ground 6.4.2. See further C. Lo Manto, 'Corporate Governance (gedragsregels) in (de) strijd met elementaire beginselen van verantwoord ondernemerschap' [Corporate Governance (code of conduct) conflicts with basic priciples of entrepeneurship]', in *Verzamelde 'Groninger' opstellen aangeboden aan Vino Timmerman* [Collective Papers from 'Groninger' offered to Vino Timmerman], (Kluwer: Deventer 2003) and Timmerman, *supra* note 116 *(NJB)*, pp. 1633, 1634 and 1637.

119. According to Koelemeijer, *supra* note 112, p. 16. *Ibid*, S. Bisschop, *supra* note 34, pp. 78 *et seq*. Regarding the legally entrenched Tabaksblat Code see the Governmental Decree, *supra* note 105, Explanatory Memorandum, p. 8.

120. J.B. Huizink, *Rechtspersonen, Artikelsgewijs commentaar* [Legal Entities, explanation by article], Article 2:8 DCC, entry 6 (those involved with the legal entity's organisation), updated until 1 March 2003, (Kluwer: Deventer 2003).

Another form of (derivative) enforceability of codes of conduct can be found in private law transaction documents, such as financing and insurance contracts. The tendency nowadays is that financiers and insurers often require the borrower or policyholder to commit themselves to socially responsible conduct, for instance, a commitment to avoid environmental damage or the guarantee that neither the concerned parties nor their suppliers will make use of forced labour or child labour. Failure to honour such a guarantee would then allow the financier or insurer -depending on the terms of the contract- to institute civil legal proceedings against the borrower or policyholder for: the termination of the contract, the forfeit of a penalty, a claim for damages, or modification of the terms of the contract.

Finally, attention is drawn to the annual discharge from liability for directors and members of the supervisory board. Since 2001, the link between the discharge from liability and the approval of the annual accounts has been severed.[121] In the case of a discharge from liability, the general meeting of shareholders determines whether the directors and members of the supervisory board have properly executed their management and supervisory duties, and discharges them from internal liability towards the company pursuant to article 2:9 DCC if this is found to be the case. This procedure provides the general meeting of shareholders with an opportunity for debate with the board of directors on the policy conducted and to be conducted, and also provides them with the opportunity to exert influence in this area. Within this context, the new draft 'Décharge Statuut' (discharge statute) is worthy of note.[122] This statute states, *inter alia*, that the board of directors and the supervisory board should be obliged to report on the mission and vision of the company, including the adoption of a set of values and norms, and on risk management with regard to environmental issues, for instance, and on its social policy.

It furthermore states that the board of directors and the supervisory board must encourage and sustain the norms and values within the organisation and formulate and propagate a code of conduct. Should the business have a code of conduct, it may well be that in this context its adherence to the provisions of that code will be examined.[123]

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121. Articles 2:49, § 3, 2:58, § 1, 2:101 paragraph 3 and 2:210 paragraph 3 DCC *Kamerstukken* II 2000/01, 27 483, nos. 1-3; *Staatsblad* 2001, 467.
122. M. Brink, 'Decharge los van de jaarrekening' [Discharge separate from the annual accounts], in *Tijdschrift voor Stichting, Vereniging en Vennootschap*, 2, 2003, p. 58 and 59.
123. Directors' and officers' liability towards the company pursuant to article 2:9 DCC will be applicable if and when the company has suffered damage as a result of the director's management. This is not automatically so in case of non-compliance with a code of conduct: sometimes that may even count in favour of the company; however, if the management has resulted in serious loss of reputation it can be maintained that the company has suffered damage. For liability pursuant to Article 2:138/248 DCC (joint and several liability of →

In sum: even though a company voluntarily adopts a code of conduct regarding socially responsible conduct; voluntarily includes guarantees in contractual documents; and voluntarily propagates norms and values in that area, this does not imply that there are no legal strings attached.

2.8.1.2 Enforceability of transparency

Companies must observe legal norms regarding the transparency of their conduct with respect to environmental and social issues. The Environmental Management Act (*Wet Milieubeheer*) and the Dutch Labour Conditions Act 1998 (*Arbeidsomstandighedenwet* 1998) contain obligations for companies in the Netherlands in this respect.[124] Also of importance is new legislation obliging large companies to report on environmental and human resources issues in their annual reports. This regards both matters concerning the company and matters concerning its (foreign) subsidiaries (see section 2.6.1.2).[125] Non-compliance with this legal obligation may be a reason for:

- an action to revise the content of the annual report;[126]
- an action for damages against one or more directors in case of misrepresentation of the company's profile in the annual report resulting in loss suffered by a third party;[127]
- an action for damages arising from a wrongful act or prospectus liability;[128]

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directors in case of bankruptcy due to mismanagement), a limited discharge, or a discharge refused by the general meeting of shareholders, will not make much of a difference considering paragraph 6 of those articles. The institution of an action shall not be barred by any discharge granted to a director.

124. Lambooy, *supra* note 59.
125. *Supra* note 63, Dutch Modernisation Directive Implementation Bill (new text Article 2:391 paragraph 1 DCC). This new obligation is inapplicable only if information about environmental and human resources issues is not necessary for a proper understanding of the developments, the results, or the position of the legal entity and group companies of which the financial performance-indicators have been included in the annual accounts.
126. If the information that is lacking not only should have been included in the annual report, but also has a bearing on the figures in the annual accounts, for example on the balance sheet item Provisions, an action for the revision of the annual accounts is also an option. Articles 999-1002 Dutch Code of Civil Procedure [*Wetboek van Burgerlijk Rechtsvordering*].
127. Articles 2:139/249 DCC. If the information that is lacking also has an influence on the figures in the annual accounts, the action may also be brought against members of the supervisory board pursuant to articles 2:150/260 DCC.
128. Articles 6:162 DCC; 6:194 DCC. See also Prospectus Directive 2003/71/EC, OJ 2003 L 345/64, Article 6 paragraph 2 (1) and Article 11. The Prospectus Directive Implementation Bill was approved by the Dutch government on 12 November 2004, but has not yet been published (source: '*Orde van de dag*', 18 November 2004).

– an inquiry procedure if there are well-founded reasons to doubt a correct course of action;[129] and possibly even
– criminal prosecution.[130]

Besides this future legal obligation, there is the recommendation of the Dutch Council for Annual reporting's Guideline 400.[131] Guideline 400 recommends that medium-sized and large companies include elaborate information on environmental, social, and economic issues in their annual reports as per financial year 2004. This reporting requirement concerns matters regarding the company as well as matters concerning its (foreign) subsidiaries (see section 2.6.1.3). Guideline 400 does not represent a legal obligation. It nevertheless has some legal significance because (i) Guideline 400 signals an increasing social expectation for companies to report on the social aspects of their operations in their financial reports, and (ii) courts may take into consideration public opinion when interpreting the statutory regulations.[132]

Another point to bear in mind is that if a company includes guarantees in agreements with banks and other private parties, it will probably have to declare that its annual account and annual report are accurate and complete, as required by law because other parties rely on those guarantees when they enter into an agreement. Should the annual report later turn out to be incomplete or incorrect, the company could be exposed to civil lawsuits, such as the termination of the agreement, modification of the terms of contract, the forfeit of a penalty, or a claim for damages; all this depending on the terms of the contract.

Of additional importance in the procedure on the annual discharge of the board of directors and the supervisory board by the general meeting of shareholders, is whether the company has reported on environmental, social, and ethical issues in its annual report. If this is not the case, the discharge will not pertain to those issues. After all, a discharge does not cover events not included in the annual report, the annual accounts and additional documents, or information that was not conveyed to the general meeting before the discharge.[133]

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129. Article 2:345 *et seq* in conjunction with Articles 2:14 and 2:15 DCC. Cf. Enterprise Division of the Amsterdam Court of Appeal, 17 April 1997, JOR 1997/81 (Bobel) and Enterprise Division of the Amsterdam Court of Appeal, 9 July 1998, JOR 1998/122 (Vie d'Or).
130. Should the information that is lacking also have an influence on the figures in the annual accounts, Article 336 in conjunction with Article 51 and Article 225 in conjunction with article 51 Dutch Penal Code may also apply.
131. See: § 2.6.1.3.
132. Enterprise Division of the Amsterdam Court of Appeal, 7 November 2002, JOR 2003/6 (KPN/SOBI), with annotation Van der Zanden, legal ground 3.32 (an appeal to the Dutch Supreme Court has been filed). Cf. Enterprise Division of the Amsterdam Court of Appeal, 20 November 2003, JOR 2004/10 (ReedElsevier/SOBI), with annotation Van der Zanden, legal ground 3.8.
133. *Supra* note 123.

In summary, it may be concluded that a company that fails to meet the obligation to include information on environmental and social issues in its annual report risks being exposed to legal proceedings and annulment of financing agreements. In addition, its directors may be held personally liable if the annual report misrepresented the company's profile and caused damage to a third party.

2.8.2 Corporate governance

2.8.2.1 Enforceability of desired conduct

Corporate governance can be traced back to various sources of law:

- legal norms in company law and securities law, enforceable through the courts;
- private rules, such as rules established by, for instance, professional associations of accountants, which in some cases are enforceable through disciplinary courts and in other cases through ordinary courts;
- private agreements with stock exchanges, such as rules of procedure applicable to companies that have concluded a listing agreement with a stock exchange. Acting in breach of such agreements may, for instance, lead to delisting, or to other contractual sanctions that the parties have agreed beforehand;
- standards of conduct included in the business community's self-established codes of conduct, such as the Tabaksblat Code.

The enforceability of corporate governance concepts laid down in company law, securities law, private rules, or agreements will not be addressed in this section; only the enforceability of the standards of conduct recommended in the Tabaksblat Code will be discussed. Enforceability can be assessed by considering the Tabaksblat Code as a whole, or by considering each provision separately. First the enforceability of the separate provisions will be discussed, followed by the enforceability of the code as a whole.

From discussions about the enforceability of the separate provisions of the Tabaksblat Code in legal literature it can be deduced that these provisions can be divided into three categories:[134]

134. C. de Groot, *Facetten van Ondernemingsrecht* [Aspects of Corporate Law], (Rozenberg Publishers: Amsterdam, 2002), p. 46; S.M. Bartman, De Code-Tabaksblat: een juridisch lichtgewicht [The Tabaksblat Code: a legal featherweight], in *Ondernemingsrecht*, 4, 2004, pp. 123-125 and legal literature quoted by him; Das, *supra* note 116, p. 127; Raaijmakers, *supra* note 110, § 5.3.

– provisions that correspond with written or unwritten rules of law (for example: principle IV.2 stipulating that the general meeting appoints the external auditor, corresponds with article 2:393 paragraph 2 DCC). These provisions are definitely binding;
– provisions that are contrary to written or unwritten rules of law (for example: best practice provision II.2.7 regarding the maximum severance pay for directors upon dismissal differs from Dutch labour law provisions;[135] best practice provisions may also be contrary to the provisions of a company's Memorandum and Articles of Association). Such best practice provisions are non-binding until an amendment is made and/or provisions in the articles of association to the contrary are amended; and
– provisions that neither correspond nor conflict with written or unwritten rules of law (for example: the recommendation to adopt a code of conduct as an internal risk management and control system and to publish this code on the company's website; best practice provision II.1.3 sub b.) The fact that such provisions are included in the Tabaksblat Code does not imply that they should be considered binding rules of law, albeit they may have some legal significance. They may – similar to what is stated above in section 2.8.1.1 on the enforceability of voluntarily adopted codes of conduct that contain standards of conduct regarding CSR – guide the court in its interpretation of certain open norms in the Dutch legal system.[136] In this respect, the fact that the Tabaksblat Code is entrenched in law, and the question whether or not the company has stated in its annual report its intention to adhere to the Tabaksblat Code provisions are of importance. A company that has included such a statement, but subsequently acts contrary to these provisions, will have difficulty explaining why those (non-binding) provisions of the Tabaksblat Code should be without legal effect. On the other hand, it will not be easy for a shareholder to demonstrate to the court that the board of directors made an 'improper' decision, since the board of directors has to take a multiplicity of interests into account and not only the interest of the shareholders.[137]

With regard to the enforceability of the Tabaksblat Code as a whole, it should be borne in mind that corporate governance is about the distribution of power

135. Generally speaking, these are the provisions that require legislative amendments according to the recommendations of the Tabaksblat Committee; Tabaksblat Code, *supra* note 32, pp. 62-65.
136. In § 2.8.1.1 the open norm of reasonableness and fairness within the organisation of the legal entity, and the open norms pertaining to the inquiry procedure (doubt as to correct course of action, and obviously incorrect course of action) were discussed.
137. In corporate governance issues this will be even more difficult if the general meeting of shareholders has not clearly expressed its displeasure with choices of the board of directors with respect to a certain corporate structure, Maatman, *supra* note 17, p. 119.

within the company, and the exercise of that power by the company's internal bodies in their interaction. Shareholders are probably the first to suffer the consequences of non-compliance with the Tabaksblat Code by members of the board of directors or the supervisory board, or the external auditor. As internal corporate rules are concerned, the enforcement of compliance with such rules lies primarily with the shareholders. Shareholders have powers conferred upon them by law and by the Memorandum and Articles of Association to prompt the board of directors to modify the corporate governance structure. Besides this, they can use other means to exert pressure. For example, shareholders can resolve to:

– adjust the remuneration policy for directors;
– withdraw the instruction to the external auditor and award it to another auditor;[138]
– refuse to adopt the annual accounts;[139]
– use their right to place an item on the agenda of the shareholders meeting;[140]
– dismiss members of the board of directors and/or the supervisory board; or
– sell off their shares.

In practice, however, it will not be easy to unite all shareholders to act, as the composition of the general meeting changes frequently and different shareholders may have different interests.[141]

Such private law enforcement by shareholders of listed companies takes place in the public eye, which puts a lot of pressure on the company's board of directors.[142]

In conclusion, it can be argued that it is up to the general meeting of shareholders to decide on how to respond to conduct of directors or supervisory board members that deviates from those provisions of the Tabaksblat Code that were not pre-approved by the general meeting of shareholders. The general meeting of shareholders can deploy legal and non-legal means in doing this. When arriving at that decision, the fact that not all provisions of the Tabaksblat Code are legally binding will most probably play a role.

138. Article 2:393, § 2 DCC.
139. Article 2:58 DCC (Articles 2:163/273 DCC ceased to have effect because of the Dual-Board Company Structure Reform Act.
140. Article 2:114a DCC.
141. G.T.M.J. Raaijmakers, Beleggers, aandeelhouders en de AVA, [Investors, Shareholders and the General Meeting], in *Ondernemingsrecht*, 4, 2005, pp. 106-112.
142. Tabaksblat Code, *supra* note 32, p. 47. Winter, *supra* note 116, pp. 339-341.

2.8.2.2 Enforceability of transparency

Legal norms pertaining to transparency of the conduct of businesses in the area of corporate governance must be observed. The Dual-Board Company Structure Reform Act is important in this respect since the new paragraph 5 of article 2:391 DCC creates the possibility of introducing additional requirements for the content of the annual report by Governmental Decree. Also of importance is the Governmental Decree in which the Tabaksblat Code has been designated as a code of conduct containing additional requirements in respect of the annual report.[143] Similar to the amendment of the provision in paragraph 1 of article 2:391 DCC (annual report) which was introduced as a result of the Modernisation Directive with regard to providing information about environmental and human resources issues,[144] the provision in the new paragraph 5 of article 2:391 DCC was not meant to stimulate a change in conduct, but only aims to promote transparency with respect to corporate governance. This same approach was taken in corporate governance initiatives in other countries.[145]

In line with the Tabaksblat Code, which prescribes its applicability for Dutch listed companies to become effective as of financial year 2004, the Governmental Decree stipulates that it is applicable to annual reports for the financial year 2004 onwards. The Decree prescribes that the annual report must contain information on the company's observance in that financial year of the principles and best practice provisions of the Tabaksblat Code directed at the board of directors and the supervisory board; any deviations must be justified. If the company does not intend to comply with the provisions in the next two financial years, a further justification is required. The Explanatory Memorandum on the Governmental Decree states that the information given by the company is not without legal effect, since the company commits itself to those stakeholders mentioned in article 2:8 DCC.[146] In addition, non-compliance with this statutory duty to supply information on corporate governance matters – similar to not supplying information on environmental and human resources issues- can be a ground for the legal actions mentioned earlier in section 2.8.1.2.

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143. *Supra* notes 104 and 105.
144. See: §§ 2.8.1.2 and 2.6.1.2.
145. *E.g.* the Combined Code. See also Proposal for a Directive, *supra* note 80, which contains a proposal for a new Article 46a for the Fourth European Directive Annual Accounts and an amended Article 36(2) of the Seventh European Directive Annual Accounts, which both apply the 'comply or explain' principle.
146. Governmental Decree, *supra* note 104, *Explanatory Memorandum*, p. 8.

2.9 Differences between corporate social responsibility and corporate governance

2.9.1 Issues

CSR concerns ethical issues. A number of these issues involve corporate behaviour that affects the 'outer world', such as the prevention of environmental damage and the refusal to pay money (concessions) to corrupt powers (because this money is not used for the benefit of the local population). Some issues relate to internal corporate governance, such as permitting the establishment of employee associations and improving safety standards at work, and training. Others involve both aspects, as is the case with fighting child labour: the company itself must not employ children, nor must it purchase products produced in so-called 'sweatshops' by child labour. Generally speaking, all of these issues are of public concern. Sometimes it is not easy to define specific interested parties as in fact all people benefit from environmental risk mitigation and CSR to some extent or another.

Corporate governance involves issues of a procedural and technical nature, such as corporate power structures and the manner in which the various corporate bodies exercise their powers. Sub-issues, such as integrity in decision-making and conflict of interest notifications, are aimed at improving internal corporate relations between these bodies. Those who benefit are listed companies and institutional investors who make use of the capital market.

2.9.2 Addressees

CSR in the Netherlands is aimed at Dutch listed and unlisted companies, their Dutch and foreign subsidiaries and group companies, and foreign companies with business activities in the Netherlands. Corporate governance in the Netherlands, including the Tabaksblat Code, is aimed at listed companies.[147]

2.9.3 Advisors

Various professionals act as CSR advisors. Accountants, ecologists and communication consultants in particular are in the lead in this field.

Corporate governance, on the other hand, is mainly the area of lawyers and civil law notaries, although accountants also play a role in advising companies on how to present their annual reports.

147. Tabaksblat Code, *supra* note 32, preamble and p. 38.

2.9.4 Conduct versus dialogue

Stakeholders, and in particular NGOs, play an active role in the field of CSR. The general public also turns out to be sensitive to information on irresponsible corporate conduct.

Moreover, on the capital market it seems to have become standard practice to assess a company's ethical standards prior to investing in a company or including it in certain investment funds.[148] It is often argued that entering into a dialogue with stakeholders is an important aspect of CSR. A dialogue will certainly contribute towards stakeholders having a positive view of the company's conduct. However, CSR is not about establishing an excellent code of conduct, presenting a great sustainability report or extensive consultation with stakeholders, but about a company's actual conduct. If stakeholders think that a company is acting unethically, they may commence legal proceedings against the company or go to the press. Either way, loss of reputation is an imminent risk. It is not so much the dialogue but the actual corporate conduct that is important.

In the Netherlands, the corporate governance debate has been shaped by the Tabaksblat Code. A listed company may choose to endorse the principles and best practice provisions of the Tabaksblat Code in its corporate governance structure, but is not obliged to do so. Companies are required to put derogations from the Tabaksblat Code to a shareholder vote. If the corporate structure obtains the shareholders' approval, the company is deemed to have fulfilled its corporate governance obligations. A company is in fact still free to decide upon its own corporate structure, provided that the shareholders approve. In this respect, the dialogue on a company's corporate structure is thought to be of more importance than the actual corporate structure itself.

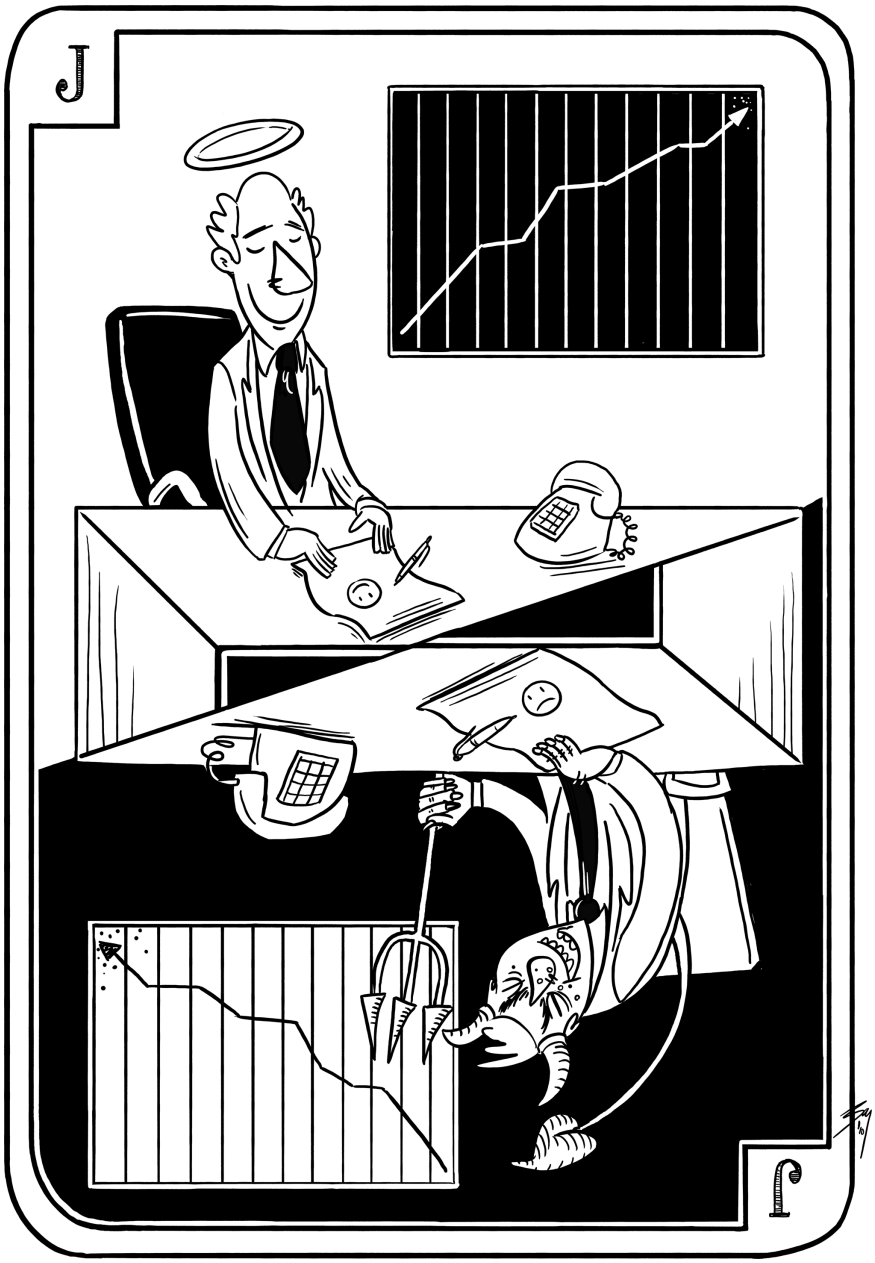
2.9.5 Enforceability of good conduct

With regard to CSR it is not an easy task for stakeholders to force a certain conduct upon companies by legal means. Firstly, they will have to establish a substantial interest in order to be able to institute legal proceedings. Secondly, there are few legal norms that impose legal obligations on companies to behave in the way that stakeholders want them to. If stakeholders are not admitted in

148. 'Accoord banken over sociale en milieunormen' [Banks agree on social – and environmental standards], in *De Financiële Telegraaf*, 4 June 2003, relating to the 'Equator Principles': an agreement between large international banks to adopt strict social and environmental standards for financing infrastructure projects. See also the World Bank Guidelines and International Finance Corporation Guidelines, at http://www.worldbank.org and http://www.ifc.org, websites accessed on 3 May 2010. See also ABN AMRO Holding Sustainability Report 2003, pp. 20-27 concerning the balancing of social, ethical and environmental issues when deciding on requests for credit applications. See also *supra* note 28.

court, their only other option is to make their wishes known through the press. Private parties such as banks and investors may be able to enforce good corporate conduct if this is contained in the contract requirements.

When it comes to corporate governance, both legislation and the documentation of incorporation confer powers on shareholders which they may use to make the board of directors change a company's corporate structure. This, however, does not imply that in this way they can enforce their view of a good corporate structure. Much depends on what commitments a company has taken on in its annual report. Besides, shareholders may put the pressure on by other means, such as selling off their shares.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2.10 Parallels

2.10.1 A change in attitude

CSR requires a change in attitude and awareness among employees: they now have to carefully assess environmental and social aspects when taking decisions on behalf of the company. In so doing long-term perspectives must prevail over short-term ones.

Corporate governance also requires a change in attitude of directors and supervisory boards to be fully committed to a competent and conscientious performance of duties. Shareholders also need to change their attitude and should become actively engaged in a company's policy, while focussing on long-term strategies instead of short-term ones.

2.10.2 A code of conduct

CSR presupposes a change in corporate attitude. A code of conduct containing concrete standards of conduct provides clarity for all employees on the corporate conduct pursued by the company. Moreover, a code of conduct may function as a yardstick by which interested parties or a court can assess a company's behaviour.

Corporate governance is also based on the presumption that companies establish a code of conduct. Both the Tabaksblat Code and SOX assume that companies have adopted a code of conduct.[149]

2.10.3 Transparency

Pursuant to the Modernisation Directive (*see* section 2.6.1.2) article 2:391 paragraph 1 DCC (annual report) was amended. By virtue of this new provision companies now have to include non-financial information, such as environmental and employee matters in their annual reports. Sustainability reporting is further stimulated by Guideline 400, the GRI, NGOs and investors willing to invest in sustainable companies.

Article 2:391, paragraph 5 DCC was introduced for the purpose of improving corporate governance. It refers to a governmental decree that obliges listed companies to include information on their corporate governance structure on a 'comply or explain' basis. The proposal for the Corporate Governance Amendment Directive (see section 2.6.2.2.) contains a similar obligation.

The requirement of transparency is conducive to assuming accountability for a company's corporate conduct and policy *vis-à-vis* shareholders and other interested parties. Interested parties may call the company to account for its

149. *Supra* note 115.

policy and conduct. Communication between companies and interested parties has resulted in greater mutual understanding of the issues at stake and allows for a timely adjustment of company policy.

2.10.4 Internal control and risk management systems

CSR requires that business operations which are potentially harmful to the environment, employees or other interested parties are properly assessed. On the basis of these assessments adequate strategies may be formulated for keeping these risks from materializing. A sound system of internal control and risk management is indispensible to support these strategies.

As far as corporate governance is concerned, it is important to realise that issues that may cause negative publicity adversely affect the reputation of a company, its directors and supervisory board and undermine public confidence in the company. That is why internal risk management systems that assess risks at an early stage are essential. Subsequently, internal control and risk management systems improve the accuracy and verifiability of (financial) information that ends up with the board of directors.[150]

CSR as well as good corporate governance demands that corporate scandals are avoided or controlled to protect a company's good reputation. This is important to remain attractive for financiers, investors, future employees and consumers.

The down side of these developments is that the board of directors tends to focus more on implementing and monitoring internal control systems and is less inclined to act on the basis of its trust in the people who work for and within the company. This begs the question whether the entrepreneur's capacity to do business and make innovations is in any way affected by this process.[151]

2.10.5 Avoiding detailed legislation

Large companies have expressed a preference for changing corporate conduct through self-regulation. Both changing corporate conduct and self-regulation have received a great deal of attention:

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150. Tabaksblat Code, *supra* note 32, Principle II.1 and best practice provisions II.1.3. and II.1.4; SOX, sections 302 en 906 state that directors are responsible for establishing and maintaining internal checks and reporting on these checks in their annual reports.
151. Cf. Supplement on Corporate Governance, in *Het Financieele Dagblad*, 21 September 2004, pp. 6 and 7.

- CSR and corporate governance take a prominent place on the agenda and are sometimes assigned to an individual member of the board of directors as a separate task;[152]
- Companies have established codes of conduct and have included these in annual accounts or on their websites;
- Duties of (compliance) officials have been extended to include the monitoring of compliance with codes of conduct and the provisions of the Tabaksblat Code;
- Annual reports contain information on both corporate governance and CSR and sustainability reports are published;
- Companies confer with institutional investors on CSR and corporate governance.[153]

2.11 Conclusion

CSR and corporate governance are international developments attracting considerable attention while sharing common features. Both developments concern the behaviour and internal management of large, mostly international, companies. The international business community has been urged to incorporate ethical awareness and integrity practices into its everyday business. Codes of conduct are instrumental in achieving this. With a view to stimulating good corporate conduct and citizenship, the accountability of companies and directors has been increased. In addition, compliance with corporate governance standards demands that companies give reasons for derogating from corporate governance codes. Corporate transparency should be increased in order to provide adequate information to interested parties, allowing them to judge whether or not a company behaves ethically and in accordance with corporate governance standards. If interested parties have doubts about this, the information provided may serve as a starting point for taking up the issue with the company in question. Communication between companies and interested parties is becoming ever more important. If communication cannot solve the

152. 'Commissarissen hebben geen mvo-achtergrond', [Supervisory boards lack a CSR background], in *VBDO – Bericht*, 1, 2004, p. 6; Ernst & Young, '*Maatschappelijk verantwoord ondernemen: Het omzetten van verantwoordelijkheden in daden'*, [Corporate Social Responsibility: responsibility put into practice], (Kluwer: Deventer 2002), pp. 4 *et seq*.

153. 'Corporate Shareholder Engagement: Een onderzoek naar het gesprek over corporate governance en duurzaamheid tussen Nederlandse bedrijven en hun investeerders', [Corporate Shareholder Engagement: A survey of the dialogue on corporate governance and sustainability between Dutch corporations and their investors], Nijenrode University, The Netherlands, February 2004. The Dutch Association of Investors for Sustainable Development also plays an active role as a shareholder and interest group in the communication with large companies.

matter, interested parties may initiate legal proceedings to enforce their view of good conduct or claim damages.

CSR and corporate governance have not as yet evolved into strict legal norms and it will therefore be difficult for interested parties to successfully enforce their view of good corporate behaviour before a court. When interpreting open legal norms, a judge can take into account codes of conduct and developments in society. It is likely that a code of conduct that is entrenched in law and subscribed to by a company in its annual report, will be awarded more import by a judge than a code of conduct that is established or adopted by a company on a voluntary basis. Thus, standards for corporate conduct will be developed further, which will benefit CSR and good corporate governance.

The issues involved in the development of CSR and good corporate governance are of a very different nature. CSR concerns ethical issues that go beyond everyday corporate practice. The development of CSR is aimed at adjusting corporate behaviour for the purpose of (i) preventing depletion of the Earth's natural resources; (ii) promoting human rights protection, (iii) promoting a fair and social corporate policy for all employees in all countries where the company carries out business operations and (iv) combating bribery. Corporate governance is about rules for corporate organisation and their implementation. The development of corporate governance seeks to restore the balance between corporate bodies with an aim to raising shareholder confidence in company directors and the capital market. To this end, companies enjoy a large degree of discretion with respect to corporate governance. CSR requires a different approach: it is neither the company nor its shareholders that determine the minimum standards of corporate business strategy, but society. Therefore, a wider audience of individuals has an interest in CSR than in corporate governance. Those who benefit from good corporate governance are mainly the company's shareholders. To enforce their view of good corporate governance they may exercise their shareholders' rights, by legal and other means. The broad spectrum of interested parties with regard to CSR does not make it any easier to enforce ethical corporate conduct. Interested parties may effectively be barred from seeking legal redress. Stakeholders, for instance, must first establish a substantial interest in the case before they are allowed to fight corporate unethical behaviour in court. Alsoit may sometimes be too dangerous for an interested party to openly challenge a company, for example in case of human rights violations. In other cases, lack of legal personality and *locus standi* prove problematic: who will stand up for polar bears, or in other words biodiversity preservation, against business activities that damage their habitat? Seeking publicity seems to be the only option to attract attention to unethical corporate behaviour in such cases. These kinds of actions may cause loss of reputation. Many companies want to avoid this, especially the ones active in the consumer market.

Financial institutions, for example, try their best to protect their reputation in this respect. To this end, they tend to be stricter with the companies they do business with: only companies that embrace CSR will obtain funds or be included in investment funds. This strategy also involves specific guarantees on environmental and social matters and against commercial bribery in investment contracts and other investment documents. Financial markets play a key role in this development, particularly since ethical investing is on the increase. Some stock exchange indices now only consist of sustainable funds.

Both in the fields of CSR and corporate governance measures have been taken at an international, European and national level, while more measures are under way. All of these measures aim to improve transparency in corporate behaviour and corporate strategy. Moreover, initiatives have been taken to draw up new codes of conduct that companies can adopt to realise good corporate governance and CSR. Obviously, new legislation, the Tabaksblat Code and codes of conduct on CSR will not prevent future bankruptcies and accounting scandals from happening. Nor will they be a safeguard against environmental disasters or human rights violations. What all these initiatives do seek to obtain, however, are a transparent and sound corporate risk assessment with minimum risks. The measures intend to make companies accept responsibility by embedding CSR principles in their organisations and by applying corporate governance principles, thus limiting the risk of scandals and other misfortune. Both CSR and corporate governance focus on best practices and the exchange of experience. They started off as voluntary initiatives, but have become stricter over time. Companies are obliged to include CSR and corporate governance information in their annual reports. There have been regular complaints from companies that these developments preclude them from doing real business and taking risks. Most likely, the developments in the fields of CSR and corporate governance are just a matter of habit, like all new things. It is expected that practising CSR on a global scale and implementing good corporate governance will have become fully accepted in ten years time. Finally, it should be remembered that corporate ethical conduct has a positive side to it: risk management may have a purifying effect on the entire company, it may save money through the efficient use of raw materials and it may stimulate innovation, leading some companies to stand out from the others by displaying ethical behaviour.

Annex 2.1 Outline of the Tabaksblat Code recommendations

The Board of Directors (Principles II.1 – II.3 and V.1, V.3)

- The board of directors in performing its duties shall be guided by the interests of the company and the enterprise connected therewith, taking into consideration the interests of the company's stakeholders. The board of directors is responsible for complying with all relevant legislation and regulations, for managing the risks associated with the company's activities and for financing the company;
- the company shall employ as instruments of internal risk management and control risk assessment, a code of conduct that is published on the company's website, lay out guides for its financial reports and its monitoring and reporting system. In the annual report the board of directors shall state that internal risk management and control systems are adequate and effective and provide a clear substantiation of this statement. The board of directors shall also report on the actual operation of these systems;
- transparency on salaries and emoluments of directors;[154]
- a fixed maximum severance pay, standing agreements on the level of the fixed and variable parts (bonuses) of the remuneration, adoption by the supervisory board;[155]
- strict guidelines for granting share options to members of the board of directors in order to secure the board's long-term commitment to the company strategy and disclosure of the cost of share option schemes in the annual accounts;
- transparency about dealing in securities by members of the board of directors;
- a member of the board of directors is appointed for a maximum period of four years. A board member may be reappointed for a term not exceeding four years at a time;
- transparency regarding conflicting interests of members of the board of directors. Decisions by the board of directors that cause conflicts of interest need the approval of the supervisory board;

154. Articles 2:383b-2:383e DCC contain provisions relating to full transparency on the remuneration of each director and supervisory board member of public companies limited by shares.

155. Article 2:135 DCC (Dual-board Company Structure Reform): The company's policy on the remuneration of directors must be determined by the general meeting of shareholders; if the articles provide that a corporate body other than the general meeting shall fix the remuneration of directors, for example the supervisory board, such body must submit the proposal for approval to the general meeting regarding shares or share option schemes. § 2 determines that the works council shall be notified in writing of the remuneration policy at the same time as this is submitted to the general meeting of shareholders.

– the board of directors is responsible for the quality and completeness of all publicly disclosed financial statements, not just the annual accounts. The supervision and involvement of the supervisory board and an external auditor are recommended.

The Supervisory Board Members or Non-Executive Directors (Principles III.1 – III.8)

– The supervisory board in performing its duties shall be guided by the interest of the company and the enterprise connected therewith, taking into consideration the interests of the company's stakeholders;
– greater emphasis on composition and competence of the supervisory board;
– the number of supervisory boards of listed companies of which an individual may be a member is limited to a maximum of five (aims to break through the old boys' network, create opportunities for new talent);
– supervisory board members must be independent from the company, with the exception that only one member of the supervisory board is allowed to have ties with the company;
– clear criteria for the independence of supervisory board members;
– transparency with respect to conflicting interests of supervisory board members;
– transparency in remuneration of supervisory board members;[156]
– the supervisory board shall discuss the performance of the board of directors and the performance of its individual members as well as its own functioning and that of its individual members;
– the supervisory board shall appoint three committees specialised in (i) the auditing of the annual accounts, the operation of the internal risk management and control systems, and compliance with codes of conduct (the Audit Committee), (ii) the remuneration and emoluments of individual members of the board of directors (the Remuneration Committee) and (iii) the selection and appointment of members of the board of directors (the Selection and Appointment Committee);
– the position of the supervisory board has been strengthened: new duties, more active engagement, presence of its members, greater emphasis on responsibility and accountability towards its shareholders and capital markets. The role of the supervisory board used to be limited to supervising

156. Article 2:145 DCC (Dual-Board Company Structure Reform) increases the authority of the general meeting of shareholders for awarding remuneration to the supervisory board members.

and advising the board of directors; its supervisory duties are much broader now and tend towards co-directorship, while not much has been determined about its advisory duty.[157]

The Shareholders (Principles IV.I – IV.3)

- The prestige of the general meeting of shareholders shall be increased and individual shareholders should be stimulated to participate in the decision-making process in the general meeting of shareholders to the greatest possible extent. To this end, electronic participation in the general meeting of shareholders (electronic voting) shall be made possible;
- shareholders shall be given the opportunity to vote by proxy (proxy voting) and proxy solicitation (communication between shareholders) shall be enhanced. Obstacles relating to cross-border shareholder voting should be removed;
- trust offices are recommended to issue proxies in all circumstances and without limitation to all holders of depositary receipts who so request;[158]
- additional requirements for approval by the general meeting of shareholders of decisions of the board of directors relating to a major change in the identity or character of the enterprise.[159]

The Institutional Investors (Principle IV.4)

- The Tabaksblat Code emphasises that institutional investors (banks, insurance companies, investment institutions and pension funds) have a responsibility towards their rank and file, namely investors, but also towards the companies in which they invest. Because of their substantial interests, they can make a difference;[160]
- institutional investors should make their voting behaviour transparent, for example by publishing their voting policy quarterly.[161]

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157. M.W. den Boogert, 'De RvC onder de nieuwe corporate governance code', [The supervisory board and the new corporate governance code], in *Ondernemingsrecht*, 2004 (4), p. 114.
158. See also Article 2:118a DCC (Dual-Board Company Structure Reform), which draws a distinction between wartime and peacetime: if the independence of the company is at stake, the trust office is not obliged to issue proxies to holders of depositary receipts.
159. See also article 2:107a DCC (Dual-Board Company Structure Reform).
160. See criticism of R.H. Maatman, 'Tabaksblat en de botsende doelstellingen' [Tabaksblat and clashing objectives], in *Ondernemingsrecht*, 4, 2004, pp. 116-119.
161. Pension funds are under an obligation to disclose information in a transparent way pursuant to the EU Occupational Pensions Directive 2003/41/EC of 3 June 2003. Similar transparency requirements can be found in existing OECD, SEC and ICGN rules, (Maatman, *supra* note 7, p. 118).

The External Auditor (principles V.2 and V.4)

- The external auditor is appointed by the general meeting of shareholders, which emphasises his independence (following the provision of article 2:393 paragraph 2 DCC);
- the external auditor shall report to the supervisory board and the board of directors;
- in this respect the supervisory board acts on behalf of the general meeting of shareholders;
- the external auditor shall attend the annual meeting and may be questioned by the general meeting of shareholders in relation to his statement on the fairness of the annual accounts;
- the external auditor also has the right to address the general meeting of shareholders if the board of directors makes statements that in the auditor's view constitute 'a material misrepresentation of the company's state of affairs'.

General provisions

- The board of directors and the supervisory board are responsible for compliance with and enforcement of the Code and are accountable for this to the general meeting of shareholders (principle I);
- owing to the two-tier board system, many substantial powers of the general meeting of shareholders, such as the appointment and removal of directors and the approval of important decisions of the board of directors, have been transferred to the supervisory board.[162] The two-tier board system impedes balanced corporate governance and is hard to explain to the international community. Therefore, the Tabaksblat Committee recommends that the two-tier board system should no longer be compulsory for listed companies;
- anti-takeover measures may only be taken in the company's interest, for example to seek alternatives, and only for a limited period of time, for example six months, after which they must be withdrawn;
- the Tabaksblat Code can only be effective if directors and supervisory board members change their attitudes and put competence, integrity and transparency first. Shareholders, too, should radically change their behaviour and become proactive.

162. Articles 2:162/272 and 164/274 DCC respectively. The Dual-Board Company Structure Reform Act has solved some issues.

Annex 2.2 Dual-Board Company Structure Reform Act

Most important amendments of the Dual-Board Company Structure Reform Act *(Wet Aanpassing Structuurregeling)*:

- The system of supervisory board members of large companies being appointed by co-option by the supervisory board was abandoned. Instead, the general meeting of shareholders now appoints supervisory board members, although on the nomination and proposal of the supervisory board. This nomination may be rejected by the general meeting, however. The works council is given a special right to recommend candidates for one third of the total number of members of the supervisory board. The general meeting of shareholders can pass a motion of no confidence in the supervisory board, which will result in the immediate removal of the members of the supervisory board;[163]
- the general meeting adopts the annual accounts of large private companies (used to be done by the supervisory board in companies with a full two-tier board system)[164]
- approval by the general meeting of shareholders is required for management decisions of all companies limited by shares that relate to an important change in the identity or character of the company or the undertaking;[165]
- the holder of listed depositary receipts, is authorised to cast the vote for the shares indicated in the proxy, unless there is a situation of 'warfare';[166]
- the remuneration policy for the board of directors is determined by the general meeting of shareholders and remuneration in shares or share options (share option schemes) require the approval of the general meeting of shareholders;[167]
- further requirements with respect to the content of the annual report may be set by governmental decree. Such requirements may relate in particular to compliance with the codes of conduct designated in the governmental decree. The Tabaksblat Code is the first code of conduct to have been so designated;[168] and
- the right of holders of shares in companies limited by shares and private companies with limited liability to place items on the agenda of the general meeting has been enhanced.[169]

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163. Articles 2:158, §§ 4, 6 and 9; 2:268, §§ 4, 6 and 9 and Articles 2:161a/271a DCC, respectively.
164. Articles 2:163/273 DCC were repealed.
165. Article 2:107a DCC.
166. Article 2:118a DCC.
167. Article 2:135 DCC.
168. Article 2:391, § 5 DCC.
169. Articles 2:114a/224a DCC.

Part I

LEGAL AND SEMI-LEGAL FRAMEWORKS SUPPORTING CSR

Chapter 3.* Institutionalisation of corporate social responsibility in the corporate governance code. The new trend of the Dutch model.

3.1 Introduction

The last decade can be characterised by the emergence of an increasing awareness about the limits to growth. Many voices have been heard pointing to the fact that the planet does not support unlimited economic growth and increasing consumption patterns by more and more people.[1] The world seems to be flat in the sense that globalisation has made the world smaller: People in Europe eat shrimp from Thailand, that are peeled in Morocco; Moroccans move to Europe to live a modern West-European life; in Costa Rica, roses are grown in areas that used to be tropical mountain forests, for the export to China and Europe; Chinese are constructing roads in Congo to facilitate the extraction of minerals and timber; and Europeans travel to Thailand for holidays, and Chinese the other way to Europe. The large-scale materialisation of these 'extreme' economic patterns has become transparent thanks to the internet. In today's business models large parts of the production processes are outsourced. International supply models consist of many chains. Practically every ingredient comes from another part of the world, implying multilevel and opaque decision making structures. Other features connected to the global style of consuming, packaging and dealing with waste include the fact that fish in the oceans have incorporated plastic in their body tissue[2] and that many fish caught by the fishing industry no longer reach reproductive age.[3] These global patterns combined with high consumerism have brought us into a situation where natural resources are being depleted, severe shortages of food and fresh water and biodiversity crises are pending on a

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* A shorter version of this chapter has been published as Chapter 15 in: *Reframing Coporate Social Responsibility: Lessons from the Global Financial Crisis* (Leeds Business School and Emerald group Publishing: Bingley 2010), pp. 145-178.

1. Club of Rome Global Assembly Amsterdam 2009, at: www.clubofrome.at/2009/amsterdam/index.html, accessed on 31 March 2010.
2. Capt. Charles Moore on the seas of plastic, at: www.ted.com/index.php/talks/capt_charles_moore_on_the_seas_of_plastic.html, accessed on 31 March 2010.
3. CITES Conference, 15-23 March 2010: Proposal to include Atlantic Bluefin Tuna on Appendix I of CITES, at: www.cites.org/eng/cop/15/prop/E-15-Prop-19.pdf, accesed on 1 July 2010; Greenpeace report on overfishing, at: http://archive.greenpeace.org/oceans/globaloverfishing/emptyseas.html, accessed on 31 March 2010.

nearby horizon.[4] Apparently, people in general, including the decision-makers in business and politics, tend to have short-term horizons.

The last decade has also seen the emergence of CSR as a concept.[5] Companies, governments and civil society have embraced the idea that the business sector has an important role to play in 'saving' the planet. CSR promotes paying attention to People, Planet and Profit when doing business, creating transparency and accountability on Environmental, Social and Governance (ESG) aspects of business activities, designing consultation processes to manage the participation of stakeholders in decision-making processes, formulating a long-term strategy, and attributing value to natural assets such as ecosystem services and biodiversity, thereby internalising external costs.[6] CSR appears to have gained recognition among society's watchdogs, corporate boards, legal practitioners and public regulators:[7] carbon emission trading has been introduced, institutional investors have endorsed the UN Principles of Responsible Investment (PRI), banks have adopted the Equator Principles, and the mining industry has agreed to sector codes of conduct.[8] William

4. FAO, The State of Food Insecurity in the World 2003, at: ftp://ftp.fao.org/docrep/fao/006/j0083e/j0083e00.pdf; Press release 4 Juny 2008, Action, Resources and Results Needed Now for Food Crisis, Zoellick says; http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/LACEXT/EXTLACREGTOPECOPOL/0,,contentMDK:21790151~menuPK:832562~pagePK:34004173~piPK:34003707~theSitePK:832499,00.html; Bernard Berendsen (*et al*), Emerging Global Scarcities and Powershifts, (Amsterdam: KIT Publishers 2009). SID Conference Energy, Water and Food: Emerging Global Scarcities and Power Shifts, 24 September 2008 on Food, Water and Energy Scarcities; http://sid-nl.org/activiteiten/slotconferentie-2007-2008/; www.IUCN.org regarding the increasing rate of extinction cases of many species, accessed on 7 April 2010.
5. SER Advisory Report on Corporate Social Responsibility: A Dutch Approach [*De winst van warden*], 15 December 2000, at: www.SER.nl, accessed on 21 March 2010. The Social and Economic Council of the Netherlands [*Sociaal Economische Raad*, SER], uses the following definition: 'CSR is the concern for the social impact of the company's operations.' The SER specifies CSR as follows: 'Deliberately focusing the business activities to create value in three dimensions – people, profit, planet – and therefore also contributing to longer-term prosperity and welfare in society; maintaining relations with the various stakeholders on the basis of transparency and dialogue, answering justified questions that are raised in society'.
6. See *e.g.* the OECD MNE Guidelines, the UN Global Compact Principles, the Equator Principles, the Principles for Responsible Investment, the Global Reporting Initiative Sustainability Reporting Indicators, the various industry codes that have been adopted, the European Union TEEB studies on the valuation of Biodiversity and Ecosystem Services.
7. N. Boeger, R. Murray and C. Villiers (Eds.), '*Perspectives on Corporate Social Responsibilit*', (Edward Elgar Publishing 2008); reviewed by K. Lowe, 2009, at: http://webjcli.ncl.ac.uk/2009/issue4/pdf/lowe4.pdf, accessed on 21 January 2010.
8. See: www.pri.org; www.equator-principles.com; CSR Frameworks Review for the Extractive Industry Canadian Business for Social Responsibility April 2009, at: http://www.csr360gpn.org/uploads/files/resources/CSR_Frameworks_Review_April_2.pdf; www.mining.ca/www/Towards_Sustaining_Mining/index.php, both websites accessed on 31 March 2010.

McDonough and Michael Braungart introduced the 'cradle-to-cradle' concept (C2C; '*Cradle to Cradle – Remaking the Way We Make Things*', 2002). MNCs the likes of the Netherlands-based chemical giant AkzoNobel and the brewery Heineken have developed strategies to be careful with fresh water in their worldwide industrial activities, and the UK-based pharmaceutical company GlaxoSmithKline participates in programmes to combat AIDS in Africa.[9] In 2009, the chocolate giant Mars announced that it will in future only purchase sustainably produced chocolate.[10] At the beginning of 2010, the Dutch retailer Ahold published its decision to no longer source pork from the bio-industry as of 2011.[11] FSC has developed the sustainably harvested timber certification, and WNF – together with the Dutch food and personal care giant, Unilever – has introduced the MSC certificate for sustainably caught fish.[12] On the subject of human rights and business, Professor Ruggie delineated the complementary responsibilities of governments and business. He called upon industry to carry out due diligence investigations to assure that corporate activities do not violate human rights. His policy framework has been widely endorsed.[13]

Given that many international and industry codes of conduct have been drafted and accepted over the last decade, and that the 'Third Generation Sustainability Reporting Guidelines' issued in 2006 by the GRI (GRI G3) have been put into practice by companies all over the world,[14] one could say that CSR has at last been seriously acknowledged. Some countries have incorporated CSR as a concept in their legislation.[15] Others have imposed a duty on companies to publish an annual sustainability report.[16] Since 2009, the

9. See: www.akzonobel.com; www.heineken.nl; www.gsk.com, all websites accessed on 31 March 2010.
10. See: www.mars.com, accessed 31 March 2010.
11. See: www.ahold.com; News item 'Albert Heijn stopt in 2011 met varkensvlees uit de bio-industrie'; at: www.agf.nl/nieuwsbericht_detail.asp?id=54718, accessed on 31 March 2010.
12. Forest Stewardship Council, at: www.fsc.org; Marine Stewardship Council, at: www.msc.org, accessed on 31 March 2010.
13. UN HRC (General-Assembly), 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, "Protect, Respect and Remedy: a Framework for Business and Human Rights", 7 April 2008. UN Doc A/HRC/8/5. See also: www.amnesty.org; www.shell.com; www.akzonobel.com; www.ez.nl; www.minbuza.nl, all websites accessed on 31 March 2010. For further reading, see: T.E. Lambooy, 'Corporate due diligence as a tool to respect human rights', in *NQHR*, 3, 2010.
14. See: www.globalreporting.org, accessed on 31 March 2010.
15. Indonesian New Company Law No. 40/2007, Article 1 defines CSR and Article 74 contains prescriptions on the 'Environmental and Social Responsibility' of companies.
16. Denmark and Sweden require companies of a certain size and type to issue sustainability reports. See further: T.E. Lambooy and M.E. Rancourt, 'Private Regulation: Indispensable for Responsible Conduct in a Globalizing World?' in *Law and Globalisation*, (Bocconi School of Law, Milano and VDM Publishing, Saarbrücken 2009), pp. 108-110. Also see T.E. Lambooy and N. van Vliet, 'Transparency on corporate social responsibility in→

Netherlands has recognised CSR in the revised Dutch corporate governance code for listed companies (the Frijns Code).[17] This Code stipulates that the directors must adopt a policy on those CSR subjects which are material to the company's business. This implies that CSR is considered as belonging to the core of corporate strategy. The UK has included similar requirements in the directors' duties description in the Company Code (section 172). On paper, the progress seems enormous. Many a legal scholar, Ministry of Economic Affairs official and company CEO has cheered the progress demonstrated in sustainability reports and private regulation. The question concerning implementation is, however, still a compelling one. The logical next step is to imbed CSR in a company's activities, and to make its employees aware of what is expected of them from the perspective of making the company's activities sustainable. Corporate governance is very instrumental in this respect, and constitutes a powerful instrument.

How will good corporate governance based both on CSR and with a long-term view be achieved? Three approaches are always mentioned: transparency in respect of corporate policies and conduct, accountability for behaviour, and participation of stakeholders. These should ideally be mingled with the triple P approach: value creation for Planet, People and Profit. Corporate law professor Charlotte Villiers of Bristol University insists that it is through law, possibly a combination of soft law and hard law, that the triple-bottom-line basis of CSR will be made reality. Although she acknowledges the success of UN initiatives and concedes that there have been improvements on the part of many companies, she points out that there is still no consistency in responsible behaviour.[18]

As a case study, the Dutch corporate governance model – a combination of hard law and soft law – will be examined in this chapter 3. The model was established in 2003-2004 by the Tabaksblat Code and accompanying legislative amendments to the DCC. Section 3.2 will briefly describe the model's theoretical foundations. It was designed to promote corporate transparency and accountability, and to bestow new instruments upon shareholders. The

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annual reports', 2008, p. 3, in *European Company Law, pp.* 127-135, containing an overview of law and regulations as well as an investigation of the public reporting on CSR over the book year 2006 by 25 listed Dutch MNCs. See also a similar investigation over the book year 2007 in N. Kamp-Roelands and T.E. Lambooy, Chapter 6. Maatschappelijk verantwoord ondernemen [CSR], in: *Het jaar 2007 verslagen. Onderzoek jaarverslaggeving ondernemingen* [The reporting year 2007. Research into corporate annual reporting], NIVRA-geschrift 78 (Deventer: Kluwer 2008).

17. Dutch corporate governance code 2008, at: www.commissiecorporategovernance.nl/page/downloads/DEC_2008_ UK_Code_DEF__uk_.pdf, accessed on 3 January 2010.
18. C. Villiers, 'Enforcement of CSR standards with incentives or sanctions', Paper presented at HiiL Law of the Future Conference, 'Globalisation, the Nation-State and Private Actors: Rethinking Public-Private Cooperation in Shaping Law and Governance', The Hague, 8 and 9 October 2009. Conference Report available at: www.hill.org, accessed on 31 March 2010.

model was revised in 2009 by the Frijns Code and supplemented by new corporate law revisions. The Frijns Code makes CSR part of a board's policy and stresses that boards have to balance all stakeholders' interests, both outside and in-company stakeholders. Sections 3.3 and 3.4 analyse how CSR elements are reflected in the Frijns Code, thereby also communicating new insights gained from relevant reports and new legislative proposals in this field. Section 3.5 will elaborate upon the role of shareholders. In the Netherlands, institutional investors have traditionally held large shareholdings in listed companies. One of the subjects of the discussion is the decision *not* to include a CSR-related obligation for institutional investors in the Frijns Code. In section 3.6, commentaries regarding the introduction of the Frijns Code and subsequent (legislative) developments will be evaluated. Section 3.7 contains an overview of the 2010 Dutch *status quo* on corporate governance linked with CSR. This chapter 7 ends with a conclusion, analysing the findings as to how CSR values can effectively become part of corporate governance. The perspective in this chapter will be the Dutch corporate governance code and corporate law. The research method is theoretical.

3.2 The 2004 foundation of the Dutch corporate governance model

Corporate governance refers to the governance of corporate entities and their activities.[19] It is about the manner in which the power within a corporation has been distributed, *i.e.* who directs the processes and who plays a role in supervising this power. It also relates to the manner in which this power is exercised: the decision-making process.

In the Netherlands, the 'Tabaksblat Code' (the Dutch corporate governance code of December 2003 for listed companies) was a semi-private regulation instigated by the Dutch government, the stock exchange and industry associations in order to restore trust in the public equity markets. The principal aim of the Code was to restore private sector confidence, partly in response to accounting scandals. The emphasis was on accountability and transparency. The Tabaksblat Committee's terms of reference 'were to examine the relationship between listed companies and providers of capital microscopically'.[20]

19. For further reading on the 2004 model, see: chapter 2 ('Corporate social responsibility and corporate governance issues'), section 2.2. Although generally speaking the concept of corporate governance is more or less similarly interpreted internationally, its meaning is slightly different in Anglo-Saxon countries, continental Europe and Asia.
20. Tabaksblat Code, 59, at: www.commissiecorporategovernance.nl/page/downloads/CODE%20DEF%20 ENGELS%20COMPLEET%20III.pdf, accessed on 21 March 2010.

It was estimated that establishing a new balance with a larger role for the shareholders would enhance the functioning of the capital markets.

The subject of CSR was touched upon by the Tabaksblat Committee but they decided that it was a different subject-matter, and that various CSR codes of conduct had been or were being developed (such as the GRI and the OECD MNE Guidelines), and that it would therefore not be necessary to include the subject in the new corporate governance code.[21] At the same time however, it should be noted that the Tabaksblat Code stated that it was based on the stakeholders model, which according to the author has a similar outlook as CSR. Regarding the stakeholdersmodel, the Tabaksblat Code stated:

> the principle accepted in the Netherlands that a company is a long-term form of collaboration between the various parties involved. The stakeholders are the groups and individuals who directly or indirectly influence (or are influenced by) the achievement of the aims of the company. In other words employees, shareholders and other providers of capital, suppliers and customers, but also government and civil society. The management board and the supervisory board have overall responsibility for weighing up the interests, generally with a view to ensuring the continuity of the enterprise. In doing so, the company endeavours to create long-term shareholder value.[22]

The Tabaksblat Code contains 'Principles' which reflect generally subscribed views on good corporate governance and enjoy wide support. The principles have been elaborated in the form of specific 'Best Practices' provisions, which create a set of standards on recommended corporate conduct. The principles and best practice provisions regulate relations between the management board, the supervisory board and the shareholders (*i.e.* the general meeting of shareholders). The participation of employees in the corporate decision-making process is regulated elsewhere, *i.e.* in the Works Councils Act (WCA; *Wet op de Ondernemingsraden*). Nevertheless, the Tabaksblat Code (as does the Frijns Code) stipulated that the supervisory board's terms of reference include a paragraph on how it would maintain a relationship with the central works council or works council.[23]

Through application of the 'comply or explain' mechanism, incorporated in article 2:391(5) DCC in 2004, the Tabaksblat Code acquired a public regulatory aspect.[24] Since 1 January 2004, listed companies are obliged to report on compliance with the Tabaksblat Code in their annual report, and in the event of a deviation, to provide an explanation. Deviations may be justified in certain

21. Tabaksblat Code, 66-67.
22. Tabaksblat Code, 3. The same foundation is slightly differently phrased in the Frijns Code, 6.
23. Tabaksblat Code and Frijns Code, best practice provisions III.1.1 and III.4.1.g.
24. This article states that more detailed prescriptions concerning the content of the annual report may be imposed, and more specifically, obligations regarding compliance with a designated code of conduct. By a Royal Decree of 23 December 2004 (Bulletin of Acts and Decrees 2004/747), the Tabaksblat Code was designated.

circumstances. Shareholders, the media, businesses that specialise in rating the corporate governance structure of listed companies, and people advising on the exercise of voting rights attaching to shares, are expected to carefully assess the reason for each and every deviation. Both shareholders and the management and supervisory boards should be prepared to enter into a dialogue on the reasons for any deviation. It is up to the shareholders to call the management and the supervisory boards to account for compliance with the Tabaksblat Code. Pursuant to article 5:86 of the Dutch Financial Supervision Act *(Wet Financieel Toezicht)*, Dutch institutional investors have also been obliged from 1 January 2007 to include in their annual report, or on their websites, a statement about their compliance with the Code.

The new 'pro-equity' balance was further augmented by amendments to Dutch corporate law which were implemented in 2004.[25] One of the amendments gave shareholders possessing one or more per cent of the voting rights the right to table subjects for discussion at the general meeting of shareholders; the same applies to shareholders possessing shares representing € 50 million or more in a listed company.[26] Another 2004 amendment provided shareholders with an approval right in respect of strategic board decisions concerning the identity or character of the company or the enterprise run by the company.[27] The termination of protective anti-takeover measures had already started in the Netherlands at the end of the nineties. Further changes in 2004 concerned the supervisory board of certain large companies, the so-called 'structure companies': the shareholders meeting appoints members of the supervisory board, and can dismiss them.[28] Previously, supervisory board members were elected by co-optation.

3.3 The 2010 Dutch corporate governance model

When the Tabaksblat Code entered into force in the Netherlands, a 'Corporate Governance Code Monitoring Committee' (Monitoring Committee) was

25. The '*Structuurwet*', *i.e.* the Act of 9 July 2004, Bulletin of Acts and Decrees 2004/370, which became effective on 1 October 2004.
26. Article 2:114a (2) DCC. At the end of 2009, a legislative proposal was presented to change the required percentage from 1 to 3 per cent and another proposal to lower the major shareholder disclosure threshold from 5 to 3 per cent as prescribed in Article 538 Financial Supervision Act. They have not yet been adopted by the Lower House; Parliamentary Documents II 2008/09, 32 014.
27. Article 2:107a DCC.
28. Articles 2:158(4)/268(4) DCC. In other companies, supervisory board members are also appointed by the general meeting. Pursuant to Articles 2:132/242, 162/264 DCC, managing directors are also appointed by the general meeting or, in the case of certain large 'structure' companies, by the supervisory board.

appointed to evaluate compliance with the Code. The Committee published a report annually. In 2008 it was decided that the Tabaksblat Code needed updating and that the Monitoring Committee should do this.[29]

Over the years, various arguments had been put forward for extending the Code to cover new themes. Relevant for this chapter are the position of women in board composition, diversity and CSR.[30] As regards CSR, two options were suggested: to include provisions on CSR in the updated corporate governance code or to draft a separate CSR code (also subject to a 'comply or explain' mechanism).[31]

In May 2008, a study was commissioned by the State Secretary for Economic Affairs, to be carried out by a committee under the chairmanship of Anthony Burgmans, the former CEO of Unilever, into the relationship between CSR and corporate governance (Burgmans Committee). The resulting report contained specific recommendations for supplementing the Tabaksblat Code with provisions on CSR (Burgmans Report).[32] The recommendation was to incorporate the subject of CSR into the provisions regarding the task and operating procedures of the boards of directors and supervisory directors.

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29. Pursuant to the request submitted in the spring of 2008 by the Dutch National Federation of Christian Trade Unions (CNV), corporate governance forum Eumedion, the Federation of Dutch Trade Unions (FNV), the Netherlands Centre of Executive and Supervisory Directors (NCD), NYSE Euronext, the Association of Stockholders (VEB), the Association of Securities-Issuing Companies (VEUO) and the Confederation of Netherlands Industry and Employers (VNO-NCW). The government endorsed the request.
30. See *e.g.* the recommendation of the *Vereniging van Beleggers voor Duurzame Ontwikkeling* [Association of Stockholders for Sustainable Development, VBDO] to the Tabaksblat Committee of 4 September 2003 on appointing a CSR Committee within the supervisory board and including CSR provisions in the corporate governance code, at: http://corpgov.nl/page/downloads/Vereniging%20van%20Beleggers%20voor%20Duurzame%20Ontwikkeling.pdf, accessed on 30 March 2010.
31. T.E. Lambooy, '*Een gedragscode voor maatschappelijk verantwoord ondernemen zoals de Code Tabaksblat voor corporate governance?*' [A code of conduct for corporate social responsibility like the Code Tabaksblat for corporate governance?], INS web publication 2007, at: www.insnet.org/nl/insnl_observations.rxml?id=3918&photo=61, accessed on 7 March 2010; K. Douma, '*Overheid, onderneem eens wat*' [Government, do something'], in T.E. Lambooy, '*Een wereld te winnen. Zestien visies op maatschappelijk verantwoord ondernemen*' [A lot can be done. Sixteen views on corporate social responsibility], (Kluwer: Alphen a/d Rijn, 2006) p. 52; M. Koelemeijer, '*Naar een Nederlandse gedragscode maatschappelijk verantwoord ondernemen?*' [To a Dutch code of conduct for corporate social responsibility?], in: J.J.A. Hamers (*et al*, eds), '*Maatschappelijk Verantwoord Ondernemen: Corporate Social Responsibility in a Transnational Perspective*' (Intersentia: Antwerp, 2005), pp. 105-124.
32. Commissie Burgmans, '*Onderzoeksrapport Geborgd of verborgen, Maatschappelijk Verantwoord Ondernemen in Corporate Governance*' [Research report: Secured or Hidden, Corporate Social Responsibility in Corporate Governance], (Ministery for Economic Affairs: November 2008), at: www.ez.nl/Actueel/Kamerbrieven/Kamerbrieven_2008/November_2008/Maatschappelijk_Verantwoord_Ondernemen/Brief_advies_commissie_ →

Further recommendations dealt with the strategy; internal control system; salaries; conflicts of interest; the expertise and composition of the supervisory board; and the provision of information to shareholders. Proposals were also made to include a requirement to appoint a special CSR committee within the supervisory board;[33] to include a provision on a special CSR code of conduct; to make the subject of CSR part of the general meeting agenda; to require integrated reporting (of financial and ESG information); and to impose certain CSR-related obligations on shareholders. The Report stressed that the Burgmans Committee had also received criticism on the idea of including CSR in the Tabaksblat Code. It therefore recommended that the largest possible effect should be aimed at with as few changes as possible. The Report thus advised to urge the management and supervisory boards to consider the material concerns for the company of societal aspects of its business, and to communicate those. Furthermore, the Burgmans Report recommended that institutional investors should be encouraged to clarify their ESG considerations.[34]

The Monitoring Committee subsequently decided to include the majority of the Burgmans recommendations in the amended corporate governance code. It stated:

> the recommendations represent a valuable addition to the Code and are a logical elaboration of the Dutch corporate governance model. This is why the [Monitoring] Committee has adopted the [Burgmans] recommendations in the preamble and the Code, with the exception of the recommendation concerning institutional investors. In the [Monitoring] Committee's view, this is beyond the scope of the Code.

A proposal for the amended code was released in June 2008 (the draft Frijns Code). Similar to the Tabaksblat Code, the core perspective of the Frijns Code was: 'that a company is a long-term alliance between the various parties involved in the company.' The draft Frijns Code stated that the management board and the supervisory board have overall responsibility for balancing the various interests. This is aligned with the common Dutch perception of the role a company fulfils in society, *i.e.* that corporate activities are embedded in a

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Burgmans/Advies_Commissie_Burgmans, accessed on 12 July 2010. The author was one of the interviewees during the Burgmans study. She had recommended to either include CSR in the new corporate governance code or to draft a separate CSR code to which the same comply or explain mechanism would be made applicable.

33. Burgmans Report, p. 41, referred to a letter of 2003 by the Dutch '*MVO-platform*' [CSR platform] to the Monitoring Committee, 'Reactie MVO Platform op concept code van commissie corporate governance', which contained various proposals on including CSR in the corporate governance code. The Burgmans Report stated that these proposals could be followed and that some others could be added to them.
34. Burgmans Report, pp. 41-42.

stakeholder model. In fact, the CSR concept is fairly much in line with the traditional Dutch stakeholder model.[35]

The proposed changes coincide with the approach introduced in 2006 in section 172 of the UK Company Act. Section 172 requires boards to employ a broader and long-term perspective in their management. This is a new duty developed from the fiduciary duty of good faith to act in the company's best interest.[36] This section imposes a duty to act in the way a director considers – in good faith – would be most likely to promote the *success of the company*. When exercising this duty, the director is required to have regard for various non-exhaustive factors listed in section 172(1) including the long-term consequences of the decisions as well as the interests of the employees; the relationships with suppliers and customers; the impact of the decision on the community and environment; the desirability of maintaining a reputation for high standards of business conduct; and the need to act fairly towards members of the company. Scholars point out that this duty introduces wider CSR into a director's decision-making process but they regret that 'success' is not defined.[37] The UK Department of Trade and Industry (DTI, 2010) guidance on the Bill suggests that success in relation to a commercial company is considered to be its 'long-term increases in value'.[38] Inevitably, the courts will set out the 'perimeters' in the interpretation of this duty. According to commentaries, it remains to be seen how in practice a director is to balance all these sometimes conflicting factors in his decisions.[39]

Besides ensuring the continuity of the enterprise, and trying to create long-term shareholder value, the draft Frijns Code advocated that the management board and the supervisory board should take 'the interests of the various

35. Articles 2:140/250 DCC on the role of supervisory directors (to consider the interest of the company and the enterprise). Professor van Schilfgaarde, '*Van de BV en de NV*' [regarding limted liability companies and publicly held companies in the Netherlands] (Kluwer: Deventer 2006), on pp. 11-15 and 35 it argues that this norm also applies to managing directors. He points to Supreme Court, 13 September 2002 (JOR 2002/186); Professor Slagter, '*Ondernemingsrecht*' [Corporate Law], (Kluwer: Deventer 2006), pp. 4-20, 135-137, 140, even states that this norm also applies to shareholders. See also the speech of Frank Heemskerk, State Secretary for Economic Affairs, on 18 January 2010 in Rotterdam, New Years Event of MVO Nederland; www.rijksoverheid.nl/documenten-en-publicaties/toespraken/2010/01/20/nieuwjaarsevenement-mvo-nederland.html; and his letter to the Lower House of 28 January 2010 on the progress of CSR in the Netherlands at: www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2010/01/29/mvo-voortgangsrapportage.html, accessed on 16 February 2010.
36. See *e.g.* 'Companies Act 2006 and Directors Duties. Overview,' at: www.bytestart.co.uk/content/legal/35_2/companies-act-directors-duties.shtml, accessed on 6 March 2010.
37. See for case law on the duty to promote the success of the company: A. Hicks, S.H. Goo, '*Cases and materials on company law*', (Oxford University Press: 6th Ed. 2008) p. 385.
38. See: www.dti.co.uk, accessed on 6 March 2010.
39. Note 37 and Villiers, *supra* note 18.

stakeholders, including *corporate social responsibility* issues that are relevant to the enterprise' into account [Emphasis added]. If stakeholders are to cooperate within and with the company, it is essential for them to be confident that their interests are represented. It was stipulated by the Monitoring Committee that the two pillars upon which good governance is founded and which are essential conditions for stakeholder confidence are (i) good entrepreneurship, which includes integrity and the transparency of the management board's actions, and (ii) effective supervision of their actions and accountability for such supervision. Moreover, it was argued that good relations between the various stakeholders are of great importance, particularly through continuous and constructive dialogue.[40]

Interested parties could comment on the proposals until September 2008.[41] In addition to written reactions, the Monitoring Committee held consultations with special interest groups and experts to discuss the proposals in more detail. The comments led to amendments to the draft Frijns Code, and, as the Committee indicated, fostered support for the Code. One respondent asked the Committee to try to avoid including social themes in the Code. In the respondent's view: 'social themes are not directly connected with corporate governance, such as detailed rules on executive pay, diversity and corporate social responsibility'. Other respondents were of the opinion that 'the [CSR] proposals did not go far enough to safeguard the company as a long-term alliance of interests, or wished greater emphasis to be placed on the role of employees (and their representatives) or more attention given to integrity'.[42] In reaction to these comments, the Monitoring Committee stated: 'the fact that the Code is seen as a way of solving issues identified in society is a testament to its strength'.[43]

One respondent drew attention to 'the inherent tension in the stakeholder model between, on the one hand, the rule that when taking decisions the management and supervisory boards should be guided by the interests of the company and its stakeholders and, on the other, the fact that these boards are accountable for their actions to shareholders, who are themselves entitled to put their own interests first'.[44] The Committee considered this tension particularly relevant in takeover situations, and dealt with this issue in the preamble. The preamble states that the way in which this tension should be resolved will differ from case to case. For example, shareholders can give priority to their own interests with due regard for the principle of reasonableness and fairness. The

40. Frijns Code, Preamble, 7.
41. The Monitoring Committee received a total of 32 reactions from special interest groups, listed companies, accountancy and law firms and private individuals.
42. Frijns Code, Account of the Committee's work, p. 49.
43. *Idem.*
44. *Idem*, 51.

greater the interest a shareholder has in a company, the greater is his responsibility towards the company, the minority shareholders and other stakeholders. The Committee pointed to the Code's general rules of conduct which are supposed to ensure careful handling of the processes involving the various bodies that constitute the company. These are designed to help management and the supervisory board 'weigh up the different interests'.[45] Whereas the Committee addressed the issue of the tension between different interests in takeover situations (the management and supervisory board, on the one hand, and a group of shareholders on the other), the author regrets that the Committee did not elaborate on how to solve conflicts with other stakeholders, *e.g.* concerning the company's CSR strategies. This is unfortunate since CSR conflicts frequently occur, and it seems that a company's management does not not always know how to deal with them constructively.[46] The Code could have proposed ways of creating a platform for complaints, and offered suggestions for remedial measures.

On 10 December 2008, the Monitoring Committee published the final revised corporate governance code, *i.e.* the 'Frijns Code' named after the chairman of the Monitoring Committee, Mr Jean Frijns. The Code came into force 1 January 2009.[47] A Decree to designate the Frijns Code in accordance with article 2:391(5) DCC was adopted in 2009.[48] Consequently, just like the Tabaksblat Code, the Frijns Code applies to listed companies with a registered office in the Netherlands.[49]

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45. Frijns Code, Preamble, 7.
46. Stakeholder conflicts about CSR issues are presented in R. van Tulder and A. van der Zwart, '*International Business-Society Management: linking corporate responsibility and globalisation*', (Londen: Routledge Publishing, 2006); T.E. Lambooy and M.E. Rancourt, 'Shell in Nigeria: From Human Rights Abuse to Corporate Social Responsibility', in *HR&ILD*, 2, 2008, pp. 55-259; T.E. Lambooy, 'Case Study: the International CSR Conflict and Mediation' (2009-2), p. 6 and (2010-2), p. 59.
47. Frijns Code, Recommendations to the legislator, p. 45. The Committee recommended that listed companies include a chapter in their annual report on the broad outline of their corporate governance structure and compliance with the Frijns Code and present this chapter to the general meeting in 2010 for discussion as a separate agenda.
48. Royal Decree of 10 December 2009, published on 21 December 2009, (Bulletin of Acts and Decrees 2009/545).
49. Frijns Code, Preamble, 5: 'whose shares or depositary receipts for shares have been admitted to listing on a stock exchange, or more specifically to trading on a regulated market or a comparable system', and large companies with a registered office in the Netherlands (*i.e.* balance sheet value > € 500 million) 'whose shares or depositary receipts for shares have been admitted to trading on a multilateral trading facility or a comparable system'.

3.4 Discussion on the CSR provisions in the Frijns Code

In this section 3.4, the 'CSR provisions' in the Frijns Code addressing management boards and supervisory boards will be described, and commented on. The last part of this section will address the theme of gender concerns in board composition.

3.4.1 Management board and CSR

According to Dutch law the task and duty of the managing board is to: 'manage the company' (article 2:129 DCC). Many books have been published about the role of the directors in managing the company. Defining the strategy, organising the business, and the creation of value are the themes that usually emerge.[50] The Frijns Code stipulates in Principle II.1:

> The role of the management board is to manage the company, which means, among other things, that it is responsible for achieving the company's aims, the strategy and associated risk profile, the development of results and *corporate social responsibility issues that are relevant to the enterprise.* The management board is accountable for this to the supervisory board and to the general meeting. In discharging its role, the management board shall be guided by the interests of the company and its affiliated enterprise, taking into consideration the interests of the *company's stakeholders.* [Emphasis added]

Compared to the Tabaksblat Code, the inclusion of the CSR theme is new. Principle II.1 is linked to best practice provision II.1.2, which lists the subjects the management board shall submit to the supervisory board for approval. Under (d), '*corporate social responsibility issues that are relevant to the enterprise*' are mentioned. Clearly times have changed since introduction of the Tabaksblat Code: CSR issues are now considered part of management strategy and are believed to be sufficiently important to require the supervisory board's consent.[51]

According to the last sentence of best practice provision II.1.2, the main elements of a company's CSR strategy must also be mentioned in the annual

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50. See *e.g.* M. Huse, '*Boards, Governance and Value Creation. The Human Side of Corporate Governance*', (Cambridge: University Press: 2007). This book concerns the role of boards in corporate governance. How should they be structured in order to maximise value creation? It looks at the role of boards in a variety of different countries and contexts, from small and medium-sized enterprises to large corporations. It explores the working style of boards and how they can best achieve their task expectations. Board effectiveness and value creation are shown to be the results of interactions between owners, managers, board members and other actors. Board behaviour is thus seen to be a result of strategising, norms, board leadership, and the decision-making culture within the boardroom.
51. Articles 2:164/274 DCC also oblige the management board of certain large 'structure' companies to obtain approval of the supervisory board regarding important decisions.

report. This provision is in line with Dutch corporate law and accounting guidelines. Article 2:391(1) DCC requires the inclusion of extra-financial information in the annual report such as information regarding environment and employee matters.[52] In addition, the Dutch Council for Annual Reporting has issued Guideline 400, which recommends providing ample information on CSR strategies, policies and results in the annual report.[53] Consequently, best practice provision II.1.2, last sentence, did not introduce a new topic to Dutch corporate practice, as many listed companies already complied with the aforesaid legal requirement and Guideline. Best practice provision II.1.2 indeed records best practices rather than setting a new standard for recommended corporate conduct.

To support Principle II.1, best practice provision II.1.3(b) requires that a code of conduct be published on the company's website as an instrument of internal risk management and control systems. The Tabaksblat Code had a similar provision (II.1.3). As the Frijns Code does not elaborate on this provision, it should probably be understood as only relating to the company's risk and control systems.[54] In the author's view, the Frijns Code missed an opportunity to validate the fact that many companies have, by way of best practices, endorsed an international and/or an industry CSR code of conduct. The Code could have recommended that any applicable CSR codes of conduct be published on a company's website. This would have enhanced transparency concerning the question as to what type of conduct and what ambitions might be expected from the company in respect of putting their CSR policies into practice.

3.4.2 Supervisory board and CSR

Dutch law describes the supervisory board's task as follows: 'the supervisory board shall supervise the management, and general affairs of the company and the related enterprise. The supervisory board shall support the management board with advice. In the fulfilment of their duties, the supervisory board

52. Small and medium-sized companies are exempted from this obligation pursuant to Articles 2:396/397 DCC. The text and scope of application of the Frijns Code departs slightly from the DCC obligation. This provision was introduced pursuant to the Modernisation Directive (2003/51/EC), and can be found in most EU countries' corporate or accounting laws. See further Lambooy and Van Vliet *supra* note 16.
53. Kamp-Roelands and Lambooy *supra* note 16.
54. The US Sarbanes-Oxley Act (Sections 406/407-6) and the 'New York Stock Exchange, NYSE Final Corporate Governance Listing Standards, approved by the Securities and Exchange Commission on 4 November 2003 and amended on 3 November 2004 (Section 303A.10 'Corporate Governance Rules' also require companies to disclose any codes of ethics that they follow. See: www.nyse.com/pdfs/finalcorpgovrules.pdf, visited on 7 April 2010.

members shall focus on the interest of the company and the connected enterprise' (article 2:140(2) DCC). In 2009, the Erasmus Institute for Supervision and Compliance published a draft code of conduct for supervisory board members for discussion purposes.[55] It provides provisions and insights from Dutch law, the corporate governance codes and research. Principle III.1 of the Frijns Code, concerning the 'supervisory board, follows more or less the above cited DCC text (as did the Tabaksblat Code). In addition thereto, this Principle stipulates that 'the supervisory board shall also have due regard for *corporate social responsibility issues* that are relevant to the enterprise'. It also states that the supervisory board 'shall take into account the relevant interests of the company's stakeholders'.[56]

This Principle is elaborated in best practice provisions. Provision III.1.6 highlights the most important matters that require supervision by the supervisory board: '(a) achievement of the company's objectives; (b) corporate strategy and the risks inherent to the business activities; (c) the design and effectiveness of the internal risk management and control systems; (d) the financial reporting process; (e) compliance with primary and secondary legislation; (f) the company-shareholder relationship; and (g) *corporate social responsibility issues that are relevant to the enterprise*.' The part under (g) is new compared to the Tabaksblat Code. This concurs with provision II.1.2(d) concerning management board practices, which states that CSR falls within the scope of strategic management matters that need supervisory board approval.

Provision III.1.1 stipulates that the division of duties within the supervisory board and the procedure of the supervisory board shall be laid down in the 'terms of reference,' which shall be posted on the company's website. They shall include a paragraph outlining how the supervisory board's relations with the management board, the general meeting and the central works council or works council will be maintained. Since the Frijns Code assigns profound responsibility to the supervisory board, it was considered desirable that a form of structured consultation be set up to enable the members to exchange ideas and information and to serve as a point of contact for *third* parties. The supervisory board members are expected to develop initiatives in this respect.[57] This is exemplified by provision III.4.1(g), which obliges the chairman to ensure that the supervisory board has proper contact with the management board and the works council (or central works council). For this chapter 7, especially the relationship with stakeholders such as the works council is

55. A. de Bos and M. Lückerath-Rovers, *'Gedragscode voor Commissarissen en Toezichthouders. Discussiedocument*' [Code of Conduct for Commissioners and Supervisors. Discussion Document], Erasmus Instituut Toezicht & Compliance, nr. 10, 2009.
56. See also: for an overview of opinions in the Netherlands about the role of the supervisory board regarding CSR: D. de Waard, '*Toezicht op Maatschappelijk Verantwoord Ondernemen*' [Supervision on Corporate Social Responsibility], Van Gorcum: Assen, 2008.
57. Frijns Code, p. 48.

interesting from a CSR perspective as it stimulates stakeholder participation. Another best practice provision asserts that 'the supervisory board and its individual members each have their own responsibility for obtaining all information from the management board and the external auditor that the supervisory board needs in order to be able to carry out its duties properly'. The board may obtain information from company officers and external advisers and require that they attend its meetings (III.1.9). This provision thus allows the supervisory board to invite representatives of 'People and Planet NGOs' or other experts in these fields in order to solicit their opinion on the company's CSR strategy and policies. This in turn would contribute to stakeholder interests.

Principle III.3 of the Frijns Code on 'Expertise and Composition' evidently stipulates that 'each supervisory board member shall be capable of assessing the broad outline of the overall policy' and 'the specific expertise required for the fulfilment' of his or her duties. Noteworthy from a CSR perspective is that this Principle lays a new foundation in terms of *gender*, *i.e.* that the supervisory board 'shall aim for diverse composition in terms of such factors as gender and age'. Best practice provision III.3.1 elaborates on this by stating that the supervisory board 'shall prepare a profile of its size and composition', which profile 'shall deal with the aspects of diversity' and 'state what specific objective is pursued' in that respect. In so far as the existing situation differs from the intended situation, the supervisory board 'shall account for this in its report and shall indicate how and within what period it expects to achieve this aim'. The profile will be made generally available and be posted on the company's website. Provision III.1.2 states that the annual statements[58] shall include a report by the supervisory board, in which the board describes its activities in the financial year. Furthermore, the Frijns Code expects that the supervisory board's report includes certain specific information about each supervisory board member, such as: *gender*; age; profession; principal position; nationality; other positions, in so far as they are relevant to the performance of the duties of the supervisory board member; the date of initial appointment; and the current term of office (provision III.1.3). This is in excess of the DCC requirements. The supervisory board shall discuss the desired profile, composition and competence of the supervisory board on an annual basis (provision III.1.7).

In the consultations preceding the adoption of the final text of the Frijns Code, some respondents expressed general support for the manner in which the Committee had formulated the provisions on diversity in the Code. A few

58. *I.e.* the entire annual report referred to in Article 2:391 DCC, the financial statements referred to in Article 2:361 DCC, the other information referred to in Article 2:392 DCC, the report of the supervisory board, key figures, multi-year figures, shareholder information and so forth (provision III.1.2).

advocated the inclusion of a target figure for female board representation in the Code. In response, the Monitoring Committee pointed at the 'explicit provision that companies are expected to apply and disclose a specific objective in relation to diversity' (*i.e.* provision III.3.1) and stated that 'there is wide support for this amendment'.[59]

3.4.3 Gender concerns in board composition

Considering the above mentioned Principles and provisions concerning the management and supervisory board, it seems that the gender representation issue only concerns the supervisory board composition. However, reflecting on the above cited response of the Monitoring Committee, and referring to the content of provision III.5.14, one could extend the gender issue in board composition to the management board. *Vide* provision III.5.14:

> the selection and appointment committee [of the supervisory board] shall in any event focus on: (a) drawing up selection criteria and appointment procedures for supervisory board; members *and management board members*; (b) periodically assessing the size and composition of the supervisory board *and the management board*, and making a proposal for a composition profile of the supervisory board. [Emphasis added]

Moreover, since equal representation is certainly an important CSR theme, and pointing to the instruction that the management board adopt a CSR strategy, one could take the position that the strategy should provide for this. However, the author considers it a missed opportunity that the Frijns Code does not provide more clarity on this point.

It is interesting to note that gender has entered the corporate governance discussions on board composition. A fair representation of women in company boards would help abolish discrimination based on sex, which in many places in the world is still more of a rule than an exception in work and income situations.[60] In the Netherlands, listed companies' boards comprise, on average, seven per cent female board members whereas the European average stagnates at 11 per cent.[61] Together with Belgium, Italy and Spain, the Netherlands sits in the lowest European echelon. Higher management also constitutes fewer

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59. Frijns Code, p. 55.
60. See *e.g.* 'The Female Factor; A Seat at the Table', *i.e.* a year-long series of articles, columns and multimedia reports in the International Herald Tribune which examines where women stand in the early 21st century, including S. Grytoyr, 'Getting Women into Boardrooms, by Law', 27 January 2010; Heather Timmons, 'Female Bankers in India Earn Chances to Rule', 28 January 2010; Worldconnectors, Statement on Gender and Diversity: Justice and solutions for all: through gender and diversity, March 2010; available at: www.worldconnectors.org, accessed on 5 March 2010.
61. M. Lückerath-Rovers, *'Female Board Index' 2007* and '*Female Board Index 2009*' (Erasmus Instituut Toezicht en Compliance: Rotterdam, 2008), p. 35. The studies provide →

females than males. The same 'gender gap' can be observed with university professors and high-level public officials. Even in politics, although generally in modern states it is attempted to achieve a fair male/female representation among MPs and cabinet ministers, there are still few female prime ministers or presidents. Confirming the existence of the gender gap – most notably in the composition of corporate management bodies – a 2007 McKinsey study offers fact-based insights into the importance for companies of fostering the development of women in the business arena, so that a greater number attain positions of high responsibility.[62] The study suggests that the companies where women are most strongly represented at board or top-management level are also the companies that perform best. The same outcome can be detected from a 2007 Finnish study demonstrating a 48 per cent higher profitability of companies with women 'on board'.[63] The reasons are that without females on board, a board lacks half of the talents, misses the voice that brings into the decision-making process the concerns and interest of women with regard to the products and services offered by the company, and it appears that decisions are taken better, quicker, more nuanced, and generally with a stronger long-term perspective.

In order to avoid gender discrimination, it is a good thing to pay attention to this problem in corporate governance codes and company codes. In the discussion on the effective enforcement of CSR standards at the HiiL 2009 Annual Conference, the question was inevitably raised whether we need more sanctions in respect of non-compliance with CSR standards. Villiers expressed the view that sanctions are increasingly necessary. She exemplified this statement by her case study 'Boardroom Composition and Gender Parity'.[64] The study concluded that there is a lack of gender diversity in boardrooms of many large companies across the world. The weak enforcement of the right to

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an overview of female representation on the management boards and supervisory boards of 107 Dutch NV companies listed on Euronext Amsterdam. In September 2009, 38 listed Dutch companies had one or more women on their management board and/or supervisory board; this is 35.5 per cent of all 107 Dutch listed companies. Still 69 companies had no women. Of the 813 directors in the sample, 57 (7.0 per cent) were female. This was the weighted average of the percentage of female executive directors (2.4 per cent) and the percentage of female non-executive directors (9.5 per cent). The research also indicated that the support by large listed companies for greater gender diversity in the board, still only seems to be words and no deeds; of the 116 new appointments in Dutch boards only on 14 were women. P. Kalma, 'Voorkeursbeleid: voor of tegen? Ter overname: glazen plafond', in *S&D*, 12, 2008, pp. 48-52.

62. S. Devillard-Hoellinger *et al.*, '*Women matter. Gender diversity, a corporate performance driver*', (Paris: McKinsey & Company 2007).
63. A. Kotiranta *et al.*, '*Female leadership and firm profitability*' (Finnish Business and Policy Forum: Helsinki 2007). See also: European Professional Women's Network, 'Women on boards. Moving mountains', 2006;
64. Villiers, Hiil Conference Report, *supra* note 18.

equal treatment, proclaimed in numerous human rights instruments, shows the parallel with the enforcement problem of CSR standards. In her research, she compared the approaches chosen by different European states to address the problem of gender equality on the boards of the companies. For instance, the UK has chosen a voluntary approach that proved unsuccessful. Norway, on the other hand, imposed sanctions on companies, *i.e.* a company will be dissolved unless it complies with the gender quotas for company boardrooms laid down in the Law on Public Companies.[65] This measure turned out to be effective: in 2009, Norwegian company boards had 44 per cent females. In the UK, this figure is lagging: 15 per cent. This study illustrates that imposing an obligation in respect of compliance with CSR standards, including the promotion of equal treatment, or the threat of sanctions can be very effective.

Gender is not a criterion that, as yet, can be found in Dutch law or case law regarding the composition of the supervisory board. In that light, Principle III.3 of the Frijns Code is welcomed. Interestingly, a Labour Party MP, Paul Kalma, has proposed a bill to fight the gender gap with quotas which are to be incorporated in the DCC.[66] It reads that a board of a large company (>250 employees) should be composed of at least 30 per cent female and 30 per cent male members, in so far as it comprises natural persons. Non-compliance should be explained in the annual report. The Bill intends to force a change in traditional role models and to encourage companies to actively scout for and coach female talents. It is expected that quotas will not be necessary once females have entered the 'old boys' network' or have established their own 'old girls' network'. This pattern revealed itself in Norway where female board representation currently exceeds the quota of 40 per cent. By 2007, over 90 per cent of the 460 listed Norwegian companies complied with the new norm.[67] The Dutch Bill states that the quota obligation will disappear by way of law by 2016. It was adopted by the Lower House in December 2009 and has subsequently been submitted to the Upper House.

With a same view, a bill submitted to the French Parliament in January 2010 requires of all companies listed on the Paris stock exchange that they ensure that female employees make up 50 per cent of their board members by 2015. If passed, a gradual implementation of the law would see businesses obliged to have women in 20 per cent of board seats within 18 months, and 40 per cent

65. Private firms were given until July 2005 to increase female representation on their boards. However, these voluntary measures failed; by the deadline, the number of women had increased, but had only reached about 25 per cent. In response, the government introduced official legislation in that same year. This time, the penalties for non-compliance were severe: as of January 1st, 2008, firms were penalised first with fines, then with deregistration from the Oslo Stock Exchange and finally dissolution. See: www.mba.unisg.ch/org/es/mba.nsf/SysWebRessources /March-April/$FILE/Norway.pdf, accessed on 26 January 2010.
66. Parliamentary Documents II, 2008/09, 31 763.
67. Kalma, note 61, p. 50.

within four years. The proposals, which would also apply to state-owned companies and non-listed firms with supervisory boards, are scheduled to be debated in the spring of 2010 and would need the approval of both houses of parliament to become law.[68]

3.5 The Frijns Code and institutional investors

3.5.1 The Frijns Code on institutional investors

Compared to the Tabaksblat Code, Principle IV.4 of the Frijns Code on the responsibility of shareholders no longer focuses exclusively on institutional investors (*i.e.* pension funds, insurers, investment institutions and asset managers). The principle is subdivided into '*responsibility of institutional investors*' and '*responsibility of shareholders*'. The Monitoring Committee explains this by defining institutional investors as a special category of shareholders who act primarily in the interests of the ultimate beneficiary owners or investors.[69] As such, Principle IV.4 makes it explicit:

> Institutional investors shall act primarily in the interests of the ultimate beneficiaries or investors and have a responsibility to the ultimate beneficiaries or investors and the companies in which they invest, to decide, in a careful and transparent way, whether they wish to exercise their rights as shareholder of listed companies.

Owing to this special position, provisions IV.4.1 to IV.4.3 instruct institutional investors to publish annually, in any event on their website, their policy on the exercise of the voting rights for shares which they hold in listed companies, the implementation of their policy in the year under review, and at least once a quarter whether and, if so, how they have voted as shareholders at the general meeting.

CSR does not play a role in these provisions. The Burgmans Report had suggested to add the following CSR-related phrase to the above-cited Principe IV.4: *and whether and to which extent they take into account ESG*

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68. See: www.guardian.co.uk/world/2009/dec/02/french-government-gender-equality-plan, accessed on 26 July 2010.
69. Frijns Code, p. 56. See further R.H. Maatman, '*Het pensioenfonds als vermogensbeheerder*' [The pension fund as asset manager], (Kluwer: Deventer 2004) for a Dutch perspective on fiduciary duties of pension funds. See also R.H. Maatman, 'Tabaksblat en de botsende doelstellingen' [Tabaksblat and conflicting objectives], in *Ondernemingsrecht*, 4, 2004, pp. 116-120, in which he argues that voting rights are an asset to the investor which should be used in an effective and efficient way. He advocates transparency of the way in which institutional investors use their corporate governance tools so that the beneficiaries may judge that.

factors.[70] If this text had been included, it would have meant that institutional investors were to disclose to what extent and in what manner they consider extra-financial information regarding environmental, social and governance aspects in their decision-making process. However, the Monitoring Committee decided that this matter was beyond the scope of the Code. The author regrets this as will be explained below.

Still, as shareholders are considered important players in a Dutch company's decision-making, it seems relevant to assess in this chapter 3 what the Frijns Code asserts about shareholder responsibilities. Referring to the Tabaksblat Code, the Monitoring Committee commented that the increase in the general meeting's powers in the Tabaksblat Code was prompted by the need to strengthen the checks and balances within the company and to improve the quality of corporate governance. However, the Committee admitted that the increase in shareholder rights had also resulted in greater emphasis being placed on the interests of shareholders both individually and collectively. To stop the power pendant from swinging too far to the shareholders' side,[71] the Frijns Code requires shareholders to act in accordance with the principle of '*reasonableness and fairness*'. Principle IV.4 expresses this. The same phrasing can be found in a key-provision of the DCC, article 2:8, stipulating that a company and those who, pursuant to the law or the articles of association, are involved with its organisation must behave towards each other in accordance with the principle of reasonableness and fairness. The Monitoring Committee explained that in the event of conflicts shareholders should demonstrate their willingness to enter into a dialogue with the company and fellow shareholders. If the dialogue fails to produce results, shareholders are entitled to exercise their statutory rights in order to express the views they have on the strategy, including the right to put items on the agenda and the right to call an extraordinary meeting of shareholders.[72]

As regards the powers of the general meeting, Principle IV.1 states:

> Good corporate governance requires the fully-fledged participation of shareholders in the decision-making in the general meeting. [….] The general meeting should be able to exert such influence on the policy of the management board and the supervisory board of

70. Burgmans Report states: '*en of en in welke mate zij ESG-factoren in die afweging meenemen*' [and whether, and to which extent, they take ESG-factors into account], p. 42
71. Frijns Code, pp. 47 and 56, referring to the activities of some shareholders and the foreign takeovers of leading Dutch companies which have prompted social debate. It stated that since 2004, Dutch listed companies have increasingly come under the influence of the market for corporate control (mergers and acquisitions). See also G.T.M.J. Raaijmakers, '*De financiële markt en het ondernemingsrecht. De behoefte aan lange termijn-waarborgen in het ondernemingsrecht*' [The financial market and corporate law. The need for long term assurances in corporate law], Introductory lecture Vrije Universiteit Amsterdam, 2009, at: www.nautadutilh.com/publicationfiles/16_06_09_Geert%20Raaijmakers_De%20financiele%20markt%20en%20het%20ondernemingsrecht.pdf, accessed on 16 March 2010.
72. Frijns Code, p. 56.

> the company that it plays a fully-fledged role in the system of checks and balances in the company. Management board resolutions on a major change in the identity or character of the company or the enterprise shall be subject to the approval of the general meeting.

The last sentence concurs with article 2:107a DCC, as referred to above in section 3. 2. Professor Geert Raaijmakers (corporate and securities law at the Vrije Universiteit of Amsterdam) regrets that the Monitoring Committee has not provided more 'guidance' as to how a constructive dialogue between the shareholders and the company be conducted: how should the media and other means of pressure be dealt with, and how should parties organise their normal exchange of views?[73]

3.5.2 Fiduciary duty and ESG factors: the Freshfields report

Traditionally, many ESG factors have not been incorporated in financial analysis. This is beginning to change as institutional investors see the connection between long-term interests of their beneficiaries and the medium to long-term risks of issues such as climate change, dependence on biodiversity and ecosystem services corporate governance and employee relations. In respect of the role of institutional investors in promoting CSR and socially responsible investment (SRI), it has often been contended by pension funds that their fiduciary duties only allowed them to strive for profit maximalisation and that they are not allowed to consider ESG factors in their investment decisions.[74] The United Nations Environment Programme – Finance Initiative, Asset Management Working Group (UNEP FI)[75] commissioned a study on this question by the law firm Freshfields Bruckhaus Deringer (Freshfields). UNEP FI had submitted the following question to Freshfields:

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73. Raaijmakers, note 71, p. 39.
74. Mercer Investment Consulting, 'Universal ownership: exploring opportunities and challenges', Conference report, Saint Mary's College of California, April 2006, pp. 10-11. See also R. Maatman, 'Prudent-person-regel en verantwoord beleggingsbeleid' [Prudent-person-rule and responsible investment policy], in *Tijdschrift voor Ondernemingsbestuur*, 6, 2007, pp. 177-187 regarding Article 135(1) Pensioenwet (Pension Act) which states that pension funds should invest in accordance with the prudent-person rule. See also the discussion on SRI in R. Bauer, *'Verantwoord beleggen: de hype voorbij?'* [Investing responsibly: is the hype over?], Introductory lecture Faculty of Economics and Business Administration, Maastricht University, 2008, at: http://arno.unimaas.nl/show.cgi?fid=13645, accessed on 20 March 2010.
75. UNEP FI is a strategic public-private partnership between UNEP and the global financial sector. UNEP works with over 180 banks, insurers and investment firms, and a range of partner organisations, to understand the impacts of environmental, social and governance issues on financial performance and sustainable development. See: http://www.unep.org/Documents.Multilingual/Default.Print.asp?DocumentID=593&ArticleID=6247&l=en, accessed on 23 April 2010.

> Is the integration of environmental, social and governance issues into investment policy (including asset allocation, portfolio construction and stock-picking or bond-picking) voluntarily permitted, legally required or hampered by law and regulation; primarily as regards public and private pension funds, secondarily as regards insurance company reserves and mutual funds?

UNEP FI released a report in 2005, entitled 'A legal framework for the integration of environmental, social and governance issues into institutional investment' (Freshfields Report).[76] The report shows that there are in fact no limitations on the integration of ESG factors in the investment decision-making process; to the contrary, the law not only allows but requires it in certain circumstances. The Freshfields Report defines the concept of fiduciary duties as 'duties that common law jurisdictions impose upon a person who undertakes to exercise some discretionary power in the interests of another person in circumstances that give rise to a relationship of trust and confidence.' The UNEP FI question was analysed in seven major capital markets' jurisdictions: (i) the common law jurisdictions of the US, the UK, Australia and Canada, and (ii) the civil law systems of Germany, France, Italy, Spain and Japan. The Freshfields Report noted that none of these jurisdictions had rules prescribing how ESG factors should be integrated and that investment decision-makers retain some degree of discretion as to how they invest the funds under their control. According to Paul Watchman, leading author of the report, 'in most jurisdictions, the law gives a wide discretion, encircled by general duties rather than exacting standards' and that 'a number of the perceived limitations on investment decision-making are illusory'.[77] As the Report states:

> Like many professional activities, investment decision-making is an art rather than a science: there is no formula that guarantees a particular outcome. It is important to distinguish therefore between optimal decision-making and optimal decisions. The law is concerned with the former, as the latter can be arrived at only with hindsight.[78]

One common legal element of the investment decision-making for all the examined jurisdictions is the requirement that decision-makers follow the 'correct process' in reaching their decisions. For common law jurisdictions, this requirement stems from the fiduciary duties of prudence and, in the civil law jurisdictions, the duty to seek profitability and otherwise manage investments conscientiously in the interests of beneficiaries. According to the Freshfields Report,

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76. Available at: www.unepfi.org/fileadmin/documents/freshfields_legal_resp_2005.pdf, last visited on the 26 October 2008.
77. Sustainable Development International, News Item, 9 November 2005, at: www.sustdev.org/index.php?option=com_content&task=view&id=977&Itemid=34, accessed on 21 March 2010.
78. Freshfields Report, p. 7.

> decision-makers are required to have regard (at some level) to ESG-considerations in every decision they make. This is because there is a body of credible evidence demonstrating that such considerations often have a role to play in the proper analysis of investment *value*. As such they cannot be ignored, because doing so may result in investments being given an inappropriate value.[79]

After the Freshfields Report was launched, many comments and critics emerged. Professor Cynthia Williams from the College of Law at the University of Illinois opined that the Freshfields analysis confirms the fact that not only is it permissible to consider ESG factors, but fiduciary duties require that they be considered where there is the potential for a material, financial impact from those factors. She stated: 'Thus, the impacts of climate change and how to mitigate them would be something that trustees and other fiduciaries really must consider, since the physical risks from climate change, and the regulatory and legal risks, portend serious financial impacts in addition to social impacts, health, welfare, and other impacts.'[80] To consider ESG factors in investment decisions is therefore part of the fiduciary duty (to be a 'prudent fiduciary').

One interesting and controversial question relates to the interests of beneficiaries: when the report states that the fiduciary duty must be in the interests of beneficiaries, does this mean in the immediate future or in the long-term? *E.g.*, Professor Jim Hawley, the co-director of the Center for the Study of Fiduciary Capitalism at St. Mary's College of California, poses the following question: 'If what you do now is very likely to create a world 30 years from now that's far more polluted, is that in the beneficiaries' best interest or not?'[81] The Freshfields Report does not provide an answer to this question as it merely states that the term 'interests' can have different meanings in different jurisdictions. The Report considers the duty to act prudently and the duty to act in accordance with the purpose for which investment powers are granted, *i.e.* the duty of loyalty, to be the most important fiduciary duties, which may include the duty to do due diligence on ESG issues.

3.5.3 PRI and UNEP FI Fiduciary Responsibility Report

Since publication of the Freshfields Report, there has been more innovation and evolution in the field of ESG integration. The launch of the PRI in 2006 by then UN Secretary-General Kofi Annan was a significant development. The PRI

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79. Frshfields Report, pp. 10-11. Climate change is mentioned as an example of an environmental consideration that is recognised as affecting value. See also: www.thecarbontrust.co.uk, accessed on 23 April 2010.
80. W. Baue, Fiduciary Duty Redefined to Allow (and Sometimes Require) Environmental, Social and Governance Considerations, News item, 3 November 2005, at:http://www.sri-advisor.com/article.mpl?sfArticleId=1851, accessed on 21 March 2010.
81. *Idem.*

considers itself 'an investor initiative in partnership with UNEP FI and the UN Global Compact' and 'a framework to help investors achieve better long-term investment returns and sustainable markets through better analysis of environmental, social and governance issues in the investment process and the exercise of responsible ownership practices'. With over 550 signatories from the institutional investment community, including many of the world's largest pension funds, collectively representing approximately USD 18 trillion in assets under management, the PRI is helping to identify best practices among investors.[82]

Furthermore, UNEP FI published a sequel to the Freshfields Report in 2009, entitled "Fiduciary Responsibility. Legal and Practical Aspects of Integrating Environmental, Social and Governance Issues into Institutional Investment" (Fiduciary II).[83] This new report provides updated information on the legal ramifications of ESG criteria in investment management. Fiduciary II states that professional investment advisors and service providers to institutional investors – such as investment consultants and asset managers – may have a far greater legal obligation to incorporate ESG issues into their investment services or face "a very real risk that they will be sued for negligence" if they do not.[84] The report also provides indicative legal language that can be used to embed ESG considerations in the investment management agreements and related legal contracts between institutional investors and their asset managers.

3.5.4 Eumedion Position Paper

In March 2010, Eumedion, the Dutch corporate governance forum, issued a position paper on engaged shareholdership.[85] Eumedion noted 'that the debate

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82. See: http://www.unep.org/Documents.Multilingual/Default.Print.asp?DocumentID=593&ArticleID=6247&l= and www.unpri.org, accessed on 23 April 2010).
83. Paul Watchman, an internationally-recognised fiduciary law expert and the principal author of the original Freshfields Report, was one of the major contributors to Fiduciary II. The report is available at: http://www.unepfi.org/fileadmin/documents/fiduciaryII.pdf, accessed on 23 April 2010. For a critical analysis see Benjamin Richardson, 'From fiduciary duties to fiduciary relationships for Socially Responsible Investment', paper presented at PRI Academic Conference, Copenhagen, 5-7 May 2010, available at: www.unpri.org/academic10/Paper_2_Benjamin_Richardson_From%20Fiduciary%20Duties%20to%20Fiduciary%20Relationships%20for%20Socially%20Responsible%20Investment.pdf, visited on 13 June 2010.
84. Fiduciary II, p. 16.
85. Eumedion, 'Position paper on engaged shareholdership', adopted on 12 March 2010, at: www.eumedion.nl/page/downloads/Position_Paper_Engaged_shareholdership_DEF.pdf, accessed on 2 April 2010. Compare the ICGN/Eumedion seminar held in Amsterdam on 2 March 2009 where in a vote 49 per cent (versus 44.9 per cent) of the participants indicated that the financial crisis had undermined the reliance in the shareholder model of corporate governance.

on the role of shareholders in the system of corporate governance had taken a new direction'. Shortly after the appearance of the Tabaksblat Code and the amendment of corporate law provisions in 2004, the emphasis was on encouraging shareholders to use their new rights. However, according to Eumedion: 'Following the actions of some reputedly activist shareholders involving a number of Dutch listed companies, the discussion is now mainly concerned with the manner in which shareholders use their rights. Shareholders are presently being increasingly reminded of their obligations.' The paper pointed to the Dutch government's quest for a long-term agenda[86] and the Monitoring Committee's reference to the 'citizenship' of the shareholder.[87] It affirmed that greater responsibility is expected from institutional investors in particular, on the basis of the idea that they hold the majority of the shares in Dutch listed companies and manage other people's money.[88]

The critical view of the role of the shareholder has been reinforced by the financial crisis. A frequently heard point of criticism by society is that shareholders sometimes used their control rights to exert pressure on management boards of listed companies to focus first and foremost on achieving short-term results, which interferes with the implementation of a strategy focused on the long term. At the same time, it has also asserted that shareholders did not sufficiently scrutinise decisions taken by the management board and that they did not hold the management board sufficiently to account for its performance.[89] The views of

86. 'Working on the future', a policy agreement augmenting 'working together, living together', 25 March 2009, at: www.government.nl/Government/Supplementary_policy_agreement, accessed on 2 April 2010.

87. Corporate Governance Code Monitoring Committee, First Report on Compliance with the Dutch Corporate Governance Code, Summary 5, December 2009, at: www.commissiecorporategovernance.nl/Information%20in%20English, accessed on 2 April 2010.

88. Eumedion *supra* note 85, p. 1.

89. *Idem*. See also: G. Kirkpatrick, OECD-rapport, 'The Corporate Governance Lessons from the Financial Crisis', in *Financial Market Trends*, 2009. It argues: 'that the financial crisis can be to an important extent attributed to failures and weaknesses in corporate governance arrangements.(…) Accounting standards and regulatory requirements have also proved insufficient in some areas leading the relevant standard setters to undertake a review. Last but not least, remuneration systems have in a number of cases not been closely related to the strategy and risk appetite of the company and its longer term interests'; at: http://www.oecd.org/dataoecd/32/1/42229620.pdf, visited on 3 June 2010; and
'Report of The High-Level Group on Financial Supervision in the EU', 25 February 2009, pp. 29 and 30. It states: '[Corporate Governance] (110) This is one of the most important failures of the present crisis. (111) Corporate governance has never been spoken about as much as over the last decade. (Procedural progress has no doubt been achieved, establishment of board committees, standards set by the banking supervision committee) but looking back at the causes of the crisis, it is clear that the financial system at large did not carry out its tasks with enough consideration for the long-term interest of its stakeholders. Most of the incentives (…) encouraged financial institutions to act in a short-term perspective and to make as much profit as possible (…) the new accounting rules were systematically biased →

Eumedion[90] resulted in recommendations to institutional investors, including the following: (i) substantial investments in personnel and training or to mandate – based on its own ESG policy – an external asset manager to act as an engaged shareholder; (ii) integration of ESG factors into the investment process; (iii) willingness to cooperate with other institutional investors; (iv) remuneration of fund managers that is more strongly linked to the long term and to the interests of the client and the ultimate beneficiaries; (v) a mandate to asset managers that covers a longer period and addresses engaged shareholdership; (vi) the drafting of internal rules on dealing with a number of different interests; (vii) the recall of lent shares when there are important matters on the agenda for the shareholders' meeting and openness on the subject of control positions during dialogue with enterprises. Of listed companies, Eumedion expects a good corporate governance structure and a high degree of transparency, and willingness on the part of the management board and the supervisory board to enter into dialogue with institutional investors. Finally, Eumedion itself will undertake research into (i) increasing the involvement of major shareholders in the selection of supervisory directors, and (ii) the added value of drafting a Dutch code for institutional investors.[91]

Furthermore, from the Eumedion position paper it becomes apparent that although institutional investors have a long-term investment philosophy, this is not synonymous with keeping shares in companies for the long term. Their position is that 'the emphasis in the social debate should not be placed so much on the encouragement of keeping shares for a longer term, but on the encouragement of engaged shareholdership on the part of institutional investors.' By 'engaged 'shareholdership', it is meant that the investor at least

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towards short-term performance (indeed these rules led to immediate mark-to-market recognition of profit without allowing a discount for future potential losses). As a result of all this, the long-term, "through the cycle" perspective has been neglected. (112) In such an environment, investors and shareholders became accustomed to higher and higher revenues and returns on equity which hugely outpaced for many years real economic growth rates. Few managers avoided the "herd instinct" – (…) (114) There should be no illusion that regulation alone can solve all these problems and transform the mindset that presided over the functioning (and downward spiral) of the system'; at: http://ec.europa.eu/economy _finance/publications/publication14527_en.pdf, accessed on 2 June 2010.
See also B.R. Cheffins, 'Did Corporate Governance 'Fail' During the 2008 Stock Market Meltdown? The Case of the S&P 500', News Item, May 2009. This paper argued that corporate governance did not fail, based on a study of a sample of companies at 'ground zero' of the stock market meltdown, namely the 37 firms removed from the iconic S&P 500 index during 2008.

90. Based on the research report by A.G.Z. Kemna and E.L.H.M. van de Loo, 'Role of institutional investors in relation to management boards and supervisory directors: a triangular survey', commissioned by Eumedion, October 2009, at: www.eumedion.nl/page/downloads/Onderzoeksrapport_DEF_III.pdf, accessed on 2 April 2010.
91. Eumedion *supra* note 85, p. 3.

exercises his voting rights during shareholders' meetings and/or engages in a dialogue with the company.[92]

3.5.5 Freshfields Report, Eumedion Position Paper and Frijns Code

Concluding, the Freshfields Report indicates that it is not only permissible for institutional investors to consider ESG factors, but that their fiduciary duty requires that these factors be considered. The same line was followed in Fiduciary II and is now followed by Eumedion, which promotes training of institutional investors and their asset managers in order that they will be able to integrate ESG factors into the investment process. Consequently, according to the author, the Burgmans Report pointed in the right direction by advising to include in the Frijns Code that institutional investors 'decide, in a careful and transparent way, whether they wish to exercise their rights as shareholder of listed companies *and whether and to which extent they take into account ESG-factors' [Emphasis added]*. It is regrettable that the Frijns Code did not include this phrase. However, we may perhaps anticipate – as announced by Eumedion – a new Dutch code for institutional investors covering such issue.

3.6 Developments in legislation and practice

3.6.1 Commentaries to the Frijns Code and subsequent developments

Regarding the inclusion of CSR as a subject in the Frijns Code, various developments are interesting to record.

The first one is positive: various leading Dutch companies have set up a CSR committee.[93] This shows an increasing awareness of the importance of the role of CSR. Even more so, it demonstrates that these companies consider CSR a strategic issue.

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92. *Idem.*
93. Burgmans Report, p. 41. Furthermore, *e.g.* Shell's supervisory board has a CSR Committee chaired by former Dutch prime-minister Mr Wim Kok; www.shell.com/home/content/aboutshell/who_we_are/leadership/the_board/ board_of_directors_09112006.html; Rabo bank has a Young Rabo CSR Committee comprising employees of all levels of the organisation; www.jongrabo.nl/index.php?option=com_content&view=article&id=134:spetterende-aftrap-mvo-commissie&catid=22:verslagen&Itemid=43; Heineken has installed a 'CSR Advisory Board'. The most important task is to define the main areas of focus for the corporate responsibility agenda and to develop interventions that will lead to improved company performance in these areas. Measuring, benchmarking and stakeholder dialogue all help the CSR Advisory Board to determine their priorities; www.heinekeninternational.com/VISION.aspx, all sites accessed on 30 March 2010.

The second development is disappointing. Not only is the lack of a CSR definition reiterated as a manifest problem, but supervisory board members interviewed indicated their concern that the new CSR provisions may only be a 'tick-the-box' exercise.[94] Furthermore, informal consultations with Dutch listed companies indicated that corporate secretaries of boards often have a legalistic approach. They seem unsure about the content and extent of the new CSR provisions and wonder whether they pertain to strategic decisions only or also to decisions at the operational level that relate to CSR.

The third development is an interesting one. In section 3.3, it was explained that Frijns Code provision II.1.2 requires the management board to report on the main elements of the company's CSR strategy in the annual report. The Dutch MP Kalma thought the meaning of this provision unclear. He pondered that it could be understood as referring to the obligation included in article 2:391(1) DCC, accounting Guideline 400 or the GRI G3. Since the Monitoring Committee does not elaborate on this, Kalma has put questions to the Dutch Cabinet. The answers did not clarify the point.[95] Consequently, he decided to prepare an initiative bill on this. The Bill proposes to amend article 2:391(1) DCC so that the text thereof aligns with the Frijns Code, *i.e.* to require Dutch companies to give an account in their annual reports on CSR aspects important for the enterprise: 'report or explain'.[96] Small and medium-sized companies will be exempted from this obligation. It would however apply to all large companies including non-listed companies. In addition thereto, inspired by Swedish and Danish legislation, the author has suggested to propose a Decree as meant in article 2:391(5) DCC to designate the GRI G3 guidelines as a code of conduct with which large companies have to comply in their annual reporting or in a separate sustainability report. They should be allowed to deviate, subject to an explanation as to why and to which extent they deviate. Kalma has subsequently mentioned this option, although so far the Cabinet has responded negatively to the suggestion.[97]

Another development that will be mentioned here is not a new one that relates to the Frijns Code, but affirms the decision of the Frijns Committee to consider CSR as a principle of corporate governance. Since a few years there have been shareholders of listed companies who have called for a more

94. R. Havelaar, '*Commissarissen; zie toe en daag uit. Evaluatieonderzoek naar invoegen Maatschappelijk Verantwoord Ondernemen in Code Corporate Governance. Rol van commissarissen: toezichthouders, adviseurs en aanjagers voor MVO bij beursgenoteerde bedrijven*' [Research on the role of supervisory board members regarding CSR], at: http://www.triple-value.com/upload/docs/Zie_toe_en_daag_uit_SAMENVATTING_MASTER_THESIS.pdf, accessed on 30 March 2010.

95. Parliamentary Documents II, 2009/10, 31 083 (32)8, (35)6, (83)5 and (88)8 regarding 'Corporate governance, hedge funds and private equity'.

96. In February 2010, the Dutch Cabinet has fallen. New elections will be held on June 2010. It is unclear what will happen to the legislative proposals of MPs.

97. Reference is made to note 95.

sustainable board strategy. *Vide e.g.* the resolution of Shell shareholders submitted for the general meeting 2006.[98] They indicated that they had concerns about three projects: Corrib Gas in Ireland, Bayelsa State in the Niger Delta and Sakhalin in Russia. In the resolution they requested that 'in the interests of the good reputation of the Company, and the avoidance of costly delay to, or interruption of, production', the directors undertake greater action on environmental sustainability in order to ensure the peace, safety, environment and prosperity of local communities directly affected by the company's operations. The resolution also called upon the directors to report to the shareholders by the 2007 general meeting how the company has implemented the measures. At that time, the Shell directors issued a recommendation to the general meeting to reject the resolution arguing that it was not necessary to adopt the resolution as the Shell board already acted responsibly. The resolution was defeated with 83 per cent voting against it and 6 per cent for it. A percentage of 11 abstained from voting. The value of the shares that day that did not follow the board recommendation was over £10 billion.[99]

In 2010, another resolution was presented by the organisation FairPensions (London) requiring Shell to perform further research as to how the intended oil exploration of the tar (oil) sands in Canada can be performed in a sustainable way. Eleven per cent of the shareholders voted for the resolution or abstained.[100] The Dutch pension asset manager APG has indicated that it considers to withhold its votes or to vote for the resolution, depending on whether the critical questions that it submitted to Shell will be answered satisfactorily by Shell.[101] This resolution is scheduled for Shell's general meeting in May 2010. A similar resolution has been proposed for the BP general meeting in April 2010. A number of institutional investors have communicated the intention to vote for these shareholder resolutions.[102] From a responsible corporate governance perspective,

98. The Ecumenical Council for Corporate Responsibility (ECCR), supported by the World Council of Churches and 130 other shareholders, proposed this resolution, at: www.eccr.org.uk/dcs/ShellShareholderResolution.pdf, accessed on 2 April 2010.
99. See: www.eccr.org.uk/dcs/CoracleShellHague_Aug06.pdf, accessed on 2 July 2010.
100. 'What FairPensions is doing about tar sands', at: http://fairpensions.org.uk/tarsands, accessed on 2 August 2010. 'ECCR to support BP and Shell shareholder resolution on tar sands', News ECCR 2010, available at www.eccr.org.uk/News-article-sid-179.html, accessed on 2 April 2010; and ECCR newsletter June 2010, available at www.eccr.org.uk/dcs/ECCRNewsletter_June10.pdf, accessed on 15 June 2010.
101. 'Kritiek APG op Shell Canada. Pensioenbelegger eist duurzame oplossing voor omstreden oliewinning uit teerzanden' [Critical comments APG on Shell Canada. Pension fund asset manager demands sustainable solution for disputed oil operations concerning tar sands], in *Het Financieele Dagblad*, 19 January 2010.
102. Behind the resolutions is a coalition of major investors, NGOs and trade unions, including Co-operative Asset Management, CCLA, Rathbone Greenbank, FairPensions, ECCR, WWF, Greenpeace, Platform and Unison. Available at: www.eccr.org.uk/News-article-sid-179.html, accessed on 2 April 2010.

reflecting in hindsight on the BP disaster in the Gulf of Mexico and the fact that BP had successfully lobbied with the US Minerals Management Services for an exemption from performing a detailed environmental impact analysis, those shareholder resolutions seem to have been on the spot.[103]

3.6.2 New revisions of the Dutch Company Code impacting corporate governance

In December 2009, the Dutch Lower House adopted various important proposals to amend corporate law.[104] The Bills have been submitted to the Upper House and are expected to be adopted in the course of 2010. The subjects concerned the restoration of the balance of power in companies limited by shares, improving the integrity of legal entities, modernisation and creating flexibility in the structure of Dutch companies and the introduction of a works council's right to present a position in the general meeting of shareholders with regard to certain resolutions.

One Bill introduces the permissibility of a 'one-tier board', *i.e.* one corporate body that includes executive directors and non-executive directors.[105] Many Anglo-American legal systems allow this model. To a certain extent the role of the non-executive director will be comparable to the role of supervisory directors in the Dutch two-tier system, although it will exceed the duty of supervision and advising, *i.e.* responsibilities will also encompass directors' responsibility. In a one-tier board, key board resolutions[106] of a large 'structure' company will have to be approved by the majority of the non-executive directors. Conflict of interest situations, including in the event of a merger, acquisition or public offer, are addressed. The Bill also prescribes a limitation of the number of board positions that can be held by one person, which aligns with provision III.3.4 of the Frijns Code. Furthermore, as announced in section 3.4 *supra*, the Bill determines that the division of seats between men and women within the company must be balanced.[107] This provision will be applicable to all large privately and publicly held Dutch companies (BVs and NVs), both in a one-tier system and in a two-tier system.

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103. 'U.S. exempted BP's Gulf of Mexico drilling from environmental impact study', in *Washington Post*, 5 May 2010, at: www.washingtonpost.com/wp-dyn/content/article/2010/05/04/AR2010050404118.html, accessed on 15 June 2010.
104. Legislative proposals of 8, 10 and 15 December 2009. The revision originates from the 2004 Memorandum of Amendments on the modernisation of the corporate law proposed by Minister Donner, the then Minister of Justice. Parliamentary Documents II, 2003/04, 29 752 (2).
105. Parliamentary Documents II, 2008/09, 31 763.
106. Within the meaning of Articles 2:164/274 DCC.
107. See note 105.

Another Bill provides for a change in the provisions regarding the convening and registration of shareholders' meetings, thereby implementing the European Directive concerning the exercising of certain rights of shareholders in listed companies.[108] This Directive is aimed at strengthening the cross-border exercise of shareholders' rights in listed companies including voting and proxy voting. A request made by shareholders to the management board of a publicly held Dutch company (NV) to place an item on the agenda (see *supra* section 3.2) may no longer be refused based on the argument that weighty interests of the company dictate otherwise.[109] The request, however, must be substantiated. In addition, the item to be put on the agenda can be tested against the article 2:8 DCC standard of 'reasonableness and fairness'. This matches the Frijns Code's approach as set out above in section 3.5.

Worthy of note is the Bill that introduces certain new rights for the works councils of Dutch public limited companies.[110] The Bill stipulates that a works council can express its opinion about (i) key board resolutions as referred to in article 2:107a DCC submitted for shareholder approval, (ii) resolutions to appoint, suspend and dismiss managing directors and supervisory directors, and (iii) the remuneration policy, *i.e.* concerning management salaries and bonuses. The Bill also entails the right for the works council to communicate its view regarding any proposal for the appointment of supervisory board members.[111] This applies to works councils of holding companies and of subsidiary companies (provided that the majority of the employees of the company and the group companies work within the Netherlands). The new rights are in addition to the works council's advisory rights pursuant to articles 25 and 30 Dutch Works Council Act and are meant to reinforce codetermination at such a time that the works council's view can play a role in the decision-making process in the general meeting. If the works council does not express a view or if the works council is not granted the right to speak in the general meeting, the validity of any shareholder resolution adopted will not be affected and neither do any sanctions apply.

108. Parliamentary Documents II, 2008/09, 31 746.
109. Reference is made to note 26 concerning two other relevant legislative proposals not yet been adopted.
110. Parliamentary Documents II, 2008/09, 31 877.
111. Article 2:158(4) DCC.

3.7 Overview of the 2010 Dutch status quo on corporate governance and CSR

Resuming, the previous sections elaborated on the current Dutch corporate governance and CSR situation. A compact overview is presented in Box 3.1.

Box 3.1 Dutch corporate governance and CSR

CSR policies

1. The Frijns Code acknowledges CSR as belonging to the core corporate strategy. It indicates that the management board is expected to formulate a CSR policy and to submit their CSR policy to the supervisory board for approval.
2. The Frijns Code explicitly records that the supervisory board's responsibilities include the supervision and approval of the management's CSR policy.
3. Both the DCC and the Frijns Code prescribe that the main elements of the company's CSR strategy are to be included in the annual report, thereby informing the shareholders but also other stakeholders. It is however unclear to which reporting standard the Frijns Code refers.
4. An initiative bill is currently under preparation requiring large companies to include full information on their CSR policies and conduct in their annual report ('report or explain'). Furthermore, a proposal is considered to designate the GRI G3 reporting guidelines as a code of conduct for large companies ('comply or explain'). Both initiatives aim to make information published by companies on CSR more complete, uniform and comparable, thereby enhancing the usefulness of ESG information for outside stakeholders including banks and institutional investors.

Gender as an issue in the board's composition

5. The Frijns Code prescribes that the supervisory board's composition should be well balanced, also from a gender perspective. In a more indirect way, also the composition of the management board is considered a concern of the supervisory board.
6. A Bill has been adopted in the Lower House requiring that the composition of the management board and the supervisory board of large companies (> 250 employees) reflects a gender balance, *i.e.* comprising at least 30 per cent females and 30 per cent males.

7. The works council can exert an influence on the board's composition because it will have a right to communicate its position in the general meeting regarding the appointment of directors; it already has a right to propose candidates in certain large companies (article 2:158/268 concerning 'structure' companies); and it is entitled to advise on proposals for new managing directors (article 30 DWCA).

Disputes

8. The Frijns Code states that the supervisory board has the duty to maintain relations between the company and its stakeholders such as the shareholders, the works council and others.
9. According to the Frijns Code and the DCC, the supervisory board shall be guided by the interests of the company and the enterprise, and shall take into account the relevant interests of the company's stakeholders. It might be assumed that interests refer to long-term interests. In the case of conflicts, the supervisory board must weigh the interests of the different stakeholders against each other.
10. A new Bill dictates that a request made by shareholders to place an item on the agenda must be substantiated, and may no longer be refused by the management board because of 'important company interests'. Disputes need to be solved using the standard of 'reasonableness and fairness', which guidance is already provided for in article 2:8 DCC. The same standard was suggested in the Frijns Code for solving disputes with shareholders.

New shareholders' rights and duties

11. A new Bill will improve the cross-border exercise of shareholders' rights in listed companies including voting and proxy voting.
12. The Frijns Code stipulates that the fact that shareholders are bound by the principle of reasonableness and fairness includes the willingness to enter into a dialogue with the company and fellow shareholders.
13. Transparency will be increased concerning the voting policies of institutional investors as the Frijns Code stipulates that – as an obligation to their beneficiaries, and to the listed companies in which they invest – institutional investors must decide in a careful and transparent manner whether they wish to exercise their voting rights, and if so, how they have voted.
14. Despite the Freshfields Report and its sequel, Fiduciary II, the Frijns Code did not follow the suggestion of the Burgmans Report to require institutional investors to be transparent as to whether and to which extent they take ESG factors into account. Eumedion, the Dutch

corporate governance forum, recommends institutional investors to integrate ESG factors into the investment process, and explores whether a Dutch code for institutional investors should be drafted.

Works councils' rights

15. Pursuant to a new Bill which introduces new rights for works councils, they will be involved in the decision-making process in the general meeting. The works council will be able to share its opinion and to speak at the general meeting on (i) key board resolutions that need shareholder approval as referred to in article 2:107a DCC, (ii) resolutions to appoint, suspend and dismiss managing directors and supervisory directors, and (iii) the directors' remuneration policy.
16. The works councils in certain large companies were already entitled to propose supervisory board candidates (article 2:158/268 DCC concerning 'structure' companies).
17. For a long time, the works council has had the right to advise on strategic decisions as listed in article 25 DWCA, and on proposals for director appointments pursuant to articles 30 DWCA.


CFO
CEO
CSR

3.8 Overall analysis and concluding remarks

As set out in section 3.1, much progress has been made during the last decade in improving CSR. Nonetheless, it remains a challenge for boards to employ strategies with a long-term focus on sustainability. New types of shareholders, such as hedge funds and private equity parties have attempted to influence corporate strategy. Their acts sometimes caused conflicts with boards on corporate strategy. These conflicts as well as the financial crisis sparked the debate about short-termism.[112] To avoid new crises, the author contends that we need a true reorientation of our economy and business methods towards a model that encourages a value increase in three dimensions: People, Planet and Profit, *i.e.* a fusion of interests. The supporting corporate governance model can enhance this by (i) requiring company boards to define ambitions and standards to be met, (ii) creating transparency of business activities, and in (investment) decision-making, (iii) stimulating accountability for corporate conduct and offering remedy measures, and (iv) allowing stakeholders to participate in the decision-making process. The inclusion of CSR as a subject of corporate governance in the Frijns Code, is a positive step in this direction. It encourages companies to explicitly consider CSR matters and to make them part of (long term) core-business concerns.

As regards setting ambitions and standards, section 3.4 explained that the Frijns Code requires of directors – in general wording – that they 'manage CSR issues that are relevant to the enterprise' and that they submit the same for supervisory board approval (Principle II.1 and provision II.1.2). The code of conduct that the directors have to publish on the company's website is however only regarded as an internal risk management instrument (provision II.1.3(b)). The Frijns Code could be improved by requiring directors to set plain standards for CSR performance in a code of conduct (or by referencing an existing international code of conduct), and by defining clear ambitions as part of the CSR strategy. Best practices include communicating them on websites and in annual reports, and to report on the progress. Today, the question is no longer whether a company wishes to become a responsible company, but rather how it can be one.

A long-term perspective needs to be the focal point in order to recover trust in the markets. In section 3.5 it has been argued that transparency is crucial in this respect, not only on corporate governance aspects (G), but also on Planet (Environmental=E) and People (Social=S) aspects, *i.e.* together, on the ESG factors. Transparency will contribute to making business methods and activities visible, as well as any hidden and externalised consequences of economic

112. See *e.g.* Eumedion Position Paper *supra* note 85, p. 1; OECD Report *supra* note 89; R.A.M. Pruijm RA, '*Evenwichtig Ondernemingsbestuur: een wensdroom?*', Introductory lecture Hogeschool Fontys Financieel Management, 2008, pp. 53-58.

activities. The information can be used by corporate directors, policy makers, consumers, and investors when taking decisions while conscious of all their effects and impact.

Regarding the transparency of business activities, section 3.4 described that the Frijns Code requires that boards mention the main elements of the company's CSR strategy in the annual report (provision II.1.2). Although said provision is in line with Dutch corporate legislation (article 2:391 DCC), Dutch accounting guidelines (Guideline 400), and the international developments concerning the GRI G3 sustainability reporting guidelines, the Frijns Code does not refer to any of these. As was noted in section 3.6, Dutch MP Kalma had expressed the opinion that provision II.1.2 is therefore unclear. Whereas many internationally operating companies already follow the GRI G3 reporting guidelines and/or Guideline 400, the provision does not even affirm best practices. It could be improved by explicitly referencing them. In section 3.6, the author contends that the same result could be achieved if these guidelines were to be designated as a code of conduct within the meaning of article 2:391 (5) DCC with which a company has to comply or explain. Moreover, in order to generate reliable and comparable information about business activities, it would be recommendable to recommend verification and validation by independent auditors. This aspect has not been covered by the Frijns Code.

This brings us to the second dimension,transparency: transparency in investment decision-making. As has been demonstrated in section 3.5, there is room for improvement. Institutional investors could consider ESG factors in a more systematic way, and be more transparent about their considerations and choices. Also, CSR would be supported if investors were to show a stronger loyalty and engage more actively in ESG issues with the companies in which they invest. The author expressed regret about the Monitoring Committee's decision not to include a duty on institutional investors to disclose 'whether and to which extent they take into account ESG factors' in the Frijns Code. The Monitoring Committee rejected the recommendation of the Burgmans Committee to include this in Principle IV.1. In section 3.5, the author referred to the internationally accepted Freshfields Report on the fiduciary duties of institutional investors, which report confirmed that such investors may and sometimes should take ESG factors into account in their decision-making process. The sequel to this Report came out in 2009 and provides a legal roadmap for concrete steps to operationalise responsible investment. The author also discussed the Eumedion position paper. Its view concurs with the Burgmans recommendation. The position of Eumedion includes the view that greater responsibility is expected from institutional investors, in particular that ESG factors are to be integrated into the investment process, and that engaged shareholdership is to be encouraged.

In respect of the question whether the Frijns Code assists in stimulating accountability for corporate conduct and offering remedy measures, the general

idea is that making CSR part of corporate governance will enhance accountability. However, corporate governance can further develop in this respect. As suggested above, the formulation of clear standards and ambitions would definitively improve accountability. As regards offering remedy measures, the Frijns Code does not address how to deal with stakeholder conflicts related to CSR issues. The author opined in section 3.4 that it would have been positive if the Frijns Code had included language on how to resolve CSR conflicts with external stakeholders.

The last subject considered in the light of CSR concerns the question whether the Dutch corporate governance model facilitates and encourages stakeholders to participate in the decision-making process. In the view of the author, a stakeholder dialogue is a first step in the CSR process, and stakeholder participation constitutes the next step. Corporate strategy is set by a few people at the top of a company. In order to implement CSR strategies, what is needed is people from the floor to advise about filling in the main structures and making it work in practice. Existing expertise available in the company as well as fresh ideas can be very valuable to make CSR operational.[113] It is also imperative that as part of the stakeholder participation, the company liaises with external stakeholders. They can contribute to the discussion the perspective of people elsewhere who may be affected by the company's activities and the public interest (Planet).[114] The Netherlands and other European countries introduced a legal system of codetermination in order to have the workers' interests respected long ago. In some jurisdictions, such as France and the UK, unions play a stronger role in codetermination. The Frijns Code explicitly maintains that the directors take into consideration the concerns of stakeholders, and that they engage in dialogue with stakeholders; section 3.4 discussed this (Principles II.1 and III.1, provisions III.I.1, III.4.1(g) and III.1.9). In section 3.6 it has been explained that pursuant to a Bill, the Dutch works councils will acquire some rights to express their opinion in the general meeting. However, the author feels that boards can make more effective use of co-determination systems for the carrying out of CSR policies. On the other hand, works councils themselves can

113. See *e.g.*, Guaranteeing the influence of "human capital", at: www.boeckler-boxen.de/2607.htm, visited on 6 July 2010.

114. The 2004 OECD Principles of Corporate Governance include a part IV on 'The Role of Stakeholders in Corporate Governance' and make specific reference to the 'rights of stakeholders', p. 21. See under IV.A.: 'The rights of stakeholders that are established by law or through mutual agreements are to be respected'.

also claim a more active role in the CSR debate.[115] However, as regards the participation of external stakeholders in the decision-making process, it seems that the authors of the Frijns Code had not intended to further institutionalise this. The author considers this a next step in the development of corporate governance based on CSR. The participation of stakeholders is necessary in order to create legitimacy of business decisions. This becomes even more important in the case of MNCs due to their impact on society. Introducing stakeholder participation could for example take place by inviting external stakeholders to the decision-making process, either as experts or as co-decision-maker, *e.g.* by making them part of a supervisory board or a works council committee, or by establishing a special CSR committee. Section 3.6 mentioned some examples of best practices in this respect. Propositions to this end were also recorded by the Burgmans Committee (see section 3.3).

Board composition has to do with expertise but can also link up with stakeholder participation. Shareholders and works councils have a say in the appointment of directors in Dutch companies. Interestingly, the Frijns Code pays attention to gender and diversity considerations concerning the composition of the supervisory board. Equal gender representation of boards is also part of a new Bill (at least 30 per cent female and 30 per cent male). The Frijns Code could have followed this line, which would be in accordance with international legislative developments. Furthermore, the Frijns Code could have been more explicit in its wish that the gender component of the composition of the board of directors also requires attention (see the discussion in section 3.4).

Concluding, making CSR part of the Dutch corporate governance code is an interesting step. It will assist boards to guide the company towards sustainable business with a long-term view. However, there is room for improvement of the Frijns Code. Corporate governance will undoubtedly develop further as a tool that supports CSR.

115. Professor L. Sprengers of Leiden University, '*De toekomst van de medezeggenschap. Aanbevelingen aan de wetgever*' [The future of employee participation. Recommendations to the legislator], (Kluwer: Deventer 2009). It argued that the drawbacks of shareholder activism pursuing short-term financial returns while disregarding the interests of the other stakeholders call for a reinforcement of the position of the works council by granting it the right of investigation, *i.e.* the right to start an enquiry procedure (*enquête*; Articles 2:344-359 DCC). Enquiry proceedings are aimed at halting mismanagement or an adrift situation. The petitioner requests an investigation of the company's affairs and, in addition, can request preliminary provisions to restore the balance. The same proposal was suggested to the Dutch legislator in 2009 by the Association of Labour Law Practitioners (*Vereniging voor Arbeidsrecht*). They argue that although unions can exercise the enquiry right, unions currently seldom represent employees at company level, hence there is no strong incentive for them to start litigation.

Chapter 4. Annual report can provide transparency on corporate social responsibility

Information on environmental and employee matters of large European Union based companies' worldwide activities must now be included in their annual reports[1]

4.1 Introduction

Annual reports are becoming more voluminous every year. In this chapter the author will address the reasons for this and in doing so will focus on new legislation for annual reports of large companies based in EU Member States as a result of the Modernisation Directive (2003/51/EC). This Directive prescribes that large companies annually report on non-financial key performance indicators, among others environmental and employee matters relating to their worldwide business activities. Annual report in this context refers to the directors' report, which together with the balance sheet and the profit and loss account constitute the annual accounts. By 2008, the Modernisation Directive's new reporting obligations had been implemented in almost all EU Member States.

In this chapter, the text of the Modernisation Directive will be examined to the extent that it concerns annual reporting and the history thereof. An overview of the status and manner of implementation of the Modernisation Directive in the EU Member States will be presented and the measures that the Commission can take in order to speed up its implementation will be briefly discussed. Subsequently, the focus will be on the Netherlands, thereby discussing other non-financial reporting requirements and relevant legal consequences of implementation of the Modernisation Directive. Finally, for illustrative purposes, a quick scan of the annual reports over 2006 of twenty-five large Dutch companies has been included with a view to demonstrating application of the new rule in practice.

1. This chapter was published as an article in T.E. Lambooy and N. van Vliet, 'Transparency on Corporate Social Responsibility in Annual Reports', in *European Company Law*, Vol. 5, 2008 (3), pp. 127-135. The research for this article ended on 1 March 2008.

4.2 The Modernisation Directive

4.2.1 The Accounting Directives

The Modernisation Directive on the annual and consolidated accounts of certain types of companies, banks and other financial institutions, and insurance companies came into force on 18 June 2003. It aims to harmonise and modernise the national accounting laws and, by doing so, to create IAS.[2] Previously, the European legislator issued Directive 78/660/EEC on the annual accounts of companies (the Fourth Directive) and Directive 83/349/EEC on consolidated accounts (the Seventh Directive).[3] The Modernisation Directive replaces certain articles of these accounting directives with a view to filling in a number of blanks and improving them.[4]

4.2.2 New annual reports standards

Discussion of the Modernisation Directive is limited to the changes that relate to the content of the annual report. Articles 1.14 and 2.10 provide the new minimum standards. The former applies to the single company report. the latter to the annual report that forms part of consolidated accounts. The text of these articles is virtually identical. Whenever article 1.14 is referred to this should also be read as a reference to article 2.10.

Article 1.14 prescribes that the annual report should provide a fair review of the development and performance of the company's business and of its position, together with a description of the principal risks and uncertainties it faces. To achieve this, an analysis should be made of the development and performance of the company, including both financial and, where appropriate, non-financial key performance indicators relevant to the particular business. The non-financial key performance indicators referred to are, amongst others, environmental and employee matters

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2. Directive 2003/51/EC of the European Parliament and of the Council of 18 June 2003 amending Directives 78/660/EEC, 83/349/EEC, 86/635/EEC and 91/674/EEC on the annual and consolidated accounts of certain types of companies, banks and other financial institutions and insurance undertakings. Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003L0051:EN:NOT. See §§ 5, 9, 11, 14 and 15 and Preamble, Modernisation Directive.
3. Directive 86/635/EEC on the annual and consolidated accounts of banks and other financial institutions (Directive Four A) and Directive 91/674/EEC on the annual and consolidated accounts of insurance companies (Directive Four B) were also amended by the Modernisation Directive. W.J. Slagter, '*Ondernemingsrecht*' (Kluwer: Deventer 2005), p. 472, §§ 112.3-16.
4. Accordingly, Article 1.14 replaces Article 46, § 1, of the Fourth Directive, Article 2.10 replaces Article 36 of the Seventh Directive, Article 3.1 replaces article 1, §§ 1 and 2, of Directive Four A and Article 4.1 replaces Article 1, §§ 1 and 2, of Directive Four B.

These indicators should be included in the analysis to the extent necessary for an understanding of the company's development, performance or position. Moreover, the analysis should be balanced and comprehensive and consistent with the size and complexity of the company's business. In providing this analysis, the annual report shall, where appropriate, include references to and additional explanations of amounts reported in the annual accounts.

4.2.3 Information on worldwide activities

Since annual accounts and annual reports reflect the developments of a company and its branches worldwide, the environmental and employee matters to be dealt with in the annual report, also relate to the company's activities abroad. This is even clearer in the case of a consolidated annual report. Article 2.10 of the Modernisation Directive specifies that the consolidated annual report should provide information on all companies the results of which are included in the consolidated annual accounts.

This is in line with the developments in the field of CSR (Planet, People, Profit), which promotes that a company is transparent on the environmental and employee aspects of its activities, worldwide. This is what consumers want, what banks increasingly require when considering providing a loan and what pension funds and other capital market players are increasingly demanding before deciding on investments.[5]

4.2.4 Environmental matters

Neither the text of article 1.14 nor the text of any other articles of the Modernisation Directive give an explanation of what precisely should be included in the annual report in respect of 'environmental and employee matters'. These terms are very general in nature and it would have helped if they had been clarified and made more concrete in the Directive itself. However, the Preamble to the Modernisation Directive does refer to

5. See: the Equator Principles, adopted by many large banks (http://www.equator-principles.com) and the Principles for Responsible Investment, signed by many of the world's largest pension funds (www.unpri.org). See also M. Jeucken, *Sustainability in Finance. A Retroductive Exploration* (Eburon Academic Publishers: Delft 2004), and C. de Groot, 'Can Corporate Governance Contribute to Sustainable Development?', pp. 195-214 and T.E. Lambooy, 'Sustainability Reporting by Companies is Necessary for Sustainable Globalisation', pp. 215-237, both in E. Nieuwenhuys (ed.), *Neo-Liberal Globalism and Social Sustainable Globalisation* (Brill: Leiden/Boston 2006). Furthermore, R. Mullerat, '*Corporate Social Responsibility. The Corporate Governance of the 21st Century*', International Bar Association, (The Hague: Kluwer Law 2005). Also interesting: M. Vander Stichele, *Critical Issues in the Financial Industry. SOMO Financial Sector Report* (Stichting Onderzoek Multinationale Ondernemingen: Amsterdam 2005).

Commission Recommendation 2001/453/EC[6] which contains examples of environmental issues that should be reported on, such as: the company's policy and programmes in respect of pollution prevention, avoidance of damage to flora and fauna, information on the use of energy and improvements that have been made in, for instance, the use of materials and waste disposal.[7] An obligation to inform on the quantities of materials used, water and waste and on reductions thereof, implies that the non-financial information that is to be provided exceeds legal compliance issues. This type of information alludes to the question whether the company operates in a sustainable way, respecting and taking into account the P of Planet. Consequently, the new reporting obligation refers to the way in which a company demonstrates corporate social behaviour and thus whether or not the company follows best practices in its decision making processes.

4.2.5 Employee matters

On 'employee matters', neither the Modernisation Directive nor the Preamble thereto provides any form of clarification. However, certain EP resolutions that preceded the Directive and influenced the text of article 1.14 have been examined.[8] The EP argued that European companies should avoid the use of double standards: that is, applying stricter health and safety norms in production facilities in Europe than in production units 'abroad', such as in developing countries that may not have such strict legislation as the EU, or that may have strict legislation that is not enforced. Increasing globalisation and withdrawal of foreign investment restrictions facilitate outsourcing and in-sourcing business models which in turn bear a risk of misuse of local legal and factual circumstances. This is why the EP, the Commission and the Council promote the development of CSR.[9] The EP resolved that CSR requires that companies generate information on their conduct abroad and thus create transparency on their business practices worldwide. Information on the effects of corporate activities on the local and worldwide environment should be made available.

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6. § 9 of Preamble Modernisation Directive refers to Commission Recommendation of 30 May 2001 on the recognition, measurement and disclosure of environmental issues in the annual accounts and annual reports of companies. See also the following documents on EU environmental policy: COM(92) 23 of 18 March 1992, PbEG C154E, p. 218; Resolution Council, § 7.4, PbEG C138, revised by Decision 2179/98/EG, PbEG L1-13; COM(2001) 31 def. of 24 January 2001; Resolution EP and Council 1600/2002/EG, PbEG L242, §§ 3.4-3.7.
7. Commission Recommendation, Annex under 2 and 4.2.
8. PE A5-0133/2003 def. proposal of 24 April 2003, p. 11 sub 27, pp. 17, 20, 25. See also 2003/71/EG (Prospectus Directive), Articles 7.3, 10.1; Resolution of 13 May 2003 C067 17-MAR-04 028(E). Report Parliament of 4 December 2002 on the proposal of the Commission for the Modernisation Directive, PE A5-0432/2002. Resolution of 30 May 2002, EP P5_TA-0278/2002, C187 07-AUG-03 035 180(E), p. 5, sub 6.
9. See: http://ec.europa.eu/enterprise/csr/policy.htm, accessed on 1 April 2008.

The same applies to companies' behaviour as regards local labour standards and compliance with human rights, for instance freedom of speech and freedom of association. Viewed in this light, the words 'employee matters', as used in article 1.14, should be interpreted broadly. They may refer to issues of health and safety, human rights, schooling, education and career perspective, maybe also fair payment, all related to employees of the company and its subsidiaries and branch offices. This implies that the annual report information should not only provide information on compliance with local legislation, but also on the way the company follows best practices in its worldwide operations in respect of the P of People. This may well exceed legal requirements.

4.2.6 Information on suppliers?

It is often argued that European based companies are to provide information on the environmental and employee aspects of the business activities of their *suppliers*. For instance, in the Netherlands, parliament has resolved that the government should examine the question of whether a Dutch law on chain responsibility is necessary and could be useful with an aim to increasing the availability of information on the suppliers of Dutch companies.[10] A civil society initiative initiated the discussion on the question whether a consumer should have a right to information as regards the CSR-aspects of a product. The Labour Party is preparing a draft bill on 'chain transparency.'[11]

4.2.7 Guidelines for interpretation

It is assumed that Commission Recommendation 2002/453/EC and the EP Resolutions can be used as a guideline for national governments that incorporate the Modernisation Directive in national law, for companies that follow this new reporting rule and for the European Court of Justice (ECJ) which may have to interpret this.

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10. Dutch Parliament Resolution of 19 April 2007 and subsequent request from the Dutch government of 26 April 2008 to the Social Economic Council (*Sociaal Economische Raad*; SER), to advise about the usefulness and necessity of legislation on supply chain responsibility, due by the end of March 2008. However by 1 April 2008, no advice was available as yet; www.ser.nl.
11. See chapter 8 (To know or not to know), section 8.6.1. See for the civil society initiative: *Wet Openbaarheid Ketens* [Act on the Transparency of Product Chains], at: http://www.ketens-netwerken.nl/resources/uploads/files/documenten/WetOpenbaarheidvanproductieenKetens.pdf, accessed on 25 July 2010.

4.2.8 Exemptions

Article 1.14, paragraph b, allows Member States to exempt companies covered by article 27 of the Fourth Directive[12] from the requirement to include information on non-financial indicators in their annual reports. This exemption concerns small and medium-sized companies for which the new obligation could prove to be too burdensome.

4.3 Implementation in national legislation

4.3.1 Implementation date

The Modernisation Directive dictates that annual reports over the book year 2005 should follow the new instructions and that the implementation date is 1 January 2005 at the latest.[13] In accordance with article 249 of the EC Treaty (since 1 December 2009, pursuant to the Lissabon Treaty, this article has become article 288 EC Treaty), Member States can incorporate a directive by creating new legislation or by amending existing legislation.

4.3.2 Implementation by Member States

It has been examined to what extent the Member States have implemented article 1.14 and in which national legislation this new annual reporting requirement has been incorporated. The closing date of this research project was 29 February 2008.[14]

It was found that most Member States have implemented article 1.14 either literally or in other words but with the same meaning (see the overview with results in Annex 4.1 *in fine*). Consequently, large companies registered in the EU, have to comply with the new requirement to furnish information on non-financial matters, such as environmental and employee matters. This counts when these matters are important for the company's development, performance and position, which will in many situations be the case.

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12. Companies not exceeding two of the following criteria: a balance sheet total of 17,5 million euro, a net turnover of 35 million euro and an average of 250 personnel during the book year (figures as amended *per* Directive 2006/46/EC of 14 June 2006).
13. Article 5, Modernisation Directive.
14. The Commission does not possess complete information on the question which Member States have implemented the Modernisation Directive and in which way they have done so. Moreover, Member States may provide this information in their national language. This made research on this topic quite complex. Thanks to a number of EU lawyers most of the information available was unravelled.

This legal achievement of the EU symbolises the importance placed upon CSR. The new legal transparency requirement will be even more effective since the environmental and employee matters regard the company's worldwide operations. Providing information on such non-financial aspects will create consciousness within the company and with its employees. Moreover, research shows that annual CSR reporting stimulates a company to improve its environmental programme. Since all relevant facts are quantified and visible in a report, they imply an invitation to the company to do (even) better next year so that the company can present an improvement. For instance: 'this year we produced less waste than last year, we used less water and less energy for the same production outcome, we have made our production processes run in a more efficient way.' As regards reporting on employee matters, this seems to work in the same way: when a company reports this year that a certain number of accidents occurred, it will certainly strive for a lower number in next year's report. Another aspect is that when a company, for example, reports that it has attracted a medical doctor on the premises for its employees, this will create goodwill. That means that it will be easier to find new employees, customers will like the company better and it will also reduce illness of employees and thus increase productivity.

Among all twenty-seven EU countries, only Bulgaria and Romania have indicated that they are delayed in the implementation of the Modernisation Directive. As regards Cyprus, Ireland and Sweden, it was not possible to determine with a reliable degree of certainty whether and, if so, in which way article 1.14 had been integrated in national law. In respect of the countries that did incorporate article 1.14, we note three deviations:[15]

Latvia: the Latvian Law on annual accounts of undertakings, chapter 7, section 55, only mentions the obligation to provide information on environmental issues and does not mention fair review;

Malta: article 177 of the Companies Act of Malta requires a 'directors' report' providing information on the subjects listed therein as well as on the subjects mentioned in the "Sixth Schedule". However, we could not find an obligation to report on non-financial information; and

Poland: article 49 of the Polish Accounting Act requires the inclusion of non-financial performances in the annual report, but the Act does not explicitly mention an obligation to give a fair review.

15. Besides the Dutch texts, the legislative history of the national legislation by which the Modernisation Directive was implemented was not examined. It can, therefore, not be explained what the reasons for deviating from the text of the Directive were.

4.3.3 Non-implementation

A Member State that fails to timely incorporate the provisions of a directive, can face legal actions of the Commission. One of the important tasks of the Commission is to supervise compliance with European legislation by Member States.[16] In the event of non-compliance, the Commission can start a so-called 'infringement procedure'.[17] The ECJ will judge whether there has been an infraction.[18] The Member State is obligated to take appropriate measures to stop the infraction. If it does not do so, the Commission can commence another proceeding before the ECJ. Eventually, the Member State can be ordered to pay a lump sum or penalty payment.[19]

4.4 Implementation in Dutch law

4.4.1 Amendment Dutch company code

In 2005, article 1.14 was incorporated in article 391, paragraph 1, Book 2 DCC by a Dutch implementation act.[20] Book 2 DCC contains the Dutch Company Code. The Dutch legislator did not literally copy article 1.14, but used similar wording. Legislative history does not explain why the wording deviates slightly from the original text, nor does it contain any discussion on this point. Legal authors have not expressed any specific opinion on this. It could, therefore, be argued that this deviation has no meaning.[21]

4.4.2 Legislative history

The legislative history accompanying the implementation act is not very extensive, although some parts are worth noting here. The Dutch legislator

16. Article 211 EC Treaty (pursuant to the Lissabon Treaty, this article has been deleted).
17. Article 226 EC Treaty (pursuant to the Lissabon Treaty: article 258 EC Treaty). See P. Craig and G. de Búrca, *EU Law, text, cases, and materials* (University Press: Oxford 2003), p. 400.
18. *E.g.* ECJ 10 December 1968, C-7/68 (*Commission vs. Italian Republic*); ECJ 21 June 1988, C-416/85, (*Commission vs. United Kingdom*); and ECJ 10 April 1984, C-324/82 (*Commission vs. Belgium*).
19. Article 228 (pursuant to the Lissabon Treaty, presently article 260 EC Treaty), §§ 1 and 2 EC Treaty. ECJ 12 July 2005, C-304/02 (*Commission versus France*), Jur. 2005, p. I-06263.
20. *Wet uitvoering IAS-Verordening, IAS 39-richtlijn en moderniseringsrichtlijn*, effective as of 27 July 2005 and applicable to annual reports over the book year 2005. See on this Act: H. Beckman, 'Wijzigingen in het jaarrekeningenrecht' [Changes in annual accounting law], in *Ondernemingsrecht*, No. 154, 2005, p. 445.
21. T.E. Lambooy, 'Aspecten maatschappelijk verantwoord ondernemen in jaarverslag; Transparantie over MVO op Europees niveau', in *Ondernemingsrecht*, 3, 2006, p. 93, note 5.

issued ambivalent signals: on the one hand it explained that the amendment meant an extension of the existing reporting requirements,[22] on the other hand the legislator stressed that the amendment did not materially change anything. From this it could be concluded that the legislator was concerned that it might be criticised for placing a larger administrative burden on Dutch companies. Seen in this light, it seems logical that the legislator emphasised various times that the amendment to the DCC section on annual reporting did in fact not contain anything new.

In respect of the new reporting requirement on environmental matters, the legislator referred to the Commission Recommendation 2001/453/EC (see section 4.2.4). However, at the same time it stated that companies that already issue environmental reports pursuant to the Environmental Management Act need not worry about the new obligation because they already report on environmental issues and can refer to that.[23]

In respect of the new reporting requirement on "employee matters", the legislator referred to the existing practice to report on the work force, that is the number of personnel, pursuant to article 2:391 paragraph 2 DCC.[24]

4.4.3 Environmental reporting obligations

In the opinion of the author, the Dutch legislator did not act very bravely nor accurately, by referring to environmental reports. In fact, such an environmental report is only required from companies that have a large industrial production facility in the Netherlands which is potentially harmful to the local environment

22. The legislator uses the words 'additional requirements' and he also refers to the Commission Recommendation. See legislative history: *Kamerstukken II* 2003/04, 29 737, No. 3 (Explanatory Memorandum, *Memorie van Toelichting*, hereinafter: 'MvT'), pp. 23-24. See also Beckman, *supra* note 21, p. 446, who is of the opinion that the reporting requirements have been considerably augmented by the Act. See also Koning/Kiersch 2007 (T&C BW), article 2:391 DCC, note 1. Furthermore, Slagter, *supra* note 3, p. 482.
23. MvT, pp. 14, 15, 23-25; *Kamerstukken II* 2003/04, 29 737, nb. 7 (Memorandum, *Nota naar aanleiding van het verslag*; hereinafter: 'Nota'), p. 12. See also Lambooy (2006), *supra* note 21. See on environmental reporting obligations: T.E. Lambooy, 'Duurzaamheids-verslaggeving door bedrijven als onderdeel van het jaarverslag?', in *Ondernemingsrecht*, 16, 2004, pp. 629-636, § 7. This environmental reporting obligation links to the European EMAS Regulation. See in this respect EEG nb. 1836/93, PbEG L 168/1 d.d. 10 July 1993 and T.E. Lambooy and T.P. Flokstra, 'Kleur bekennen middels jaarverslag' [Nail one's colours to the mast by means of the annual report], in *De Naamlooze Vennootschap*, 06, 1997, pp. 159-166. A comprehensive economic study has been performed by C. Hibbitt, *External Environmental Disclosure and Reporting by Large European Companies* (Limperg Instituut: Amsterdam, 2004).
24. MvT, *supra* note 22, pp. 15 and 24 and Nota, *supra* note 23, p. 12.

(presently approximately 330 facilities).[25] The reporting requirement only concerns the environmental issues of the Dutch facility. Consequently, the environmental aspects of operations abroad do not have to be reported on. Also, there is no link between the environmental report and the annual accounts of a company, which makes it difficult for analysts and banks to really value such information. In addition, the obligation was first to make two environmental reports: one for the public and one, with more technical details, for the governmental institution that provides the production licence, usually the provincial authorities. Recently, in 2005, the requirement to compile a public report has been rescinded with a view to reducing the administrative burden for companies.[26] Consequently, the environmental report produced pursuant to the Environmental Management Act to which the Dutch legislator referred can, in the opinion of the author, not be compared to the new EU wide requirement for companies to include information on environmental matters related to their worldwide operations in their annual report. It would have been more accurate if the Dutch legislator were to have pointed to (i) the importance of CSR, (ii) the call for sustainability reporting (see also section 4.5.6 below on the GRI), and (iii) specifically the EP resolutions requesting the Commission and the Council to adopt legislation on CSR and to assure transparency on the worldwide behaviour of EU companies as regards environmental, social and ethical standards.[27]

4.4.4 Reporting on employee matters

The same could be said in respect of the Dutch legislator's comment that the new obligation to report on employee matters is identical to that included in article 2:391, paragraph 2 DCC. This explanation does not seem very consistent, since paragraph 2 was to remain unchanged. Since, in addition to the existing paragraph 2, the act implementing the Modernisation Directive in Dutch law has introduced a new paragraph 1 that requires reporting on 'employee matters', one could deduce that something else is meant than the already existing and unchanged text. The existing text prescribed the inclusion of information on the work force meaning, how many employees work for the company. As argued in section 4.2.5 above, the author believes that the new text has a different and much broader meaning.

Any reference in Dutch legislative history to the existing practice of preparing a so-called 'Social Report' pursuant to the Labour Conditions Act, should also be put in the right legal perspective. Such a Social Report is addressed

25. Chapter 12 of the Dutch Environmental Management Act (Wet *Milieubeheer*), and the Decree Environmental Management (*Besluit Milieubeheer*). Current information available at: http://www.answersforbusiness.nl/product/laws/Milieu?infoBranch=30&branch=52&subject=187&searchType=2&localproduct=Environmental+regulations&sop=&organisationtype=Gemeente, accessed on 30 March 2010.
26. *Staatsblad*, 2005, p. 317.
27. See *supra* note 8.

to the company's employees. It does not have to be publicly released. More importantly, a Social Report only relates to production facilities in the Netherlands. A company does not have to include information on its foreign production sites. In addition, the report mainly describes the safety and health situation rather than providing a full picture of all matters relevant from a CSR perspective.[28]

4.4.5 Proposed amendment referring to OECD MNE Guidelines

The Labour Party had proposed an amendment to the act implementing article 1.14 of the Modernisation Directive in the DCC.[29] They put forward a new clause requiring Dutch companies to also disclose in their annual report whether they act in compliance with the OECD MNE Guidelines on CSR,[30] and if not, to explain why not. They basically wanted to introduce the same formula, "comply or explain", as many European countries have chosen in respect of companies' compliance with corporate governance codes of conduct. Dutch law also requires that listed companies disclose in their annual report whether they comply with the Dutch corporate governance code of conduct, the Tabaksblat Code and if not, why not.[31] The Minister responsible for the implementation act made a show by arguing that the OECD MNE Guidelines cover a completely different subject and that the Guidelines should not infringe upon the territory of financial reporting. The Minister opined that this act only contained technical changes and that the proposed amendment needs to be discussed extensively in Parliament because it would mean a material change to existing laws. Not long before the adoption of the implementation act the amendment was withdrawn, most probably as a result of a political trade-off.[32]

4.4.6 Exemptions

In accordance with the option provided in the Modernisation Directive (section 4.2.8), under Dutch law, small and medium sized companies are exempted from the new requirement to provide information on non-financial key performance indicators. Dutch law already, in general, exempts small companies from

28. Lambooy (2004), *supra* note 23, §§ 2.3 and 2.4.
29. *Kamerstukken II* 2003/04, 29 737, No. 11 (Amendement Douma).
30. See: www.oecd.org, visited on 1 July 2010. See also D. Leipziger, *The Corporate Responsibility Code Book* (Greenleaf Publishing Limited: Sheffield, 2003), pp. 52-67.
31. Article 2:391(5) DCC and the Decree of 27 December 2004 appointing the Tabaksblat Code, *Staatsblad*, 2004, 747. See also Directive 2006/46/EC, Article 1, sub 7, on the insertion of a new Article 46a in the Fourth Directive. Furthermore, compare H. Beckman, *Jaarrekening en Verantwoording* (Kluwer: Deventer 2007), *oratie* [introductory lecture], Groningen University, p. 29.
32. Legislative history: *Handelingen II* 2004/05, nb. 47, pp. 3034 and 3035 and *Handelingen II* 2004/05, nb. 49, p. 3187.

preparing and publishing an annual report.[33] In respect of medium sized companies, the implementation act now provides an exemption.[34] This exemption was motivated by the legislator with the argument of reducing administrative burden.

4.4.7 Existing Dutch accounting guidelines on CSR transparency

Before the implementation of article 1.14 of the Modernisation Directive in Dutch law, companies were already stimulated to address CSR matters in their annual reports. In 2003, the Dutch Council for Annual Reporting, published Guideline 400 in which it advised companies and their advisors to include CSR issues in their annual reports.[35] This Guideline contains a very clear description of the various CSR subjects that are to be included. The Dutch Council for Annual Reporting also published a practical tool, the so-called *Handreiking* on how to report on these non-financial CSR issues. It is fair to say that the Dutch Council for Annual Reporting Guidelines have no legal effect other than that courts can take these into consideration in their interpretation of existing accounting laws. However, it would have been useful and practical if the Dutch legislator had referred to this Guideline 400 in its explanatory memorandum to the implementation act.

4.4.8 Legal consequences

The fact that a large company must now include non-financial key performance indicators in its annual report, rather than in an environmental, social or other type of report, has legal relevance. A company's non-compliance exposes it to certain legal risks. Under Dutch law, various parties, for instance stakeholders of the company, could commence an action against a company that fails to comply with article 2:391 DCC. Although there have been no cases tried in respect of the new obligation to include non-financial information in the annual report, in Table 4.1 a brief overview of the actions which are theoretically possible in respect of annual reports is provided.

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33. Article 2:396(1) and (6) DCC. To qualify as a small company, a company has to meet two or three of the following criteria in two subsequent book years (figures as per 2008):
    (i) the value of the assets on the balance sheet does not exceed EUR 4,400,000,
    (ii) the net turnover does not exceed EUR 8,800,000, and
    (iii) the average number of employees during the book year is less than fifty.
34. Incorporated in Article 2:397, § 7 DCC. To qualify as a medium sized company, a company has to meet two or three of the following criteria in two subsequent book years (see § 1 of Article 397):
    (i) the value of the assets on the balance sheet does not exceed EUR 17,500,000,
    (ii) the net turnover does not exceed EUR 35,00,000, and
    (iii) an average number of employees during the book year is less than two hundred fifty.
35. Current text: Richtlijn 400, 2005, in *Richtlijnen voor de jaarverslaggeving* (Kluwer: Deventer 2007). See T.E. Lambooy, 'Maatschappelijk verantwoord ondernemen in de jaarverslaggeving', in *Vennootschap & Onderneming*, 2003-12. See, in general on the Dutch Council for Annual Reporting Guidelines: Slagter, *supra* note 3, p. 474.

Table 4.1 Legal actions under Dutch law

Type of action	Based on section(s)	By whom	Possible results
Annual report proceedings before Enterprise Chamber of the Amsterdam Court	447 up to 453,[36] 393 and 394, Book 2 DCC	Any interested party:[37] shareholders, employees and, under circumstances, unions, creditors, financiers or NGOs. Advocate General of the Amsterdam Court of Appeals. AFM.	Respectively, Court order to adjust the contents of the annual report, to provide information (only AFM), to appoint an accountant, or to publish the report or
Enquiry proceeding before the Enterprise Chamber of the Amsterdam Court.[38]	344 up to 359, Book 2 DCC	Right to start action attributed in article 2:345-347, DCC to specific persons, such as shareholders holding 10 % or more of the company's capital, employee association/union. Advocate General of the Amsterdam Court of Appeals.	Investigation into the matters of the company by independent researchers appointed by the Court. Provisions imposed in accordance with article 2:356, DCC (f.i. to annul a general meeting resolution with relevance to the annual report)
Proceedings to establish directors liability re. misleading annual report	139 and 249, Book 2 DCC	Affected third party	Order to compensate damages
Tort proceedings (including prospectus liability)	162 (and 194), Book 6 DCC	Affected third party	Order to compensate damages
Fraud/forgery *(valsheid in geschrifte)*	225 and 51 of the Dutch Criminal Law Code (DCRC)	Public prosecutor	Judgement: imprisonment (up to 6 years), penalty (up to EUR 67,000). Section 23, paragraph 4 DCrC. Higher penalty possible pursuant to paragraph 7 provided with sufficient motivation.

36. Since 31 December 2006, *Staatsblad*, nb. 569, pp. 10-13. See also: Kiersch, 2007, T&C BW, Article 2:447, DCC, note 3.b.
37. Slagter, *supra* note 3, pp.543-545; P. van Schilfgaarde and J. Winter, '*Van de BV en de NV*' (Kluwer: Deventer, 2006), §§ 109-110.
38. The enquiry proceeding is a typically Dutch proceeding at the Enterprise Chamber in Amsterdam. The Enterprise Chamber is part of the Amsterdam Court of Appeals.

4.5 Annual reports 2006 Dutch companies

4.5.1 Overview analysis

As large companies are now required to include non-financial key performance indicators in their annual reports, it is interesting to see how they comply with this new obligation. The annual reports 2006, published in the course of 2007, of twenty-five Euronext listed Dutch companies were examined. Different aspects were considered in the course hereof:

– does the annual report address environmental and employee matters?
– what type of CSR matters are mentioned?
– does the company address the issue of supply chain responsibility?
– the number of pages spent on non-financial performance;
– the consistency with the annual accounts and explanation thereto;
– does the company also publish a complementary CSR report?
– does the CSR report follow the 2006 GRI Guidelines? and
– does the annual report refer to the CSR report?

Annex 4.2 *in fine* shows a quick scan of the results. It was observed that the majority of the reports subdivided the non-financial indicators in environmental, social (community) and employee matters. The social aspect usually consisted of sponsoring activities but also of recruiting local personnel to create employment. It is difficult to measure information on CSR matters. That is why the number of pages was included; it gives an idea about the depth of information. Some annual reports contain little information on CSR matters and mainly refer to their complementary CSR report, the contents of which were not investigated. However, it was checked whether such a CSR report concerned a so-called 'GRI-report' (see section 4.5.6 *infra*) and if so, whether the 2002 or the 2006 GRI Guidelines were followed.

Whether a reference to another report suffices in fulfilling the legal obligation to report on non-financial matters is questionable, since the Modernisation Directive explicitly dictates that the information should be included *in* the annual report.[39]

Obviously it was not possible to check whether the CSR achievements which the companies claim, are in actual fact true. Neither could it be ascertained whether the non-financial information is consistent with the other information in the financial accounts and the explanation thereto. However, when attempting to evaluate consistency, figures clearly connecting to CSR performance were not noticed. In the Netherlands, accountants check whether the report and the financial accounts are consistent and whether the report

39. Lambooy (2006), *supra* note 21, p. 95.

complies with the law. They do not have to verify the contents of the annual report. However, accountancy firms have developed external assurance standards to verify CSR information. They apply these when so instructed by the company. It is expected that any non-financial information will be increasingly submitted for external assurance.

4.5.2 Supply chain responsibility

Supply chain responsibility is another aspect that was looked into. Sixteen of the surveyed companies appear to have a supply chain responsibility policy. Most commonly, in the relationship with its suppliers, the company uses a code of conduct similar to the code of conduct applicable to the company's personnel. These companies state that they actively control their suppliers' compliance with the policy and that they apply sanctions in case of non-compliance by a supplier (see section 4.2.6 above).

4.5.3 Environmental aspects

Annex 4.2 shows that some companies do not provide any information about environmental matters. Other companies mention environmental aspects only very briefly. Vedior for instance reports that it has a code of conduct, but it does not provide much information on the contents thereof.[40] The remainder of the companies explicitly mention the environment, although the information provided is not always very elaborate. AEGON indicates that it has a CSR code of conduct, but that its country units decide on any measures to be taken. Unilever only states that each brand can take initiatives.[41]

A subject that has the attention of almost all companies is the use of energy. This is understandable since the use of energy is quantifiable and any reduction thereof leads to a cost reduction. Ahold, Buhrmann and KPN provide information on energy saving initiatives.[42] Shell and SBM Offshore explain about the energy waste, greenhouse gas emissions and environmental damages caused by their operations. However, they give little information about how they are planning to avoid damages in the future.[43] Most companies report on energy use and reduction initiatives.

40. Vedior Jaarverslag 2006, p. 30.
41. AEGON Jaarverslag 2006, p. 93 and Unilever Jaarverslag 2006, p. 13.
42. Ahold Jaarverslag 2006, p. 10; Buhrmann Jaarverslag 2006, p. 40 and KPN Jaarverslag 2006, p. 84.
43. Shell Annual Report 2006, pp. 62 and 65 and SBM Offshore Annual Report 2006, p. 22.

4.5.4 Social matters

Companies that did not report on environmental matters, also did not report on social matters. Other companies provided information on initiatives, such as sponsoring activities and stakeholder management. Companies claim that co-operation with authorities and/or governments and involvement of NGOs and local residents in their activities creates goodwill. However, companies are not inclined to specify amounts used for social activities such as sponsoring. Only Numico and SBM Offshore gave an indication of amounts spent.[44] Ahold, Buhrmann, Fortis and AEGON mentioned their participation in sponsoring activities, but did not point out which kind of projects they support. In general, companies mostly donate money to children's projects in developing countries or in the Netherlands.

Companies that co-operate with NGOs or governments choose these organisations because of a special competence. Heineken, for example, joined the International Centre for Alcohol Policies in connection with Heineken's promotion of responsible drinking.[45]

ABN AMRO, AKZO NOBEL, Arcelor, Fortis, Heineken, ING, Randstad, Philips and TNT are participants of the Global Compact.[46]

Other ways of showing the company's responsibility towards society is, for instance, stimulating work force diversity[47] and stimulating children to eat healthily.[48]

4.5.5 Employees

All companies, except Philips, gave an account on personnel. However, whenever the information was very limited, we awarded a "no" in Annex 4.2. Since Dutch companies were already obliged to include information on personnel in their annual reports (see section 4.4.4 above), many companies appear to follow their habit by conveying the same limited information as in previous reports (such as the total number of people employed).

Employee matters can be subdivided into (i) training and (ii) health and safety matters. It was observed that:

– training personnel is an important matter for most companies. Shell, ING, Arcelor and Buhrmann have their own 'training academy.' Some of the

44. Numico Annual Report 2006, p. 30 and SBM Offshore Annual Report 2006, p. 21.
45. Heineken Jaarverslag 2006, p. 23.
46. See: www.unglobalcompact.org, accessed on 3 July 2010.
47. DSM Annual Report 2006, p. 42, Shell Annual Report 2006, p. 60 and Randstad Jaarverslag 2006, p. 31.
48. Ahold Jaarverslag 2006, p. 10.

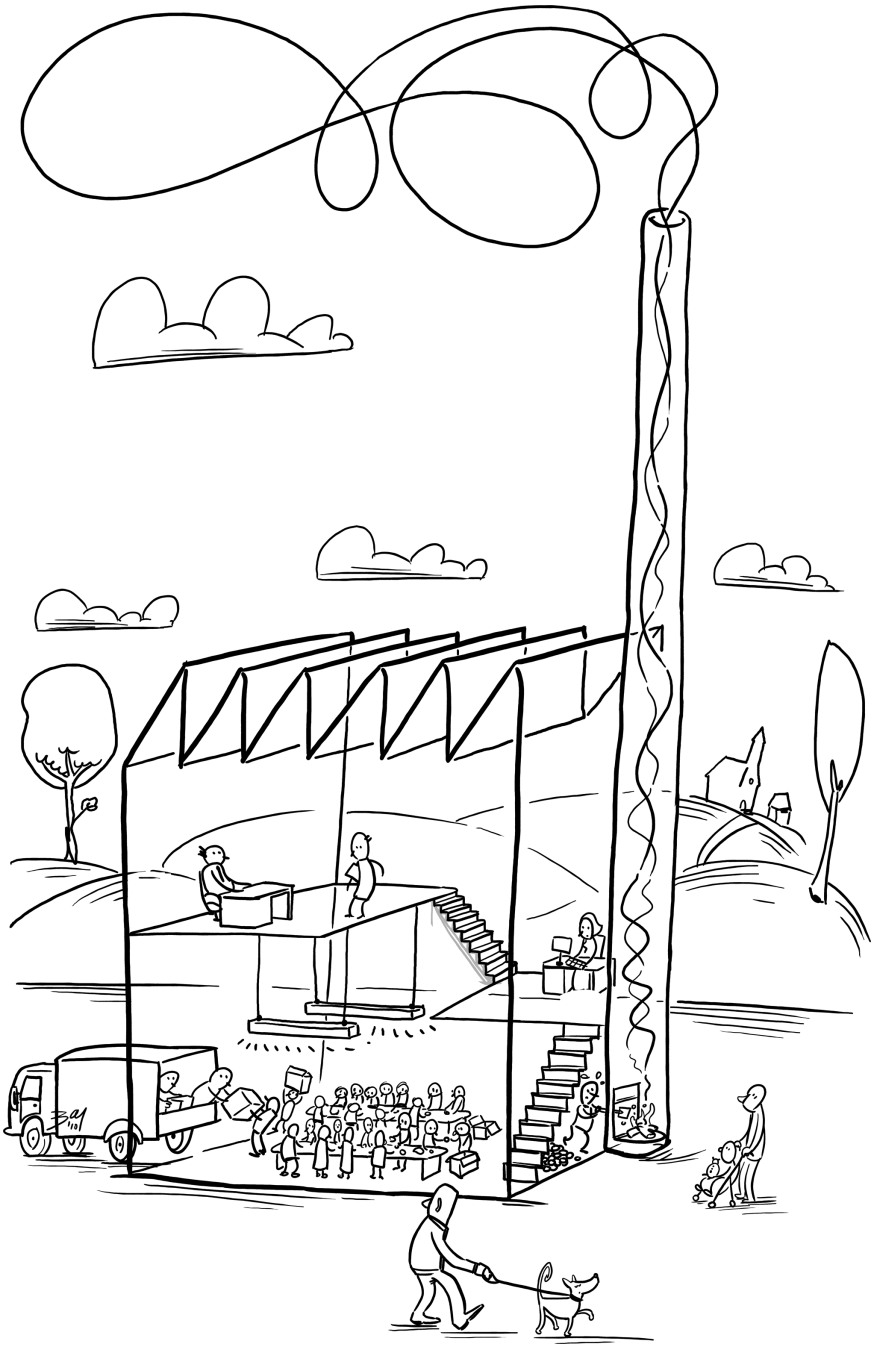
others indicated that they also have the possibility to train personnel, but they did not specify such statement; and
– companies that have operations with hazardous situations are alert to safety precautions, such as Shell, SBM Offshore and Arcelor. Other companies state that they inform employees about healthcare or that they provide medication against malaria and HIV/AIDS.[49]

4.5.6 References to CSR reports

It was found that companies which had prepared a separate, voluntary 'sustainability report' or 'CSR report', mostly followed the 2006 GRI Guidelines.

The GRI is an independent international organisation[50] that promotes and develops the use of a worldwide standard for voluntary sustainability reporting. This standard is a framework that consists of (i) sustainability reporting guidelines, (ii) sector supplements (special indicators for different industry sectors), (iii) protocols (reporting guidance) and (iv) national annexes (country specific information). Companies use this framework when producing a sustainability report. The framework itself has been established by the GRI with the input of participants from business, civil society, labour and professional institutions. Presently, more than 1,000 companies from over 60 countries generate CSR reports, predominantly large multinationals based in Japan or Western Europe, but also Indian and Brazilian companies.[51]

49. SBM Offshore Annual Report 2006, p. 21 and Heineken Jaarverslag 2006, p. 9.
50. The organisation is a Dutch foundation (*stichting*), based in Amsterdam, the Netherlands.
51. See: www.globalreporting.org, accessed on 12 July 2010.



4.6 Final remarks

Since 2003, the EU Member States have been implementing the provisions of the Modernisation Directive, among which the new standards for the annual reports of large EU based companies. One of the new standards entails, where appropriate, the provision of information on non-financial matters, such as environmental and employee matters, relating to the worldwide business activities. The EP has frequently directed political attention to the development of CSR. Transparency in corporate practices, in the EU and abroad, seems desirable for consumers, banks and institutional investors. It will enhance a proper working market.

The new annual accounts standards had to be incorporated in national law by the beginning of 2005. Most Member States succeeded in implementing these and mainly followed the wording of the Modernisation Directive. The DCC was also amended accordingly.

A quick scan of annual reports over 2006 of large Euronext listed companies, registered in the Netherlands, revealed that the majority addressed environmental and employee matters in their annual reports. However, companies tend to maintain old habits. They seem to easily generate information on personnel matters, as they were used to producing this in their annual report, whereas they are lacking in generating substantial and clear information about other non-financial aspects. They do not use the Dutch Council for Annual Reporting's Guideline 400 in a systematic way, although this guideline on CSR reporting in the annual report was already published in 2003.

Annex 4.2 shows as a trend that companies prefer to create an extensive complementary CSR report, based on the newest GRI Sustainability Reporting Guidelines (2006), rather than to provide detailed non-financial information in their annual accounts. It is noted that although the GRI standards are not codified, they do play a significant role. The question is how this situation will evolve. Will companies stick to a short annual report complemented by an extensive GRI report, or will these two reports fuse into one large report in the future?

Annex 4.1 Implementation of art. 1.14 EU Modernisation Directive in national law

Member State	Implement-ation	Literal text art. 1.14?	Implemented in which law?
Belgium	Yes	Yes	Wetboek van Vennootschappen, art. 96
Bulgaria	Delay		
Cyprus	*(#1)		
Czech Republic	Yes	Yes	Accounting Act 563/1991, section 21
Denmark	Yes	Yes	Accounting Act, art. 99 sub para. 2
Germany	Yes	No, but same meaning	Handelsgesetzbuchs, art. 289
Estonia	Yes	No, but same meaning	Accounting Act, art. 24
Finland	Yes	No, but same meaning	Accounting Act, chapter 3, sect. 1, subsect. 5, sect. 2, subsect. 1
France	Yes	Yes	Code de Commerce, art.L225-100
Greece	Yes	Yes	Corporate Law 2190/1920, art. 43 a, para 3(a)
Hungary	Yes	No, but same meaning	Act C of 2000 On Accounting, art. 95
Ireland	*		
Italy	Yes	Yes	Art. 2428 Italian Civil Code (#2)
Latvia	Partially	No, only environmental	Law on annual accounts of undertakings, chapter 7, section 55
Lithuania	*		Law on Financial Statements of Entities
Luxemburg	Yes	Yes	Loi du 17 juin 1992, art. 70 (#3)
Malta	No		Companies Act, Chapter 386, art. 177
Netherlands	Yes	Yes	Burgerlijk Wetboek, art. 2:391 lid 1
Austria	Yes	No, but same meaning	Handelsgesetzbuchs, art. 243
Poland	Partially	No, no “fair review”	Accounting Act, art. 49
Portugal	Yes	Yes	Official Plan of Account, art. 66
Romania	Delay		
Slovenia	Yes	No, but same meaning	Companies act, section 8, art. 70

Slovakia	Yes	No, but same meaning	Act. No. 431/2002 Coll. On accounting, sect. 22a. Section 20
Spain	Yes	Yes	Texto refundido de la Ley de Sociedades Anónimas, art. 202, point 1 1(4)[3]
United Kingdom	Yes	Yes	The Companies Regulations 2005, The Companies Act 1985 (#4)
Sweden	*		

The research for Annex 4.1 ended on 29 February 2008.

#1
* means: no information provided to the Commission by the Member State, nor information found through other sources
#2
Also 3 Legislative Decrees have been amended: D.Lgs.9/4/1991 n.127; D.Lgs. 27/1/1992 n. 87; D.Lgs. 7/9/005 n. 209. Implementation Act: D.Lgs 2/2/2007 n. 32, published in the Gazette Ufficiale of March 28, 2007, n. 72.
#3
Loi du 17 juin 1992 relative aux comptes annuels et comptes consolidés des établissements de crédit de droit luxembourgeois et aux obligations en matière de publicité des documents comptables des succursales d'établissements de crédit et d'établissements financiers de droit étranger, art. 70.
#4
The Companies (1986 Order) Regulations (Northern Ireland) 2005, art. 242ZZA en 242ZZB en The Companies Act 1985 Regulations 2005 art. 234ZZA en 234ZZB.

Annex 4.2 Annual reports 2006 Dutch listed companies

Company	Mention environmental and employee matters	Mentioned matters[52]	Number of pages	Complementary CSR report	Reference to CSR report	Supply chain responsibility	GRI based CSR report (G3 = 2006 guidelines)
ABN AMRO	Yes	Em	2	Yes	No	No	Yes
AEGON	Yes	En-S-Em	2	Yes	Yes	Yes	Yes
Ahold	Yes	En-S-Em	1	Yes	Yes	No	Not yet published
AKZO NOBEL	Yes	En-S-Em	4	Yes	Yes	Yes	Yes
Arcelor	Yes	En(S)Em	6	Yes	No	Yes	Not available
ASML	No	/	/	Yes	No	/	Yes
Buhrmann	Yes	En-S-Em	5	No	/	Yes	/
DSM	Yes	En-S-Em	3	Yes	No	Yes	Yes
Fortis	Yes	En-S-Em	3	Yes	No	Yes	Yes
Hagemeyer	Yes	En-S-Em	5	No	/	Yes	/
Heineken	Yes	En-S-Em	2	Yes	Yes	Yes	Yes
ING	Yes	En-S-Em	5	Yes	No	Yes	Yes
KPN	Yes	En-S-Em	3	Yes	Yes	No	Yes
Numico	Yes	En-S-Em	4	Yes	Yes	Yes	Yes

52. 'En' means environmental matters; 'S' means social matters (community) and 'Em' means employee matters.

Company	Mention environmental and employee matters	Mentioned matters	Number of pages	Complementary CSR report	Reference to CSR report	Supply chain responsibility	GRI based CSR report (G3 = 2006 guidelines)
Philips	No	/	0	Yes	Yes	No	Yes
Randstad	Yes	En-S-Em	6	No	/	No	/
Reed Elsevier	Yes	Em	0	Yes	No	No	Yes
Rodamco	Yes	Em	1	No	/	No	/
SBM Offshore	Yes	En-S-Em	4	No	/	Yes	/
Shell	Yes	En-S-Em	6	Yes	Yes	Yes	Yes
TNT	Yes	En-S	1	Yes	Yes	Yes	Yes, but based on the GRI 2002 Guidelines
TomTom	Yes	En-Em	2	No	/	Yes	/
Unilever	Yes	En-S-Em	2	Yes	Yes	Yes	Yes
Vedior	Yes	En-S-Em	2	No	/	No	/
Wolters Kluwer	Yes	En-S-Em	2	Yes	Yes	Yes	Yes

Chapter 5.* Corruption and corporate governance: 'in control' requires an anti-corruption programme

"Governance & Anti-Corruption is everyone's business."
Robert Zoellick, President of the World Bank Group[1]

5.1 Introduction

Corruption is one of the world's greatest challenges. According to the World Bank corruption is "The single greatest obstacle to economic and social development in realising public goals."[2] It creates economic and social disproportion, and damages the very essence of society. Corruption also has a severe impact on the private sector because it distorts competition and creates obstacles to market expansion. It can seriously harm the reputation of a company and expose it to substantial legal risks. Corrupt practices are also very expensive for businesses: estimates show that corruption adds at least ten per cent to the day-to-day costs of doing business in many parts of the world. The World Bank has stated that "bribery has become a USD 1 trillion industry."[3]

Corruption has two sides: a supply side and a demand side. The supply side involves parties that provide monetary payments, gifts or any other forms of expressing gratitude for services. The supply side is usually represented by the private sector. Particularly in weak governance zones – countries where law enforcement is poor – the chances of company employees being susceptible to bribery increase. The demand side of corruption is represented by those who accept different forms of payment and consequently provide some form of service or favour in return. Typically, government officials who have a great

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* This chapter has been submitted as an article to a legal journal by T.E. Lambooy and V. Figueroa. The research ended on 14 June 2009 and was updated as per 5 July 2010.

1. World Bank Institute, 'Business Fighting Corruption', 6 December 2007, at: http://info.worldbank.org/etools/antic/index.asp, accessed on 4 May 2009.
2. IURIS VALLS Abogados, 'Internal Controls to Avoid Corruption', 51 Congress Paris of the International Association of Lawyers October-November 2007.
3. UN Global Compact, 'Transparency and Anti-Corruption', at: http://www.unglobalcompact.org/Issues/transparency_anticorruption/, accessed on 4 March 2009.

deal of discretionary power and who operate in those environments where the system of checks and balances is weak or non-existent, represent the demand side.[4]

The Siemens scandal is a clear example of how costly corruption can become for companies. In October 2007, a Munich District Court imposed a EUR 201 million fine on Siemens due to it having bribed foreign public officials in Russia, Nigeria and Libya. Siemens is also the subject of other ongoing investigations into public corruption in a number of jurisdictions.[5] Public corruption refers to illegal acts carried out by private-sector actors with a view to obtaining a favourable decision from public officials, such as civil servants, political authorities or political parties.[6] Siemens has also been involved in private corruption.[7] This term refers to corruption between business people.[8] In May 2007, the Regional Court of Darmstadt sentenced two former Siemens employees to terms of imprisonment on counts of commercial bribery (private corruption).[9] It was alleged that these employees had provided

4. An interesting analysis can be found in the Center for International Private Enterprise (CIPE), 'Corporate Governance: an Antidote for Corruption', 2002, at: http://www.cipe.org/programs/corp_gov/pdf/CGANTIDOTE.pdf, accessed on 3 July 2010.
5. Siemens is a German-based multinational corporation with a business portfolio of activities predominantly in the field of electronics and electrical engineering. As per 30 September 2008, the capital stock of Siemens AG totalled approximately 2.7 billion euros, representing some 914 million no-par value shares in registered form, of which approximately 862 million were outstanding. Siemens shares are listed on all German stock exchanges as well as on stock exchanges of New York, London, Zurich and Milan. On the New York Stock Exchange, Siemens shares are traded in the form of American Depository Receipts (ADRs), with one ADR corresponding to one Siemens share; Siemens Annual Report 2008 (Berlin and Munich 2008), see: http://w1.siemens.com/investor/pool/en/investor_relations/e08_00_gb2008.pdf, accessed on 28 April 2010; Mathias Nell, Economics Department University of Passau, 'Responses to the Consultation Paper on the review of the OECD Anti-Bribery Instruments', 2008, at: http://www.oecd.org/dataoecd/7/11/40497658.pdf, accessed on 15 June 2009.
6. F. Vincke and F. Heimann, *Fighting Corruption-A Corporate Practices Manual* (ICC Publishing S.A.: Paris 2003), p. 128.
7. Siemens Annual Report 2008 (Berlin and Munich 2008), at: http://w1.siemens.com/investor/pool/en/investor_relations/e08_00_gb2008.pdf, accessed on 28 April 2010.
8. Vincke, *supra* note 6, p. 128.
9. Section 299 of the German Criminal Code (Strafgesetzbuch StGB 1998 s 299) describes commercial bribery as: "Taking and Offering a Bribe in Business Transactions: (1) Whoever, as an employee or agent of a business, demands, allows himself to be promised, or accepts a benefit for himself or another in a business transaction as consideration for giving a preference in an unfair manner to another in the competitive purchase of goods or commercial services, shall be punished by imprisonment for not more than three years or a fine. (2) Whoever, for competitive purposes, offers, promises or grants an employee or agent of a business a benefit for himself or for a third person in a business transaction as consideration, for his giving him or another a preference in an unfair manner in the purchase of goods or commercial services, shall be similarly punished." See the English translation of the Strafgesetzbuch StGB 1998, issued by the German Federal Ministry of Justice, at: http://www.iuscomp.org/gla/statutes/StGB.htm#299, accessed on 16 March 2010.

improper benefits to former employees of Enel Spa, an Italian telecom company, in order to secure contracts within the telecommunications division. In connection with these court sentences, Siemens was ordered to hand over EUR 38 million in profits. These scandals triggered an investigation by the US Department of Justice and the Securities and Exchange Commission (SEC) into possible violations of US criminal law. Fines could amount to up to USD 2 million per violation, and could under certain circumstances be augmented.[10] Moreover, lawsuits have been filed against Siemens for damages because of the decrease in its share price due to the scandals.[11] Furthermore, a Mexican governmental control authority barred Siemens Mexico from bidding for public contracts for a period of almost four years as of December 2005. The allegation concerned the non-disclosure of tax discrepancies when signing a public contract.[12]

Another example of just how costly corruption can be for companies, is the ABB case.[13] The SEC prosecuted UK and US subsidiaries of ABB for

10. Siemens Annual Report 2007, *supra* note 7; Statement by Jennifer Hammond, KPMG Forensic, (Presentation at the 2nd Annual European Anti-Corruption Summit, October 2008, The Hague, the Netherlands. It was organised by the Ethical Corporation; www.ethicalcorp.com, where information regarding the presentations can be retrieved (hereinafter: Anti-Corruption Summit 2008)); the author participated in this conference. See Foreign Corrupt Practices Act of 1977 (FCPA), Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78dd-1 to -3 (2000) §§78dd-2(g)(1) and 78dd-3(e)(1)(A). See further below, section 5.3.3 on the FCPA.
11. 'Siemens AG Named by Weiss & Lurie in Class Action', News Item, 7 December 2009. A class action lawsuit against Siemens was commenced in the US District Court for the Eastern District of New York on behalf of purchasers of the American Depository Receipt Shares ('ADR', 'ADS' or 'shares') of Siemens between 8 November 2007 and 30 April 2008.The complaint charges Siemens with violations of the Securities Exchange Act of 1934 and alleges that during the defined period, Siemens had made materially false and misleading statements concerning its ability to generate revenues and achieve earnings expectations once it had put an end to systemic and extensive fraud, bribery and other illegal and corrupt activities in order to obtain contracts or retain business. As the facts were revealed, Siemens shares plummeted. This action seeks to recover damages. See: http://www.weisslurie.com/news_events/news/siemens_ag_named_by_weiss_lurie_in_class_action. The same law firm represents a client in a derivative action arising out of commercial bribery in numerous venues throughout the world, *i.e. Johnson v. Kleinfeld, et al. f/b/o Siemens AG*, No. 07/101618, New York County Supreme Court. The action is pending. See: http://www.weisslurie.com/case/siemens_ag, all websites visited on 30 June 2010.
12. Siemens Annual Report 2007, *supra* note 7.
13. ABB Ltd, Switzerland (before: ABB Asea Brown Boveri Ltd) is the ultimate parent company of the ABB Group, which principally comprises 254 consolidated operating and holding subsidiaries worldwide. ABB is one of the world's leading power and automation engineering companies. It provides 'solutions for secure, energy-efficient generation, transmission and distribution of electricity, and for increasing productivity in industrial, commercial and utility operations. The portfolio ranges from light switches to robots for painting cars or packing food, and from huge electrical transformers to control systems that manage entire power networks and factories.' ABB Ltd's shares are listed on the SIX →

violating the US anti-corruption act, *i.e.* the Foreign Corrupt Practices Act of 1977 (FCPA). It was alleged that the ABB subsidiaries had paid bribes to government officials in Angola, Nigeria and Kazakhstan exceeding USD 1.1 million, in exchange for, amongst other things, awarding projects and securing favourable tender considerations and conditions. The illicit payments were made after ABB had become a reporting company in the US: ABB Ltd. American Depositary Shares had been listed on the New York Stock Exchange since 6 April 2001.[14] The prosecution of ABB was terminated after a settlement was reached. Two ABB subsidiaries, Vetco Gray Inc. (US) and ABB Vetco Gray U.K. Ltd., each agreed to pay criminal fines of USD 5.25 million plus USD 5.9 million in disgorgement and prejudgement interest. Also, at the end of 2008, ABB booked pre-tax provisions of approximately USD 850 million, part of which is for the potential costs related to the previously disclosed investigations by the US and European authorities into suspect payments and alleged anti-competitive practices, respectively.[15]

Swiss Exchange (traded on SWX Europe), the NASDAQ OMX Stockholm Exchange and the NYSE (where its shares are traded in the form of ADS – each ADS representing one registered ABB share). On 31 December 2008, ABB Ltd had a market capitalisation of CHF 36.2 billion, Opportunity in a world of change; ABB Ltd, 2008, Annual Report (Zurich 2009), at: http://library.abb.com/global/scot/scot266.nsf/veritydisplay/119a07d88652b46ec1257577005f6f9a/$File/ABB%20Group%20Annual%20Report%202008_e.pdf, accessed on 30 July 2010.

14. SEC, 'Complaint submitted by the SEC to de US District Court for the District of Columbia v. ABB', 1:04CV01141, 07/06/2004, at: http://www.sec.gov/litigation/complaints/comp18775.pdf, accessed on 7 June 2009.

15. SEC, 'SEC sues ABB Ltd in Foreign Bribery Case, ABB Settles Federal Court Action and Agrees to Disgorge $5.9 Million in Illicit Profits, Two ABB Affiliates also Plead Guilty and Agree to Pay $10.5 Million in Fines in Criminal Case Brought by the Department of Justice', Litigation Release No. 18775/07-06-04, at: http://www.sec.gov/litigation/litreleases/lr18775.htm, accessed on 18 March 2010; US Department of Justice 'Three Vetco International Ltd. Subsidiaries Plead Guilty to Foreign Bribery and Agree to Pay $26 Million in Criminal Fines. Separate Subsidiary Enters into a Deferred Prosecution Agreement Following Cooperation with Justice Department' (07-075, 02-06-07), see: http://www.usdoj.gov/opa/pr/2007/February/07_crm_075.html, accessed on 8 June 2009; The Vetco companies were divested by ABB in 2004, see ABB Group, 'Sustainability Performance 2008, GRI indicators', at: http://search.abb.com/library/Download.aspx?DocumentID=9AKK104295D4655&LanguageCode=en&DocumentPartId=&Action=Launch&IncludeExternalPublicLimited=True, accessed on 8 July 2010; Statement by Kurt Herrman (ABB Chief Compliance Officer), presentation at the International Bar Association's 3rd Annual Conference: 'The Awakening Giant of Anti-Corruption Enforcement," Paris, France 4-6 May 2005'. Mr Herrman shared 'the lessons learned' by ABB from the US FCPA investigations with the audience. The author participated in this conference. Herrman explained that ABB suffered over 300 million dollars in fines, legal and accounting cost, management time and other factors. Since the scandal ABB has implemented a zero-tolerance anti-corruption policy.

In both the Siemens and ABB cases, the illicit payments were improperly accounted for in the books and records, and were not detected by the directors in good time. This failure to detect demonstrates that both Siemens and ABB lacked internal control systems to effectively prevent corruption. Both companies disclosed in their annual reports and in their sustainability reports that many mistakes had been made and that they were now implementing anti-corruption programmes in order to prevent future problems from occurring.

Companies can no longer defend their mistakes by stating that they were unaware of these types of risks. They should be alerted to the fact that a number of the countries or industries in which they operate are perceived as being 'high risk corruption' regions or sectors. Information on country and industry corruption risks is publicly available: NGO Transparency International publishes an annual country Corruption Perception Index.[16] Consequently, when doing business in weak governance zones, it becomes increasingly clear that a company should give high priority to implementing in-house compliance programmes with a view to reducing the risk of corruption (hereafter: anti-corruption programmes).

An interesting feature of our digitalised world is that illegal acts will most certainly be uncovered at some point in time due to the enormous amounts of emails that every employee generates. Agreements, services and meetings are usually initiated or confirmed by email, and will thus remain traceable. It has become difficult to circumvent company data systems, which in part explains the increased attention of prosecutors around the globe for corruption.

The question arises whether the act of *not* putting an anti-corruption programme in place, almost by definition results in misleading financial statements, an incomplete annual report, an untrue 'in-control statement' (see section 5.2) and, consequently, in poor corporate governance. This key-question will be addressed in this chapter.

In section 5.2, the technical aspects of and rules applicable to 'in-control statements' will be examined: to whom, where and when do they apply? It will be demonstrated how corruption is linked to corporate governance and corporate law. Section 5.3 will describe from a company perspective, the pertinent legal risks connected with corruption: the jurisdictional risks, directors' liability and legal penalties. It will mainly address public corruption and will not address private corruption. A comparative chart of the core elements of anti-corruption conventions and legislation complements this analysis. Section 5.4 will explain

16. The annual Corruption Perceptions Index (CPI) was first released in 1995. It is the best known of Transparency International's tools. It has been widely credited with putting Transparency International and the issue of corruption on the international policy agenda. The CPI ranks 180 countries by their perceived levels of corruption, as determined by expert assessments and opinion surveys; Transparency International, 'Corruption Perceptions Index'. See: http://www.transparency.org/policy_research/surveys_indices/cpi, accessed on 3 May 2010.

why avoiding corruption also constitutes part of a company's CSR responsibilities. Section 5.5 will provide a practical overview of various types of corporate in-house anti-corruption programmes (best practices). Section 5.6 will provide an answer to the key question. It will be argued that relatively new corporate governance requirements, such as the directors' 'in-control statement' and other, statutory annual reporting requirements, require that a company provides information on its anti-corruption programmes, or the absence thereof. Finally, in this respect, CSR-related programmes and disclosures can also play an important role in the prevention of corruption as they help to develop best practices in corruption prevention on a global scale.

5.2 Internal control

5.2.1 Developments in corporate governance

In the last decade, corporate and financial scandals, such as Enron, Ahold, Siemens and ABB, have led to increased public concern about corporate governance, accounting and auditing.[17] As has been discussed in chapter 2, an important theme of corporate governance is to ensure the accountability of certain individuals within an organisation. To that end, a great deal of emphasis has been placed on 'disclosure' and 'transparency': organisations should publish and explain the roles and responsibilities of the board and its management in order to provide shareholders with a minimum level of accountability. Companies should also implement procedures aimed at independently verifying and safeguarding the integrity of the company's financial reporting. The disclosure of material matters concerning the organisation should be timely and balanced in order to ensure that all investors have access to clear and factual information.

In the EU most countries follow the Commission's approach as expressed in the Corporate Governance Action Plan (2003) discussed in section 2.6.2.2 of this study.[18] The Action Plan recommends that Member States put a national corporate governance code in place and require that companies refer to this code in their annual reports on a 'comply or explain' basis. This system is referred to as a 'principle-based system.'[19]

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17. Vincke, *supra* note 6, p. 9.
18. Communication from the Commission to the Council and the EP, 'Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward', COM/2003/0284 final, 21 May 2003, at: http://eur-lex.europa.eu/Notice.do?mode=dbl&lang=en&ihmlang=en&lng1=en,en&lng2=da,de,el,en,es,fi,fr,it,nl,pt,sv,&val=278520:cs&page=, accessed on 28 April 2010. Member States can do so through their company laws, securities laws, listing rules, codes, or otherwise.
19. Dutch Corporate Governance Code 2008, p. 48, at: www.commissiecorporategovernance.nl/page/downloads/DEC_2008_ UK_Code_DEF__uk_.pdf, accessed on 3 January 2010.

In the last decade, new corporate governance regulations have been adopted in Europe, such as the Tabaksblat Code in the Netherlands in 2003 (replaced by the 'Frijns Code' in 2008). The Combined Code on Corporate Governance in July 2003 in the UK (revised in June 2008). The Belgian Corporate Governance Code (the 2009 Code replaced the 2004 previous version). The German Corporate Governance Codex (the 'Cromme Code' of 2002 was amended in 2008). And the AFG – Recommendations on Corporate Governance – 2008 (*Association Francaise de la Gestion financière – Recommandations sur le gouvernement d'entreprise*; version 2008; this is the sixth edition since 1998).

In addition hereto, national EU legislators have amended corporate and accounting legislation in order to create a legislative basis for corporate governance codes. In the Netherlands for example, a listed company has to report in its annual report on whether it applies the Frijns Code. When it does not do so it must explain why. Moreover, the directors must include an 'in-control statement' in their annual reports (see section 5.2.4 *infra*). Most EU corporate governance codes do not require that such a statement be included in the annual report. They recommend that management communicate to stakeholders how risks and internal controls are managed.[20]

This tolerant European system stands in contrast to US corporate governance practices which are generally rule-based, *i.e.* US listed companies cannot deviate from corporate governance regulations. Non-compliance can lead to serious SEC penalties. This approach was reinforced by section 404 of SOX, *i.e.* US federal securities legislation. SOX requires, *inter alia*, that directors and external auditors personally attest to the effectiveness of internal controls: the internal control statement (see section 5.2.3 *infra*).

Rules are typically thought to be easier to follow than principles as they draw a clear line between acceptable and unacceptable behaviour. Rules also reduce the element of discretion on the part of individual managers or auditors. In practice, however, rules can be more complex than principles. They may very well be ill-suited to new types of transactions not covered by the code. Moreover, even if clear rules are followed, one can still find a way to circumvent their underlying purpose – which is more difficult if one is bound by a broader principle. Principles, on the other hand, are a form of self-regulation. They allow the sector to determine which standards are acceptable or unacceptable, and they allow room to search for, and to establish, best practices. They also pre-empt overzealous legislation that might not be practical.

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20. K. van de Poel and A. Vanstraelen, 'Management reporting on internal control and earnings quality: Insights from a "low-cost" internal control regime', November 2007, p. 3. Available at: http://aaahq.org/audit/midyear/08midyear/papers/17_VanDePoel_ManagementReporting.pdf, lastly examined on 6 September 2010.

In addition to the new European corporate governance approach, new legislation has also been adopted within the EU with regard to companies' financial statements and annual reports: the Modernisation Directive (2003), discussed in chapter 4.

Consequently, the concerns about corporate governance, internal control and external accounting have been addressed in various ways. In the following sections, the focus will first be on the US regulations concerning internal control and it will then shift to the pertinent provisions of the Frijns Code.

5.2.2 The COSO definition and the framework of internal control

Internal controls have existed from ancient times. In Hellenistic Egypt there was a dual administration, with one set of bureaucrats charged with collecting taxes and another with supervising them.[21] In present times, internal control is primarily linked to accounting practices and to corporate governance. The objective of internal control over financial reporting is to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles (GAAP). The purpose of the evaluation by management of internal controls is to provide management with a reasonable basis for its annual assessment as to whether any material weaknesses exist in the control system as of the end of the fiscal year. Any such weaknesses must be disclosed in the annual report.

Internal control is crucial for the transparency and effective governance of corporate activities. It therefore became a key element of the European and other corporate governance codes, and of the FCPA and SOX, which require improvements in internal control in US public companies and non-US public companies with a US listing. In the US in 1985, the 'Committee of Sponsoring Organisations of the Treadway Commission' (COSO) was formed.[22] COSO issued a report, "Internal Control – Integrated Framework (1992)" (COSO Report 1992), which established a definition of 'internal control' and created a framework for evaluating the effectiveness of internal controls. The standards set by COSO are important because later on, in 2003, when the SEC implemented new financial control regulations pursuant to SOX, the SEC

21. M. van Creveld, *The Rise and Decline of the State* (Cambridge University Press: Cambridge UK, 1999).
22. The COSO is an independent private-sector initiative and a non-profit commission, which was established to sponsor the US National Commission on Fraudulent Financial Reporting, which studied the causal factors that can lead to fraudulent financial reporting. Participating members of the COSO are: the American Accounting Association, Financial Executives International, the Institute of Internal Auditors, the Institute of Management Accountants; COSO, 'About Us, History', at: http://www.coso.org/aboutus.htm, accessed on 26 November 2010.

referred to these standards (see section 5.2.3 *infra*) as does the Frijns Code (see section 5.2.4 *infra*). Internal control is defined in the COSO Report 1992 as:

> a process, effected by an entity's board of directors, management and other personnel, designed to provide reasonable assurance regarding the achievement of objectives in the following categories:
>
> 1. Effectiveness and efficiency of operations.
> 2. Reliability of financial reporting.
> 3. Compliance with applicable laws and regulations.
>
> The first category addresses an entity's basic business objectives, including performance and profitability goals and safeguarding of resources. The second relates to the preparation of reliable published financial statements, including interim and condensed financial statements and selected financial data derived from such statements, such as earnings releases, reported publicly. The third deals with complying with those laws and regulations to which the entity is subject. These distinct but overlapping categories address different needs and allow a directed focus to meet the separate needs.[23]

Besides a definition, COSO created a framework for evaluating the effectiveness of internal controls. This framework views internal control as consisting of five interrelated components. Internal control over business operations is only considered 'adequate' and 'effective' when all five are present and functioning effectively. It concerns the following components:

1. The 'control environment' is what sets the tone for an organisation and provides discipline and structure. It reflects the entity's corporate governance and includes: the integrity and competence of the entity's people; management's philosophy and operating style; and the way management and the board assign authority and responsibility throughout the organisation.
2. 'Risk assessment' is the identification and analysis of risks to determine how they should be effectively managed. Once risks have been identified, sourced and measured, steps must be taken to avoid, transfer, or otherwise reduce the risks to acceptable levels. As an example, to evaluate the risk of bribery and corruption in the procurement process, one might analyse how engineering could create specifications that favour specific vendors, how purchasing could unfairly award contracts, and how accounting could record kickbacks.
3. The 'control activities' are the policies and procedures that help to ensure that management's directives are carried out. These include such practices

23. COSO, 'Internal Control-Integrated Framework', at: http://www.coso.org/IC-Integrated Framework-summary.htm, accessed on 30 July 2010. The COSO Report 1992 is available at: http://www.cpa2biz.com/AST/Main/CPA2BIZ_Primary/InternalControls/COSO/PRDOVR~PC-990009/PC-990009.jsp, accessed on11 June 2010.

as authorisation, reconciliation and the segregation of duties. Such activities would permeate the entire organisation, at all levels and in all functions. They should be tailored to reflect the entity's specific control environment, objectives, and tolerance for risks.

4. 'Information and communication systems' produce operational, financial and compliance-related reports, and they also notify personnel of their role in the internal control system. These systems must provide a means for escalating important information to the very top of the organisation and for receiving input from external parties. As an example, one should consider information on corrupt practices coming from a whistleblower. The source could be a marketing clerk within the organisation who comes across incriminating documents or an external vendor who witnesses a corrupt practice. In either event, it is critical that internal and external information be identified, captured, and communicated in a form and time frame that enables decision makers to carry out their responsibilities.
5. Finally, 'monitoring' is a process that assesses the quality of the system's performance over time. When deficiencies are discovered, they must be reported and appropriate remedial action taken. The internal enforcement mechanism must be taken seriously by subsidiary, branch, and regional management and personnel.

In 1994 COSO issued an "Addendum to Reporting to External Parties" (COSO Addendum 1994), which encourages company management that reports to external parties on controls over financial reporting to also report on controls dealing with ´safeguarding assets´ against unauthorised acquisition, use, or disposition. 'Safeguarding assets' relates mainly to bribery and other corruptive practices. The Addendum defines such controls and provides a suggested form of reporting.[24] The Addendum was issued in response to a concern expressed by some parties, including the US General Accounting Office, that the management reports contemplated by the COSO Report 1992 did not adequately address controls relating to the safeguarding of assets and therefore would not fully respond to the requirements of the FCPA. In the COSO Addendum 1994, COSO concluded that while it believed that its definition of internal control in the COSO Report 1992 remained appropriate, it recognised that the FCPA encompasses certain controls related to the safeguarding of assets

24. See: 'Internal Control-Integrated Framework', at: http://www.coso.org/IC-IntegratedFramework-summary.htm, accessed on 26 November 2010. The 'COSO Addendum 1994' and other COSO reports are available at: http://www.cpa2biz.com/AST/Main/CPA2BIZ_Primary/InternalControls/COSO/PRDOVR~PC-990009/PC-990009.jsp, accessed on 11 June 2010; See also SEC, 'Management's Report on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports', Release Nos. 33-8238, 34-47986, 14 August 2003, at: http://www.sec.gov/rules/final/33-8238.htm, accessed on 19 March 2009.

and that there is a reasonable expectation on the part of some recipients of internal control reports that the reports will cover such controls. The COSO Addendum 1994 provides for the following definition of the term 'internal control over safeguarding of assets against unauthorised acquisition, use or disposition:

> Internal control over safeguarding of assets against unauthorized acquisition, use or disposition is a process, effected by an entity's board of directors, management and other personnel, designed to provide reasonable assurance regarding prevention or timely detection of unauthorized acquisition, use or disposition of the entity's assets that could have a material effect on the financial statements.[25]

5.2.3 SOX – the 'in-control' requirement

SOX was enacted in 2002. This was the American response to a number of major corporate and accounting scandals (*e.g.* Enron, Tyco International, Adelphia, Peregrine Systems and WorldCom). When the share prices of the affected companies collapsed, investors lost billions of dollars and the public confidence in the nation's securities markets had also been affected. SOX was named after the sponsors Senator Paul Sarbanes, the Democrat Senator of Maryland, and Representative Michael G. Oxley, a Republican from Ohio. SOX was approved by an overwhelming majority (House: 334-90; Senate 99-0).[26]

SOX established improved standards for boards, management, and public accounting firms of public companies regulated by the US Securities Exchange Act of 1934 (US Securities Exchange Act). It does not apply to privately held companies. SOX contains 11 titles, or sections, dealing with subjects ranging from additional corporate board responsibilities to criminal penalties. It required the SEC to introduce rulings to implement SOX. SOX and subsequently implemented SEC rules now require public companies to evaluate their internal controls and to publish those findings together with their SEC filings. Management and external auditors are held to evaluate the effectiveness of a company's internal control over financial reporting based on a suitable control framework. For this evaluation, the framework developed in the COSO Report 1992 is generally used.

Although SOX is directed at public companies, many privately owned companies and non-profit organisations are also electing to evaluate their systems of internal control using COSO's framework. The manner in which

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25. *Ibid.*
26. The Sarbanes-Oxley Act of 2002 (Pub.L. 107-204, 116 Stat. 745, enacted 30 July 2002), also known as the 'Public Company Accounting Reform and Investor Protection Act of 2002' and commonly called 'SOX' or 'Sarbox', is a US federal law. See: 'Sarbanes Oxley Act', at: http://en.wikipedia.org/wiki/Sarbanes-Oxley_Act> accessed on 30 July 2010.

the components of the COSO framework are applied to an organisation will depend on the nature and size of the organisation. Presently, the debate continues over the perceived benefits and costs of SOX. Supporters contend that the legislation was necessary; opponents argue that SOX imposes too big a burden on US industry.

Section 404 of SOX directed the SEC to implement rules that require public companies to include in their annual reports 'a report of management on the company's internal control over financial reporting'.[27] Both US and non-US companies listed in the US are subject to compliance with these requirements.[28] The SEC issued a "Final Rule on Management's Reports on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports" (the SEC Rule on Internal Control).[29] This Rule contains provisions regarding the format and the substance of the internal control report. Concerning the format, the following elements are mentioned that have to be included:

- a statement of *management's responsibility for establishing and maintaining* adequate internal control over financial reporting for the company;
- a statement containing management's *assessment of the effectiveness* of the company's internal control over financial reporting as of the end of the company's most recent fiscal year;
- a statement *identifying the framework* used by management to evaluate the effectiveness of the company's internal control over financial reporting; and
- a statement that the registered public accounting firm that audited the company's financial statements included in the annual report has issued an *attestation report* on management's assessment of the company's internal control over financial reporting. [Emphasis added].[30]

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27. SEC, 'Commission Guidance Regarding Management's Report on Internal Control Over Financial Reporting under section 13(a) or 15(d) of the Securities Exchange Act of 1934 – Action: Interpretation', SEC 17 CFR Part 241, Release Nos. 33-8810; 34-55929; FR-77; File No. S7-24-06e, 2007; p. 9, at: http://www.sec.gov/rules/interp/2007/33-8810.pdf, accessed on 28 April 2010.
28. This applies to companies that are subject to the US Securities Act 1933 and the reporting requirements of the US Securities Exchange Act 1933 (pursuant to rules 13(a) or 15(d)), other than registered investment companies.
29. The final rules amended the exhibit requirements for periodic reports in order to add the certifications required by sections 302 and 906 of SOX to the list of required exhibits to be included in reports filed with the SEC. See SEC, 'Implements Internal Control Provisions of Sarbanes-Oxley Act; Adopts Investment Company R&D Safe Harbor', Release 2003-66, 2003, at: http://www.sec.gov/news/press/2003-66.htm, accessed on 11 June 2010; Also see: SEC, 'Final Rule: Management's Report on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports', 17 CFR PARTS 210, 228, 229, 240, 249, 270 and 274, 2003, Release Nos. 33-8238; 34-47986; IC-26068; File Nos. S7-40-02; S7-06-03) SII(H)(2), at: http://www.sec.gov/rules/final/33-8238.htm#iih2, visited on 10 March 2010.
30. *Ibid.*, SEC Release 2003-66.

The last-mentioned element requires that the company files the accounting firm's attestation report as part of the annual report. Additionally, management should evaluate any change in the company's internal control over financial reporting that occurred during a fiscal quarter that has materially affected, or is reasonably likely to materially affect, the company's internal control over the annual financial reporting.

As regards the substance, the SEC Rule on Internal Control defines 'internal control over financial reporting' as:

> A process designed by, or under the supervision of, the registrant's[31] principal executive and principal financial officers, or persons performing similar functions, and effected by the registrant's board of directors, management and other personnel, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles and includes those policies and procedures that:
>
> 1. pertain to the maintenance of records that in reasonable detail accurately and fairly reflect the transactions and dispositions of the *assets* of the registrant;
> 2. provide reasonable assurance that *transactions are recorded* as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles, and that receipts and expenditures of the registrant are being made only in accordance with authorizations of management and directors of the registrant; and
> 3. provide reasonable assurance regarding prevention or timely *detection of unauthorized acquisition, use or disposition* of the registrant's *assets* that could have a material effect on the financial statements." [Emphasis added].[32]

This definition of Internal control encompasses the subset of internal controls addressed in the COSO Report 1992 in so far as they pertain to financial reporting objectives. However, the SEC's definition does not include those elements that relate to the effectiveness and efficiency of a company's operations (compare definition used in the COSO Report 1992 under 1. – section 5.2.2, *supra*). Neither does it refer to a company's compliance with applicable laws and regulations (compare definition used in the COSO Report 1992 under 3. – section 5.2.2, *supra*), with the exception of compliance with the applicable laws and regulations directly related to the preparation of financial statements, such as the SEC's financial reporting requirements.[33]

Interestingly, the SEC's definition also creates an implicit link to the US prohibition on corrupt practices as defined in the FCPA by referring to the

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31. *I.e.* a listed company that has to report according to the US Securities Exchange Act.
32. SEC Release 2003-66, *supra* note 29. See also SEC, 'Commission Statement on Implementation of Internal Control Reporting Requirements', Release No. 2005-74, 2005, at: http://www.sec.gov/news/press/2005-74.htm, accessed on 1 May 2009.
33. SEC Release 2003-66, *supra* note 29. See also the description of internal accounting controls in the Securities Exchange Act (US) of 1934 s 13(b)(2)(B).

COSO Addendum 1994 (see section 5.2.2 *supra*).[34] In order to achieve the desired result and to provide consistency with the COSO Addendum, the SEC has explicitly included the words 'disposition of assets' under (1) and (3) of its definition. In its explanation to the text, the SEC pointed to the fact that the SEC definition will be used for purposes of public management reporting, and that the companies that will be subject to section 404 SOX requirements are also subject to the FCPA requirements.[35] It certainly seems practical to combine the information required for both purposes in one internal control statement. However, the SEC Rule on Internal Control prescribes that the framework on which management's evaluation is based will have to be a suitable, recognised control framework that is established by a body or group that has followed due-process procedures, including the broad distribution of the framework for public comment.[36] This means that the COSO framework is one eligible framework, but that others could also be used.

Under the SEC rules, management must disclose any problems that could have a material effect on the financial statements. Management will be unable to conclude that the company's internal control over financial reporting is effective if there are one or more material weaknesses in such control. Any uncertainties concerning company employees engaging in corrupt practices could therefore in the view of the author and based on the explanatory text to the SEC Rule on Internal Control be qualified as such a material weakness.

5.2.4 The Dutch Corporate Governance Code – 'in-control' statement

As of 2009, the Frijns Code applies to listed companies with a registered office in the Netherlands (see section 3.3 *supra*).[37] The Frijns Code replaced the

34. SEC Release 2003-66, *supra* note 29.
35. However, this SEC approach has also been criticised *e.g.* Peter Wallison,' Internal Control over Financial Reporting', Open letter to the SEC, where it states: "The following is a written comment submitted to the SEC in connection with its proposed rule modifying the standards for internal controls under section [404 SOX]. It is of course commendable that the Commission is attempting now to ease the burden of section [404 SOX]. However, given the incentives of the parties involved, this effort is unlikely to be successful in significantly reducing the costs of this unnecessary and burdensome statutory provision." See: http://www.aei.org/publications/pubID.25664.filter.all/pub_detail.asp, accessed on *26 July 2010*.
36. SEC Release 2003-66, *supra* note 29.
37. Frijns Code, note 19 *supra*, Preamble, p. 5: 'whose shares or depositary receipts for shares have been admitted to listing on a stock exchange, or more specifically to trading on a regulated market or a comparable system', and large companies with a registered office in the Netherlands (*i.e.* balance sheet value > 500 million euro) 'whose shares or depositary receipts for shares have been admitted to trading on a multilateral trading facility or a comparable system'.

Tabaksblat Code.[38] The content has not been substantially amended, with a few exceptions. *E.g.* one amendment concerns the inclusion of CSR in a directors' responsibilities and a recommendation to report on CSR in the company's annual report (see chapter 3).[39] Another amendment is that inclusion of 'forward-looking information' in the directors' in-control statement is no longer required. However, the Frijns Code does require a more detailed description of a company's internal risk management and control systems in the annual report.

The Frijns Code requires that the directors include an 'in-control statement' in their annual report (best practice provision II.1.5). Compared with the Tabaksblat Code, the scope of the Frijns Code management board in-control statement is less strict.[40] There is no longer a requirement to state that the internal risk management and control systems are 'adequate and effective' without any qualification. The current text is more in line with the wording used in the SEC Rule on Internal Control (see section 5.2.3 *supra*). The Frijns Code states that the management board shall declare:

> that the internal risk management and control systems provide a reasonable assurance that the financial reporting does not contain any errors of material importance and that the risk management and control systems worked properly in the year under review.

The directors must also substantiate this. In the annual report, the management board shall report on the main risks related to the company's strategy. It shall

38. By Royal Decree of 10 December 2009, published on 21 December 2009 (Bulletin of Acts and Decrees 2009/545), the Frijns Code was designated in accordance with article 2:391(5) DCC. The Tabaksblat Code was designated by the Decree of 27 December 2004, *Staatsblad* [Official Gazette], 2004, 747; which was amended by the Decree of 20 March 2009, *Staatsblad* [Official Gazette], 2009, 154, also incorporating Council Directive (EC) 2006/46 amending Council Directives 78/660/EEC on the annual accounts of certain types of companies, 83/349/EEC on consolidated accounts, 86/635/EEC on the annual accounts and consolidated accounts of banks and other financial institutions and 91/674/EEC on the annual accounts and consolidated accounts of insurance undertakings, *2006, OJ L 224/1-7*. According to article 2a of the 20 March 2009 Decree, the corporate governance statement may also be provided on the company's website provided that the company explicitly refers in its annual report to the electronically available statement; an electronic corporate governance statement will be legally regarded as being part of the annual report.
39. Frijns Code, *supra* note 19, Principles II.1 and III.1, and best practice provisions II.1.2 and III.1.6.
40. Frijns Code, *supra* note 19, Principle II.1 and best practice provision II.1.5. The suggested recommendation by Ms Barbara Biers to delete the in-control statement from the Tabaksblat Code has not been followed when amending the Frijns Code; see: B. Biers, '*Het risico van de risicobeheersing en interne controlesystemen: de 'in control' verklaring van de Code Tabaksblat*' [The risk of risk management and internal control systems: the in control statement of the Tabaksblat Code], in *Ondernemingsrecht* [Company Law Review], 16, 2005, pp. 539-545.

describe the design and operation of the internal risk management and of the control systems during the financial year (best practice provision II.1.4). In doing so, the board shall describe any major shortcomings, any significant changes that have been made to the systems, and any major improvements that are planned. They shall confirm that this has been discussed with the supervisory board and the audit committee; *i.e.* a committee which is supposed to supervise the functioning of the systems (best practice provision III.5.4a, V.2 and V.4; and compare articles 2:141(2) and 2:251 DCC pursuant to which the executive directors must inform the non-executive directors about the management and control systems in writing). The explanatory comments to the Frijns Code establish a link with the COSO framework by stating:

> it would be logical for the management board to indicate in the description of the design and effectiveness of the internal risk management and control systems what framework or criteria (*e.g.* the COSO framework for internal control) it used in assessing the internal risk management and control system.[41]

Contrary to SOX, neither the directors' in-control statement itself nor the contents of the Dutch annual report need to be certified (attested) by a registered public accounting firm.[42] However, the accountants do need to check whether the annual report was drawn up in accordance with the legal requirements (*i.e.*: does it contain all the required subjects?). They must also check whether the annual report and the in-control statement are consistent with the annual accounts (no inconsistencies).[43] Contrary to the SEC Rule on Internal Control and its commentaries, neither the Frijns Code nor the explanatory comments contain an explicit reference to anti-corruption legislation or to corporate in-house anti-corruption programmes.

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41. Explanatory comments to the Frijns Code, *supra* note 19, p. 39. Compare the Combined Code on Corporate Governance 2008 (UK), which provided its own guidelines on how to assess internal control by referring to the Turnbull Guidance – Institute of Chartered accountants in England and Wales, 'Guidance on Iinternal Control', 1999, and the UK Financial Reporting Council 'Revised Guidance for Directors on the Combined Code 2005', at: http://www.frc.org.uk/documents/pagemanager/frc/Revised%20Turnbull%20Guidance%20October%202005.pdf, accessed on 14 June 2010.
42. Article 2:393(3) DCC. See also Article 3(c) of the Decree of 20 March 2009, *supra* note 38, pp. 3 and 6; C. de Groot, *Corporate Governance as a Limited Legal Concept* (Alphen aan de Rijn: Kluwer Law International 2009), p. 119, referring to B.J.C.M. van Beurden, 'De raad van bestuur verklaart: de onderneming is "in control"' [The board declares: the company is "in control"]', *Tijdschrift voor Ondernemingsbestuur* [Review for Corporate Governance], 2004, pp. 259-164, argues that the Dutch provisions on risk reporting in the Frijns Code go further than parallel provisions in SOX and the UK Combined Code. However, both De Groot and Van Beurden referred to the Tabaksblat Code. As has been explained above, the Frijns Code imposes less strict language as regards the scope of the management board's in-control statement.
43. Decree of 20 March 2009, *supra* note 38, p. 8.

Finally, it is notable that the best practice provision II.3.1(c) states that an executive director shall "not provide unjustified advantages to third parties to the detriment of the company." Although this provision is placed under the heading of Principle II.3 regarding a conflict of interest between directors and the company, it can certainly contribute to avoiding corrupt practices within a company.

5.2.5 Internal control requirements as a corporate law mechanism to fight corruption

One of the roles of corporate law in the prevention of corruption can be found (through corporate governance and accounting regulations) in the internal control provisions on financial reporting. As explained in section 5.1 *supra* in relation to the Siemens and ABB corruption scandals, the financial and accounting controls of these companies had not detected or prevented corrupt payments from being made. This shows that maintaining weak financial and accounting controls substantially increases the risk of corrupt practices by employees. The internal control regulations described in sections 5.2.2 to 5.2.4 do not explicitly require that companies include information on their methods for avoiding corruption. However, they do require that companies implement and maintain financial and accounting controls that ensure the reliability of financial reporting, including controls concerning the disposition of assets. Therefore, if companies comply strictly by implementing and maintaining these controls, their financial reports can be expected to be fully reliable and the potential for 'hiding' illicit payments in the financial reports will in principle be reduced substantially.

Solid controls are particularly relevant if the company invests or does business in countries where the enforcement of anti-corruption rules is weak. In those circumstances, civil society expects more corporate initiative from a CSR perspective. See *e.g.* the Ruggie Report (section 7.5 *infra*).[44] This Report reiterates that businesses have a greater responsibility to behave responsibly in weak governance zones and that, consequently, businesses have to anticipate

44. UN GA Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, "Protect, Respect and Remedy: a Framework for Business and Human Rights", 7 April 2008, UN Doc A/HRC/8/5. See also the position of the US Department of Justice in regard of due diligence in high risk areas: J. Spinelli (Daylight Forensic & Advisory), 'Foreign Corrupt Practices Act Due Diligence in Mergers & Acquisitions', Ethishere TM Institute, 13 May 2009, at: http://ethisphere.com/foreign-corrupt-practices-act-due-diligence-in-mergers-acquisitions/, visited on 4 June 2010. He discusses the Opinion Release No. 0802- Pre-Acquisition FCPA Due Diligence regarding the Halliburton Company in seeking to acquire the assets of Expro a UK company on the London Stock Exchange (The Target) that provides well flow management for the oil and gas industry. It was determined that it needed to conduct extensive FCPA due diligence, because Expro operates in a high-risk industry, in high-risk countries and deals directly with government owned customers.

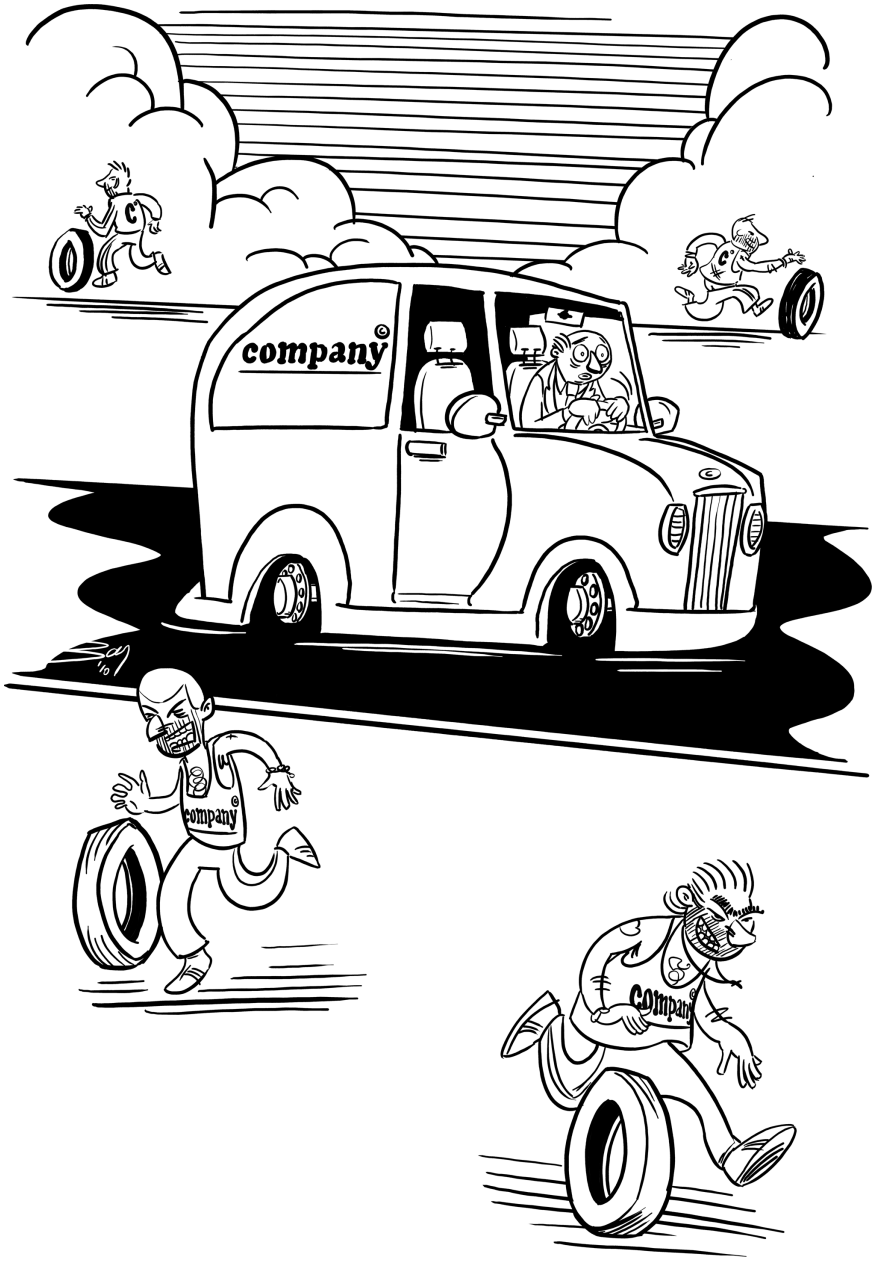
and incorporate internal programmes in order to avoid corporate-related human rights abuses. As mentioned above, corruption is an obstacle to realising public goals, among which are human rights. In particular, the implementation of the second generation of human rights, *i.e.* the economic, social and cultural rights, will be impeded when public income disappears into the pockets of a few powerful people as a result of corruption.

An example of the role that internal financial and accounting controls play in the avoidance of corruption can be found in Siemens AG's 2007 Management Report. The "Information to Shareholders" section disclosed the actions which Siemens management had taken to strengthen its financial reporting controls in order to prevent corruption:

> According to U.S. provisions […] Siemens is required to establish and maintain adequate internal control over financial reporting. In the fiscal year 2006 management concluded that the system of internal control over financial reporting proved not to be effective with respect to preventing misappropriation of funds and abuse of authority. In response to this management took action on implementing remediation actions focusing on anti-corruption controls […]. However in 2007 it was concluded that the ineffectiveness within the internal control system has not yet been remediated […].[45]

This example demonstrates that maintaining effective internal controls over financial reporting is a prerequisite for a company to prevent corruption. A corporate law obligation to report on this, such as required by SOX and the Frijns Code (through the DCC), certainly motivates a company's management to survey risks and to take measures to avoid such risks.

45. Siemens Annual Report 2007, *supra* note 7, p. 174.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5.3 Corruption risks from a company perspective

5.3.1 Costs and reputational risk

It has been calculated that in many countries corruption adds ten per cent to the cost of doing business, and that corruption adds as much as 25 per cent to the cost of public procurement. This undermines business performance and diverts public resources from legitimate sustainable development.[46] Besides the costs of bribes and facilitation payments, the additional costs include substantial legal and advisory fees, the costs of additional personnel and fines. Due to these added costs of doing business, the advantage of outsourcing production to low-wage countries could easily be negated. Moreover, the investigation and prosecution of corrupt acts diverts managers from doing their jobs, since such proceedings are extremely time-consuming and stressful.

Company experiences show that an accusation of malpractice or corruption can in itself damage a company's reputation, even if a court subsequently determines that the company has not been involved in corrupt practices. It is therefore very important for companies to be quick to counter unfounded allegations by demonstrating to the public authorities or society at large that they have effective mechanisms, policies and internal controls in place aimed at preventing corrupt practices.[47] A direct consequence of a damaged reputation is the loss of credibility, *i.e.* public trust in a company, which will subsequently result in a loss of business opportunities, including the chances of attracting equity and loans on favourable terms. It will also become more difficult to attract and retain talent. People will think that when the company does not apply good financial internal controls, many things will go wrong within its operations. The potential damage that corruption can cause to companies is therefore considerable.

In addition to the above-mentioned risks, there are many other reasons why companies should want to prevent corruption, some of them being the following. Corruption is considered to be one of the factors that result in a reduction of the share price. Investors will be afraid that the quality of management is not good.[48] FCPA jurisprudence shows that anticipated mergers or acquisition agreements have been cancelled because due diligence investigations regarding the target company have revealed a corruption-related

46. UN Global Compact, 'Transparency and Anti-Corruption', at: http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/anti-corruption.html, accessed on 19 March 2010.
47. *Ibid.*
48. Statement by Karina Litvack, Head of Governance & Sustainable Investment F&C Management (Presentation at Anti-Corruption Summit 2008, *supra* note 10).

incident.[49] A company's potential liability for corrupt practices clearly constitutes a potential risk for a successor company. Planned joint venture contracts with local companies may also be cancelled if a due diligence investigation were to reveal involvement with corruption on the part of the future joint-venture partner. In this respect, a relevant observation is that business models are changing from the traditional in-house production models to new models that are based on a globalised world in which companies through the internet are connected with production units in many countries. These outsourcing, insourcing, offshore production and supply chain models depend on local (joint-venture) partners everywhere in the world (see also section 1.1 *supra*). Corrupt practices employed by local business partners can therefore potentially negatively impact any company in the business line.

Another form of corruption is private-to-private corruption which disrupts competitive markets. Since corruption increases costs relative to profits, real price competition will be blurred due to the fact that open, fair and transparent competition among potential vendors is rendered impossible. Sellers of goods with better offers or lower prices are possibly outmanoeuvred by others using non-transparent methods. Private-to-private corruption also undermines the corporate loyalty and accountability expected from directors, managers and employees. They are obliged to act for the benefit of their companies, their stakeholders, and in accordance with the instructions of their superiors.[50]

5.3.2 International developments

In this section a series of recent international developments in anti-corruption laws will be explored. The first unilateral prohibition of the bribery of foreign public officers was the FCPA (the US Foreign Corrupt Practices Act, enacted in 1977).[51] The FCPA is part of the US Securities Exchange Act, as amended,

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49. As a consequence of a settlement between the SEC and Titan Corporation for violations of the FCPA, Lockheed terminated its Merger Agreement with Titan Corporation whereby the former company was to acquire the latter. Source: L.A. Low (Miller & Chevalier Chartered Washington, D.C.) 'Enforcement of the FCPA in the United States: Trends and the Effects of International Standards', presented to the International Bar Association 3rd Annual Conference: "The Awakening Giant of Anti-Corruption Enforcement", 2005; See also: SEC, 'SEC v. The Titan Corporation', Litigation Release No. 19107, 2005, at: http://www.sec.gov/litigation/litreleases/lr19107.htm, accessed on 19 March 2009.
50. Vincke 2003, *supra* note 6, pp. 127-139.
51. The FCPA was first passed in 1977 and is part of the US Securities Exchange Act, as amended. See: Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15U.S.C.§§78dd-1), http://www.justice.gov/criminal/fraud/fcpa/, accessed on 14 November 2010; see also P. C. Huskins, 'FCPA Prosecutions: Liability Trend to Watch', *Stanford Law Review*, 60-5, 2008, pp. 1447-1458, at: http://www.stanford.edu/group/lawreview/content/vol60/issue5/Huskins.pdf, accessed on 14 November 2010.

and thus is applicable to both American and foreign companies that have stock listed in the US. Section 5.3.3 will deal with the FCPA.

In the international arena, a series of anti-corruption treaties and policies have been enacted. These treaties aim to facilitate the cross-border enforcement of anti-corruption laws as well as the reinforcement of domestic law. Their impact is already apparent in recent prosecutions.[52] The most relevant international instruments that have been ratified and implemented by States around the globe are:

- Criminal Law Convention on Corruption, adopted by the Council of Europe;[53]
- Civil Law Convention on Corruption adopted by the Council of Europe;[54]
- OECD Corruption Convention,[55] adopted by the OECD[56]; and
- UN Convention against Corruption.[57]

Generally speaking, these international conventions provide for the criminalisation of corrupt acts in the country where they occur, and of corrupt acts carried out in another country (*i.e.* extraterritorial effect). These treaties furthermore require that the States Parties establish criminal and civil liability for *legal entities* in their jurisdictions, with a view to prohibiting the tax deductibility of bribes, and in order to impose accounting requirements on companies. These treaties have been implemented in a large number of jurisdictions by both developed *and* developing countries. In emerging markets, where the opportunities for corruption have historically been high due to the weak rule of law, the situation

52. Low (2005), *supra* note 49.
53. The Council of Europe is an international organisation, founded in 1949. The Council of Europe's Criminal Law Convention on Corruption has been signed by 49 countries, ratified by 41 governments, and has entered into force in 41 countries; See Council of Europe: 'Criminal Law Convention on Corruption CETS No. 173', at: http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=173&CM=8&DF=11/5/2008&CL=ENG and http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=173&CM=8&DF=11/14/2008&CL=ENG; both websites accessed on 14 November 2010.
54. Signed by 42 countries, ratified by 33 governments; it has entered into force in 33 countries; See Council of Europe, 'Civil Law Convention on Corruption CETS No. 174', at: http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=174&CM=8&DF=11/5/2008&CL=ENG and http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=174&CM=8&DF=11/14/2008&CL=ENG accessed on 14 November 2010.
55. Signed and ratified by 38 countries; See OECD, 'Anti-Bribery Convention', at: www.oecd.org/daf/nocorruption/convention, accessed on 2 May 2009.
56. The OECD is an international organisation of 30 countries. See OECD 'History, Members and Partners', at: www.oecd.org/pages/0,3417,en_36734052_36761800_1_1_1_1_1,00.html, accessed on 2 May 2009.
57. Signed by 140 countries and ratified by more than 107 governments. See: Transparency International, 'Policy Position Paper UNCAC', 2008, at: www.transparency.org/content/download/28888/436039/, accessed on 14 November 2008.

is changing. In these countries corruption has become a political issue and there is an increased readiness to prosecute corrupt practices.

Transparency International Worldwide Governance Indicators (the Indicators) show that some developing countries, such as Georgia, Chile and Mexico, are making progress in governance and in fighting corruption. For example, in the period 2002-2007, the Indicators revealed marked improvements in governance and the control of corruption in Georgia.[58] This country has taken various punitive and preventive steps against corruption, such as: (i) the arrest of several former ministers and high-ranking officials and the recovery of hidden and embezzled funds; (ii) the adoption of legislative changes aimed at suppressing unlawful income deviation, restricting conflicts of interest and applying strict measures of punishment for corruption offences; and (iii) the enhancement of transparency and the abolition of corrupt institutions.[59] Furthermore, the Indicators show that Chile's public governance scores higher than industrialised countries such as Greece or Italy when it comes to the implementation of anti-corruption policies.[60] Moreover, as acknowledged by Transparency International, the Mexican government has introduced a highly comprehensive anti-corruption plan. The most important measures taken during the Fox administration are (i) the passage of the Federal Law for Transparency and Access to Governmental Public Information of 12 June 2002 along with the creation of an implementing institution, the *Instituto Federal de Acceso a Informacion* (Federal Institute for Access to Information); and (ii) the Mexican Civil Service's plan to introduce a new and improved culture of public service in Mexico. These two initiatives, in contrast to other pressing issues of the Mexican public policy agenda, were passed unanimously by the legislature.[61]

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58. World Bank, 'Worldwide Governance Indicators Show Some Countries Making Progress in Governance and in Fighting Corruption', News Release No: 2008/392/WBI, at: http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:21814712%7EpagePK:64257043%7EpiPK:437376%7EtheSitePK:4607,00.html, accessed on 2 May 2009.
59. G. Jiandieri (Transparency International), 'The New Anti-Corruption Governments: The Challenge of Delivery. Georgia', p. 2. A case study, paper commissioned for the Kenya Meeting on New Governments, co-organised by the government of Kenya, TI-Kenya and Transparency International, held in Nairobi, Kenya, 2004, at: http://www.transparency.org/news_room/in_focus/2006/anti_corruption_governments/country_studies, accessed on 2 May 2010.
60. See OECD, *supra* note 55.
61. B.P. Henríquez (Transparency International), 'New Anti-Corruption Governments: The Challenge of Delivery. Mexico'. Abbreviated case study commissioned for the New Anti-Corruption Governments Meeting, co-organised by the government of Kenya, TI-Kenya and Transparency International, held in Nairobi, Kenya, 2004, at: http://www.transparency.org/content/download/4221/26064/file/MexicoCase, accessed on 2 May 2010.

In Mexico, and in other jurisdictions there have also been investigations into foreign (extraterritorial) bribery.[62]

Pursuant to the many new national anti-corruption laws, most forms of corruption are illegal in the country where they occur. In addition and as a result of the implementation of the OECD Corruption Convention, the bribery of foreign public officials has become a criminal offence in at least 26 European jurisdictions.[63] Therefore, if for example a Dutch company is doing business in the Slovak Republic and Germany, countries which have amended their Criminal Code pursuant to the OECD Corruption Convention,[64] the Dutch company risks multiple prosecutions: in the Netherlands for bribes paid in any of these jurisdictions; and also in the Slovak Republic and Germany. If the Dutch company has shares listed on a US stock exchange, it also risks prosecution under the FCPA with parallel investigations by the US Department of Justice and by the SEC. Legal experts and case law show that a company is soon considered to fall within US FCPA jurisdiction, *i.e.* for instance when it sells products in the US or has an investor relationship there. Furthermore, experts confirm that asserting a 'lack of jurisdiction' is not a good defence in FCPA prosecutions, since this defence is hardly ever accepted by prosecutors and the defendant forfeits the opportunity of cooperating with the authorities.[65] A clear example of the multi-jurisdictional prosecution risk is the Siemens case. As explained in section 5.1 *supra*, corrupt acts carried out by Siemens' employees in Russia, Nigeria and Libya triggered prosecution by the German as well as the US authorities.

This increasingly dynamic environment of anti-corruption laws, regulations and extra-territorial enforcement makes it uncertain for companies to assess and measure the legal risks to which they are exposed.[66] For this and several other reasons it is in every company's best business interests to ensure that it does not

62. See Transparency International, 'Crack-down on Foreign Bribery Underway in Mayor Exporting Countries', Press release, 7 March 2005, http://www.transparency.org/news_room/latest_news/press_releases/2005/07_03_2005_oecd_countries, accessed on 14 November 2010.
63. *I.e.* Austria, Belgium, Bulgaria, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, the Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey and the UK. See OECD Working Group on Bribery, 'Annual Report 2007', p. 38, at: http://www.oecd.org/dataoecd/21/15/40896091.pdf, accessed on 14 November 2008.
64. See: OECD, 'Steps taken by State Parties to implement and enforce the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions', at: http://www.oecd.org/document/44/0,3343,en_2649_34859_36433004_1_1_1_1,00.html, accessed on 2 May 2009.
65. Presentation Hammond, Anti-Corruption Summit 2008, *supra* note 10.
66. UN Global Compact, 'Tenth Principle against Corruption', at: http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/anti-corruption.html, accessed on 17 March 2009.

engage in corrupt practices. In the following two sections, the US and Dutch anti-corruption laws will be discussed in more detail.

5.3.3 US law – Foreign Corrupt Practices Act

In the US, the Department of Justice and the SEC are spearheading the fight against global corruption. The principal weapon in their arsenal is the FCPA. The FCPA was passed in 1977 in response to abuses that came to light as a result of a SEC voluntary disclosure programme in mid-1970, through which it was revealed that large US companies had paid bribes to government officials to obtain business in both developed and developing countries.[67] The FCPA fundamentally stands for the proposition that notwithstanding local customs or business pressures to the contrary US businesses and persons should not bribe foreign officials or foreign political parties. The FCPA's provisions include both anti-bribery provisions and accounting provisions, which will be addressed in sections 5.3.3.1 and 5.3.3.2. Their extraterritorial reach is very wide. Also non-US companies and persons can fall within the scope of application of the FCPA.[68] In the last decade, there have been increasing numbers of prosecutions of and investigations into European companies concerning FCPA violations. The penalties are severe and the reputation risks associated with prosecution are great; the environment also becomes increasingly challenging for individual officers and directors (see sections 5.3.3.3 and 5.3.3.4 *infra*).

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67. The FCPA was lastly amended in 1998; it is part of the US Securities Exchange Act 1934, as amended. FCPA of 1977: Pub. L. No. 95-213, 91 Stat 1494; codified as amended at 15 U.S.C. §§78dd-1 to 3, 2000. Available at: http://www.justice.gov/criminal/fraud/fcpa/, accessed on 3 August 2010. See further: L.A. Low, 'Enforcement of the US Foreign Corrupt Practices Act: Extraterritorial Reach and The Effects of International Standards', Miller & Chevalier, Steptoe & Johnson LLP, Washington D.C., at: http://www.steptoe.com/assets/attachments/2600.pdf>1, accessed on 19 March 2009.
68. Section 15U.S.C.§78dd-3 FCPA prohibits foreign trade practices by persons other than issuers or domestic concerns as follows: "It shall be unlawful for any person other than an issuer that is subject to section 30A of the Securities Exchange Act of 1934 or a domestic concern, as defined in section 104 of this Act, or for any officer, director, employee, or agent of such person or any stockholder thereof acting on behalf of such person, while in the territory of the United States, corruptly to make use of the mails or any means or instrumentality of interstate commerce or to do any other act in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to […](1) any foreign official […]; (2) any foreign political party or official thereof or any candidate for foreign political office […]". See Low, *supra* note 67.

5.3.3.1 The anti-bribery provisions

The FCPA prohibits persons and companies from paying bribes to non-US government officials to secure an "improper advantage," *i.e.* for the purpose of obtaining or retaining business.[69] Companies also may not 'hide' behind local agents. The FCPA prohibits giving any person something of value "while knowing that all or a portion of such money or thing of value will be offered" in the form of a bribe.[70]

The FCPA anti-bribery provisions create a limited exception for small payments or gifts made to expedite or secure the performance of a 'routine governmental action'. The facilitating payments covered by this exception include payments made (i) to obtain documents necessary to qualify a person to do business in the country; (ii) to process government papers; (iii) to provide police protection, postal services, or necessary inspections; or (iv) to provide phone, utilities, cargo, or similar services.[71]

Furthermore, the FCPA provides two affirmative defences: where the payment or gift was lawful under the written laws of the foreign country, or where the payment or gift was a reasonable and a *bona fide* expenditure directly related to either the promotion, demonstration, or explanation of products or services, or the execution or performance of the contract.[72] However, these exceptions are narrowly tailored, and it is risky to rely upon them.

5.3.3.2 The accounting controls provision

The FCPA requires US and non-US companies with securities listed in the US to "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of assets" by the company.[73] A company must furthermore devise and maintain accounting controls sufficient to provide "reasonable assurances" that four objectives are met: (i) that transactions are executed in accordance with management's instructions; (ii) that access to assets is controlled according to management's instructions; (iii) that transactions are recorded as necessary to permit proper accounting and the preparation of financial statements; and (iv) that records are reconciled with existing assets at reasonable intervals. The FCPA does not mandate any particular kind of internal control framework. Transactions should

69. Sections 15U.S.C. §§78dd-1(a)(1)(A)(i), 78dd-2(a)(1)(A)(i).
70. Sections 15U.S.C. §§78dd-1(a)(3). 78dd-2(a)(3). Furthermore: Huskins (2008), *supra* note 51, p. 1448.
71. Sections 15U.S.C.§§78dd-1(b), 78dd-2(b). Furthermore: Low, *supra* note 67.
72. Sections 15U.S.C. §§78dd-1(c), 78dd-2(c).
73. Section 15U.S.C.§78m(b)(2). See also: W. Henderson, 'Staying out of trouble: The role of the global anti-corruption program', Ernst & Young LLP, at: http://www.oceg.org/view/20796, last visited on 2 May 2010.

be recorded in conformity with accepted accounting standards designed to prevent off-the-books transactions such as kick-backs and bribes. "Reasonable detail" is "such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs."[74] The test is whether a system, taken as a whole, reasonably meets the FCPA's specified objectives. According to the SEC, an adequate internal control system should fit in with the best practices that have been formalised in a widely accepted form by COSO (see section 5.*2.2*). Two important rules are:

(i) the prohibition of the 'falsification of books and records' required to be kept under the record-keeping provisions of the FCPA.[75] This applies to any person and there is no materiality requirement. Books are defined broadly to include "accounts, correspondence, memoranda, tapes, discs, papers, books, and other documents or transcribed information of any type." The rule prohibits masking transactions or characterising them in any oblique way. It should be noted that almost every FCPA case involves payments that were concealed or mischaracterised; and
(ii) the prohibition on any officer or director from making (or causing to be made) materially 'false or misleading statements' or omitting to state any material facts in the preparation of filings required by the US Securities Exchange Act.[76] This rule extends to internal auditors as well as to outside auditors. A failure to clarify a representation can also constitute a violation.

Common high-risk areas are considered to be foreign branch offices and foreign subsidiaries. Because of different accounting and oversight systems, these entities are often used as vehicles for concealing or mischaracterising transactions. Also, when acquiring a new foreign entity, it is advisable to employ effective due diligence as prior bribe payment scenarios are likely to be found in certain countries (see also chapter 7 on due diligence). Red flags, *i.e.* certain hazy transactions or contract partners with unclear roles or related to local government officials, should be internally investigated and a good place to start the risk assessment is with the books and records.

5.3.3.3 Penalties

The penalties under the FCPA are substantial. Criminal and civil penalties can be imposed.

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74. Section 15U.S.C.§78m(b)(7).
75. 17 CFR Ch. II (4-1-98 Edition) §240.13b2-1, at: http://frwebgate.access.gpo.gov/cgi-bin/get-cfr.cgi?TITLE=17&PART=240&SECTION=13b2-1&YEAR=1998&TYPE=PDF, accessed on 2 May 2010.
76. *Ibid.*

Criminal penalties include a fine of up to USD 2,000,000 per violation of an anti-bribery provision committed by a company or other business entity, and a fine of up to USD 100,000 per violation and imprisonment for up to five years, or both, per violation committed by officers, directors, stockholders, employees, and agents.[77] Fines imposed against individuals may not be paid by their employer or principal.[78] Under the Alternative Fines Act, the actual fine imposed may be up to twice the benefit that the defendant sought to obtain by making the corrupt payment. A violation of the FCPA may also result in the civil and criminal forfeiture of assets.[79] Criminal penalties under the FCPA for a violation of the books and records provisions include a fine of up to USD 5,000,000, or imprisonment not exceeding 20 years, or both. When the violation is made by a company rather than a natural person, a fine of up to USD 25,000,000 may be imposed.[80] Again the Alternative Fines Act applies which means that the monetary fine can be increased to up to twice the benefit that the defendant sought to obtain through the violation.

Civil penalties are also included in the FCPA: per violation of an anti-bribery provision a fine of up to USD 10,000 can be imposed against the company as well as against any officer, director, employee, or agent of a firm, or stockholder acting on behalf of the company.[81]

According to the Department of Justice Prosecution Policy (Thompson Memo 2003 and subsequent revisions), a corporation will not be absolved from criminal liability by having an 'anti-corruption programme' in place, but this may provide factors that can be used in the determination by federal prosecutors whether to charge a company or only employees and agents with a crime. Relevant factors are whether the compliance programme is merely a 'paper programme' or is designed and implemented effectively; whether the programme is being enforced; whether the company has sufficient staff to audit and evaluate the results of its compliance efforts and whether employees have been informed about the programme and are convinced of the company's commitment to it. Furthermore, the US Federal Sentencing Guidelines Criteria (as

77. Sections 15U.S.C.§§78dd-2(g), 78dd-3(e).
78. Sections 15U.S.C.§§78dd-2(g)(3), 78dd-3(e)(3), 78ff(c)(3).
79. US Department of Justice, 'Criminal Resource Manual: 1019 Sanctions against bribery', November 2000, at: http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm01019.htm, accessed on 1 August 2010; The Civil Asset Forfeiture Reform Act of 2000 (CAFRA) expanded the list of civil forfeiture predicates to include each offence listed as a specified unlawful activity in the Money Laundering Control Act, 18U.S.C.§1956(c)(7). CAFRA further provided for criminal forfeiture for all offenses for which civil forfeiture was authorised. See 28U.S.C.§2461(c). Accordingly, any property, real or personal, which constitutes or is derived from proceeds traceable to a violation of the FCPA, or a conspiracy to violate the FCPA, may be forfeited. See 18U.S.C.§981.
80. Section 15U.S.C.§78ff(a).
81. Sections 15U.S.C.§§78dd-2(g)(1)(B), 78dd-2(g)(2)(B), 78dd-3(e)(1)(B) and 78dd-3(e)(2)(B).

amended from time to time, lastly in 2004) establish minimum compliance and ethics programme requirements for companies seeking to mitigate penalties for corporate misconduct. They make the expectation explicit that companies promote a culture of ethical conduct and commitment to compliance with the law, tailor programmes based on compliance risks, and periodically evaluate programme effectiveness.

5.3.3.4 Personal liability of directors and officers

Directors' and officers' duties encompass the task of protecting the company from liability, amongst other things by preventing the engagement of corrupt acts by employees and agents of the company. Failures in the performance of this task not only affect the company, they may also lead to the personal liability of the directors or officers. The fact that a director would never pay a bribe is not enough to be free from personal liability under anti-corruption laws and regulations. Of particular concern for officers and directors may be the emerging focus by the SEC on holding individual officers personally liable for failing to implement proper internal controls designed to prevent FCPA violations. "The SEC may seek the extension of personal liability to situations in which inattention or lack of action could be seen as violation of the FCPA."[82] Since 'tone at the top' is an important factor in preventing corrupt practices by employees (see *supra* section 5.5.2.1), and considering the overall responsibility of executives, this line of action by the SEC might be effective.

A clear example is the SEC's prosecution of Monty Fu, the founder and former CEO of Syncor International Corporation. The SEC alleged that Syncor's former Taiwanese subsidiary had bribed doctors in private and public hospitals in Taiwan. In addition to accusing Mr Fu of being aware of the improper payments, which he neither admitted nor denied, the SEC sought to establish the culpability of Mr Fu for his failure to implement proper internal controls that would have prevented FCPA violations. As described by the SEC "[Mr] Fu had the authority to maintain compliance with existing internal controls, and to implement additional internal controls designed to comply

82. Huskins 2008, *supra* note 51, p. 1452; Furthermore, 'Criminal Resource Manual: 1019 Sanctions against bribery' (note 79 *supra*) states that: "a person or firm found in violation of the FCPA may be barred from doing business with the Federal government. Indictment alone can lead to suspension of the right to do business with the government. Further, a person or firm found guilty of violating the FCPA may be ruled ineligible to receive export licenses; the SEC may suspend or bar persons from the securities business and impose civil penalties on persons in the securities business for violations of the FCPA; the Commodity Futures Trading Commission and the Overseas Private Investment Corporation both provide for possible suspension or debarment from agency programs for violation of the FCPA; and an unlawful payment under the FCPA cannot be deducted under the tax laws as a business expense."

with the FCPA's books and records and internal controls provisions, yet failed to do so". Mr Fu agreed to settle the SEC's charges by consenting to the entry of a final judgment imposing a permanent injunction and ordering him to pay a civil penalty of USD 75,000.[83]

As mentioned above, there are an increasing number of investigations into European companies initiated by the SEC for violations under the FCPA. This means that officers and directors of companies based in Europe can be exposed to personal FCPA liability. In addition to being concerned with prosecution by the government, directors and officers may also be concerned about personal liability that could result from suits brought by the company or about claims filed by other plaintiffs.[84] For instance, Siemens AG has publicly announced that it will start civil proceedings to claim damages that it suffered from the corruption scandal against ten of its former executive board members.[85]

5.3.4 Dutch Law

The Council of Europe Criminal Law Convention on Corruption and the OECD Corruption Convention have been incorporated in the Dutch Criminal Code (DCrC), effective as of 2002.[86] In the Netherlands, fighting corruption is in the hands of the public prosecutor. The DCrC prohibits the bribery of domestic

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83. SEC, 'SEC v. Monty Fu, C.A. No. 1:07CV01735', SEC Litigation Release No. 20310/28 2007, p. 2; See complaint at: http://www.sec.gov/litigation/litreleases/2007/lr20310.htm, accessed on 14 November 2010; Previously, in December 2002, the Commission instituted settled civil and administrative proceedings against Syncor arising out of alleged payments made by certain of Syncor's foreign subsidiaries, including Syncor Taiwan, to doctors employed by hospitals controlled by foreign authorities. Without admitting or denying the allegations, Syncor consented to pay a 500,000 dollars civil penalty and to be subject to a cease-and-desist order. See SEC, 'SEC v. Syncor International Corp., C.A. No. 1:02CV02421 (EGS) (D.D.C.)', Litigation Release No. 17887 2002. At the same time, the US Department of Justice, Criminal Division, Fraud Section and the US Attorney for the Central District of California filed settled criminal FCPA charges against Syncor Taiwan, which consented to pay a 2 million dollars fine. See, *US v. Syncor Taiwan, Inc.*, No. 02-CR-1244-ALL (C.D. Cal.), filed on 4 December 2002.

84. Huskins, *supra* note 51, p. 1451. For an extensive overview of shareholder actions against the company directors under Dutch law, please see M.J. Kroeze, '*Afgeleide schade en afgeleide actie*' [Derivative claims and shareholder actions], (Kluwer: Deventer 2004).

85. D. Schäfer, 'Siemens to claim money from ex-chiefs', in *The Financial Times*, London 30 July 2008, at: http://www.ft.com/cms/s/0/b5ab89c4-5dcd-11dd-8129-000077b07658.html?nclick_check=1, accessed on 3 May 2010.

86. Openbaar Ministerie – Beleidsregels, '*Aanwijzing opsporing en vervolging ambtelijke corruptie*' [Public prosecutor's policy document re the prosecution of public corruption], 8 October 2002; '*GRECO Evaluation Report on the Netherlands on "Incriminations (ETS 173 and 191, GPC 2)",*' adopted at its 38th Plenary Meeting, Strasbourg, 9-13 June 2008. Letter by the Dutch Minister of Justice to the Second Chamber of Parliament of 19 August 2008 re *GRECO-evaluatie inzake de strafbaarstelling van corruptie* [Evaluation of the →

public officials.[87] Like the FCPA, Dutch law also criminalises the bribery of foreign public officials. The elements of the offence of bribery of domestic public officials, and the applicable sanctions, as described below, apply accordingly to the bribery of foreign public officials.[88] In both situations, special provisions apply to the bribery of and by judges.[89] Under Dutch law, the definition of 'public officials' includes members of general representative bodies and public assemblies as well as all personnel of the armed forces; and 'judges' include arbiters and those who exercise administrative jurisdiction.[90] Persons whose appointment as a public official is pending as well as former public officials generally also qualify as public officials. Dutch law does not recognise a general exception for facilitating payments as has been included in the FCPA, although the prosecutor can decide on a case-by-case base whether or not a small gift qualifies as a bribe.

Dutch criminal law distinguishes between active bribery (paying or offering a bribe) and passive bribery (receiving or soliciting a bribe). This section is organised in line with this distinction.

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criminalisation of corruption], at: http://www.justitie.nl/search.aspx?type=advancedSearch, visited on 23 November 2008. Ratification by the Netherlands of the Council of Europe Criminal Law Convention on Corruption took place on 11 April 2002; the Convention entered into force in respect of the Netherlands on 1 August 2002. The Netherlands has made reservations to Article 12 (trading in influence) and Article 17 (jurisdiction). The territorial application is limited to the Kingdom of the Netherlands in Europe (therefore not extending to the Netherlands Antilles or Aruba). On 16 November 2005, the Netherlands ratified the Additional Protocol to the Criminal Law Convention on Corruption of 15 May 2003; this entered into force in respect of the Netherlands on 1 March 2006. The same reservations apply. This Protocol extends the scope of the Convention to arbitrators in commercial, civil and other matters, as well as to jurors, thus complementing the Convention's provisions aimed at protecting judicial authorities from corruption. Countries which ratify this instrument will have to adopt the necessary measures to establish, as criminal offences, the active and passive bribery of domestic and foreign arbitrators and jurors.

87. Articles 177, 177a, 362, 363 DCrC.

88. Articles 178a and 364a DCrC. Article 178a DCrC reads: "1. With regard to Articles 177 and 177a, persons working in the public service of a foreign state or an organisation governed by international law are equated with [Dutch] public officials. 2. […] 3. With regard to Article 178, judges of a foreign state or an organisation governed by international law are equated with [Dutch] judges." Article 364a states: "1. With regard to Articles 361, 362 and 363, persons working in the public service of a foreign state or an organisation governed by international law are equated with [Dutch] public officials. 2. […] 3. With regard to Article 364, judges of a foreign state or an organisation governed by international law are equated with [Dutch] judges."

89. Articles 178 and 364 DCrC.

90. Article 84 DCrC.

5.3.4.1 Active bribery

The provisions on actively bribing domestic public officials distinguishes two forms of offence, to which different sanctions apply:

– active bribery with an aim to causing a public official to do, or omit to do something, in violation of his/her duty, *i.e.* an *un*lawful act or omission.[91] The sanctions are a maximum of four years imprisonment, or a fine of the fifth category (by 2009: EUR 67,000); and
– active bribery with an aim to causing a public official to do, or omit to do something, which is *not* in violation of his/her duty. *i.e.* a lawful act or omission.[92] The sanctions are a maximum of two years imprisonment, or a fine of the so-called fourth category (by 2009: EUR 16,750).

In respect of the active bribery of a judge, a specific (aggravated) offence applies when the corruption is aimed at influencing a decision in a case that is subject to his judgment or when it is aimed at obtaining a conviction in a criminal case.[93] For this offence a person can be sentenced to up to six years' imprisonment or a fine of the fourth category (EUR 16,750). If the gift, promise or service was offered or provided to the judge with a view to securing a conviction in a criminal case, the sentence can be up to nine years' imprisonment or a fine of the fifth category (EUR 67,000).

Furthermore, in addition to the abovementioned sanctions, a so-called 'disqualification sanction' can be imposed on a person who commits the offence of active bribery. He can be 'deprived of certain rights,' such as the right to remain in a specific public office, or public office in general (which includes the possibility of depriving someone of the right to be a public official), a position in the armed forces, or a position as a trustee.[94]

Legal persons can also be prosecuted for active corruption.[95] In that case, higher penalties can be imposed (up to the sixth category: EUR 670,000).[96] Besides the legal person, the prosecution may be simultaneously directed against those who have ordered the commission of the criminal offence, and against those in control of such unlawful behaviour.[97] This can lead to the personal liability of directors and managers.

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91. Article 177 DCrC.
92. Article 177a DCrC.
93. Article 178 DCrC.
94. Article 28 DCrC.
95. Article 51 DCrC.
96. Article 23.7 DCrC.
97. Pursuant to article 51.2(2) DCrC, it is not required that the actual persons in charge or the persons issuing the assignment be formal members of the board, directors or owners of the legal person; someone legally subordinate to the board can be in *de facto* control. A →

5.3.4.2 Passive bribery

The provisions on the passive bribery of domestic public officials also follow the distinction between bribery leading to unlawful and lawful acts or omissions. The sanctions applicable to each of these categories are as follows:

- officials using their office for committing through bribery *un*lawful acts or omissions can be punished with a maximum sentence of four years imprisonment, or a fine of the fifth category (EUR 67,000).[98] If this offence has been committed by a minister, state secretary, royal commissioner, a member of the provincial government or provincial deputy, a mayor, an alderman or a member of a public representative body, the maximum sentence can be increased to six years' imprisonment, or a fine of the fifth category (EUR 67,000); and
- officials using their office for committing through bribery lawful acts or omissions[99] can be punished with a maximum sentence of two years imprisonment, or a fine of the fifth category (EUR 67,000). As before, if this offence has been committed by a minister, state secretary, royal commissioner, a member of the provincial government or a provincial deputy, a mayor, an alderman or a member of a public representative body, a higher maximum sentence of four years' imprisonment, or a fine of the fifth category (EUR 67,000), can be imposed.

A specific (aggravated) offence concerns the passive bribery of a judge with a view to exerting influence in a case over which he presides or to obtain a conviction in a criminal case.[100] The acceptance of, or a request for a gift, promise or service, by a judge can be subject to a sentence of to up to nine years imprisonment, or a fine of the fifth category (EUR 67,000). If the passive bribery relates to securing a conviction in a criminal case, the judge in question

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"person in charge" is criminally liable where his/her "intentions (are) directed towards the prohibited actions", where he/she "consciously accepts the considerable possibility that the prohibited acts will take place" or he/she fails to take steps to "prevent the prohibited acts that he/she was competent and reasonably obliged to take." There are no hard and fast criteria for determining whether a person is in *de facto* control. The Dutch Supreme Court has held that a person is considered to be acting as a manager where he/she holds authority or possesses considerable influence over others in the organisation, a part of the organisation or in relation to a certain activity of the organisation (HR 16 June 1981, NJ 1982, 586). OECD, 'Netherlands review of implementation of the Convention and 1997 Recommendation', 2001, pp. 11 and 13, at: http://www.oecd.org/dataoecd/39/43/2020264.pdf, accessed on 4 August 2010.

98. Article 363 DCrC.
99. Article 362 DCrC.
100. Article 364 DCrC.

can be sentenced to up to 12 years imprisonment, or a fine of the fifth category (EUR 67,000).

In addition to the above listed sanctions, for all offences involving 'abuse of office' or 'malfeasance in office,' which includes corruption offences committed by public officials,[101] a deprivation of the right to hold a certain office or public office in general, as well as to serve in the armed forces, can be imposed.[102]

5.3.4.3 Confiscation

In respect of all of the abovementioned active and passive bribery offences, so-called 'ordinary confiscation' can be imposed.[103] This is a penal sanction which can be applied, upon the defendant's conviction to objects obtained directly from the criminal offence (in whole or in part), and/or to the instruments used or intended to be used to commit or prepare the offence. Furthermore, it should also be noted that in the case of a custodial sentence being imposed, in addition thereto a fine may be imposed, even where the provision itself mentions a prison sentence *or* a fine.[104]

5.3.4.4 Sanctions

The maximum sentences for active and passive bribery are comparable to those which are applicable to other serious financial and economic offences in the Netherlands and, in the case of passive bribery, other offences involving 'abuse of office' or 'malfeasance in office.' For example, embezzlement[105] carries a maximum sentence of three years imprisonment, and fraud[106] and intentional money laundering[107] carry a maximum sentence of four years imprisonment. The maximum prison sentence for offences involving 'abuse of office' or 'malfeasance in office,' such as the embezzlement of funds while holding public office and the forgery of books or registers is six years and three years imprisonment respectively.[108] Accounting fraud, including false statements in the annual accounts, can be penalised by seven years imprisonment, or a penalty of the fifth category (EUR 67,000).[109] In respect of offences committed by companies, higher penalties may apply (the sixth category, *i.e.* EUR 670,000). Notably, compared with the FCPA, Dutch law sanctions are fairly

101. *I.e.* articles 362, 363 and 364 DCrC.
102. Article 29 DCrC.
103. Article 33 DCrC.
104. Article 9.3 DCrC.
105. Article 321 DCrC.
106. Article 326 DCrC.
107. Article 420bis DCrC.
108. Articles 359 and 360 DCrC.
109. Articles 225-227 and 336 DCrC. In addition, the civil liability of directors can be based on Articles 2:9 and 2:139 DCC.

moderate. Furthermore, Dutch prosecutors do not yet seem to be very active in respect of bribery offences as has been noted by the OECD in its country monitoring reports over the last few years.[110]

5.3.4.5 Private sector bribery

Interestingly, bribery in the private sector is also criminalised in the Netherlands.[111] A central element thereof is that the concealment contrary to good faith of the acceptance of the gift or promise from the employer or principal is considered wrongful rather than the acceptance or a promise of a gift itself. The following elements are relevant to this offence:

- *active bribery* – "a person who, in a capacity other than that of a public official, either in the service of his/her employer or acting as an agent, *accepts a gift or promise* in relation to something s/he has done or has refrained from doing, or will do or will refrain from doing, in the service of his/her employer or in the exercise of his/her mandate, and who, in violation of the requirements of good faith, conceals the acceptance of the gift or promise from his/her employer or principal, will be sentenced to a term of imprisonment of not more than one year, or a fine of the fifth category (EUR 67,000), and
- *passive bribery* – the same sentence will be imposed on a person who *gives a gift or makes a promise* to another person who, in a capacity other than that of a public official, is employed or acts as an agent, in relation to something that person has done or has refrained from doing, or will do or will refrain from doing, in his/her employment or in the exercise of his/her mandate, the gift or promise being of such nature or made under such circumstances that s/he might reasonably assume that the latter, in violation of the requirements of good faith, will conceal the acceptance of the gift or promise from his/her employer or principal." [Emphasis added].

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110. OECD, 'the Netherlands: Phase 2. Follow-up report on the implementation of the Phase 2 recommendation application of the convention on combating bribery of foreign public officials in international business transactions and the 1997 revised recommendation on combating bribery in international business transactions', 17 December 2009, p. 3, at: http://www.oecd.org/dataoecd/61/59/41919004.pdf, accessed on 4 July 2010. As per October 2008, no foreign bribery cases had been brought before the Dutch courts. Nevertheless, the Dutch prosecuting authorities have concluded out-of-court transactions with seven companies for paying kickbacks in the context of the Oil-for-Food Programme in Iraq, although the offence charged was a violation of sanctions legislation and not the foreign bribery offence. In addition, the Netherlands reported that 12 feasibility investigations and three preliminary investigations are underway in alleged foreign bribery cases, and that four requests for mutual legal assistance have been sent out in respect of a foreign bribery offence.
111. Article 328ter DCrC.

5.3.5 Annex 5.1: overview of regulations

As has become clear in this section *5.3*, the anti-corruption conventions and national legislation generally aim to prohibit or discourage similar types of conduct. However, certain aspects are different. Annex 5.1, *in fine*, provides a brief comparative overview of the core elements of: (a) the FCPA; (b) the OECD Corruption Convention; (c) the UN Convention against Corruption; and (d) the Council of Europe's Civil and Criminal Law Conventions on Corruption. This overview can in principle offer guidance to companies in assessing the legal dimensions of corruption in order to establish control over their operations as has been argued in section 5.2 *supra*.

5.4 Transparency: part of responsible corporate conduct

Corruption is not only a financial crime, it has also been addressed as a subject of CSR. Being socially responsible means not only fulfilling legal expectations, but also going beyond compliance and investing more in human capital, the environment and relations with stakeholders.[112] Furthermore, CSR aims to include the power of business in achieving sustainable development[113] by taking into account the ethical, social and environmental aspects of business decisions.[114] As corruption is considered to be one of the greatest challenges to achieving sustainable development, creating a disproportionate impact on poor communities and damaging the essence of society, it is considered important that the private sector actively contributes in addressing this problem.[115] For this reason, principles, guidelines and initiatives, enacted by international organisations or initiated by business or civil society organisations, explicitly

112. Commission (EC), 'Promoting a European framework for Corporate Social Responsibility', Green Paper, COM(2001) 366 final, 18 July 2001, at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2001:0366:FIN:EN:PDF, accessed on 3 May 2010.
113. Report of the World Commission on Environment and Development (i.e. the Brundtland Commission), 11 December 1987, defines sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs", at: http://www.un.org/documents/ga/res/42/ares42-187.htm, visited on 3 May 2010.
114. T.E. Lambooy, Sustainability reporting by companies is necessary for sustainable globalisation, in: E. Nieuwenhuys, *Neo-Liberal Globalism and Social Sustainable Globalisation* (Leiden: Koninklijke Brill NV 2006), pp. 220-221.
115. UN Global Compact, Principle 10, states as its objective: 'The adoption of the tenth principle commits UN Global Compact participants not only to avoid bribery, extortion and other forms of corruption, but also to develop policies and concrete programs to address corruption. Companies are challenged to join governments, UN agencies and civil society to realize a more transparent global economy', at: http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/principle10.html, accessed on 3 May 2010.

identify the fight against corruption as being a part of CSR. Legislation and accounting guidelines support this trend, as has been demonstrated in the previous sections. Important CSR initiatives that refer to corruption are:

– Combating Extortion and Bribery: International Chamber of Commerce (ICC) Rules of Conduct and Recommendations (2005 edition; hereafter: the ICC Rules on Bribery);[116]
– The ICC Guidelines on Whistle-blowing (2008);[117]
– The Earth Charter (Principle 13);[118]
– The GRI G3 Reporting Guidelines 2006 (SO2, SO3,SO4);[119]
– The UN Global Compact (Principle 10);[120]
– The OECD MNE Guidelines (2000) (Guideline VI);[121]

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116. These ICC rules recommend actions for governments, international organisations and enterprises to prevent corruption, available at: http://www.iccwbo.org/uploadedFiles/ICC/policy/anticorruption/Statements/ICC_Rules_of_Conduct_and_Recommendations%20_2005%20Revision.pdf, accessed on 3 May 2010.
117. See: http://www.iccwbo.org/uploadedFiles/ICC%20Guidelines%20Whistleblowing%20%20as%20adopted%204_08(2).pdf, accessed on 3 May 2010. Various anti-corruption conventions require whistleblower regulations to be implemented. ICC News release, 'ICC issues whistle-blowing guidelines', Paris 9 July 2008, states that according to a 2007 study by consultancy KPMG, 25 per cent of the incidents of fraud uncovered among 360 incidents analysed came to light thanks to a whistleblowing system put into place by companies. It also reads that the ICC guidelines, aimed at helping companies establish and implement internal whistleblowing programmes, recommend the following practical steps: create a whistleblowing programme as part of internal integrity practices; handle reports early on, in full confidentiality; appoint a high-level executive to manage the whistleblowing unit; communicate in as many languages as there are countries of operation; abide by external legal restrictions; allow reporting to be anonymous or disclosed, compulsory or voluntary; acknowledge, record and screen all reports; enable employees to report incidents without fear of retaliation, discrimination, or disciplinary action", available at: http://www.iccwbo.org/policy/anticorruption/iccccfee/index.html, accessed on 3 May 2009.
118. Earth Charter, Principle 13 states: "strengthen democratic institutions at all levels, and provide transparency and accountability in governance, inclusive participation in decision making, and access to justice", states under (e): "eliminate corruption in all public and private institutions", available at http://www.earthcharterinaction.org/invent/images/uploads/echarter_english.pdf, accessed on 3 May 2009.
119. The GRI G3 Guidelines require the following disclosures: S02-Percentage and total number of business units analysed for risks related to corruption; S03-Percentage of employees trained in the organisation's anti-corruption policies and procedures; S04-Actions taken in response to incidents of corruption, p. 34, available at http://www.globalreporting.org/NR/rdonlyres/ED9E9B36-AB54-4DE1-BFF2-5F735235CA44/0/G3_GuidelinesENU.pdf, accessed on 3 May 2010.
120. UN Global Compact Principles, Principle 10 (Anti-Corruption) reads: "Businesses should work against corruption in all its forms, including extortion and bribery", available at: http://www.unglobalcompact.org/AboutTheGC/index.html, accessed on 3 May 2010.
121. OECD MNE Guidelines, Chapter VI Combating Bribery reads: "Enterprises should not, directly or indirectly, offer, promise, give, or demand a bribe or other undue advantage to →

– The Transparency International Business Principles for Countering Bribery (2009);[122]
– Extractive Industries Transparency Initiative (EITI);[123] and
– Publish What You Pay Initiative (PWYP).[124]

There is an increasing trend for MNCs to participate in networks set up by the organisations that issue these principles and guidelines. Companies also endorse the guidelines or incorporate them in their own company codes of conduct. In addition, it can be observed that MNCs tend to voluntarily issue sustainability reports and thereby often follow the GRI Reporting Guidelines (that in turn contain references to corruption).[125]

Besides CSR codes of conducts, new European legislation on the subject of the transparency of corporate behaviour has been issued by virtue of the Modernisation Directive (see chapter 4).[126] The annual reports of large

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obtain or retain business or other improper advantage. Nor should enterprises be solicited or expected to render a bribe or other undue advantage […]", available at: http://www.olis.oecd.org/olis/2000doc.nsf/LinkTo/NT00002F06/$FILE/JT00115758.PDF> accessed on 3 May 2010.

122. The TI Business Principles for Countering Bribery provide a framework for companies to develop comprehensive anti-bribery programmes. The tool reflects recent developments in anti-bribery practice worldwide and incorporates approaches by business, academia and civil society. The initial publication was in 2003; the 2009 edition charts new territory by placing greater emphasis on the public reporting of anti-bribery systems and in recommending that enterprises commission external verification or assurance of their anti-bribery programme; available at: http://www.transparency.org/global_priorities/private_sector/business_principles, accessed on 3 May 2009.
123. The EITI has established criteria which require mining and oil companies to publish their payments to host governments and those governments to be open and accountable as to how the funds are spent; available at: http://eitransparency.org/, accessed on 3 May 2009.
124. Many civil society groups around the world demand company and government transparency in resource-rich developing countries. Members of the PWYP initiative have mobilised to monitor and research their countries' extractive regimes and budget processes and reach out to governments, companies and international financial institutions to advocate for greater revenue and expenditure transparency. Local civil society's growing interest in domestic monitoring and activism has led to an enormous demand for training and capacity-building around EITI processes, contracting and taxation regimes, auditing and accounting processes, lending and disclosure policies, as well as a wide range of other issues, including more recently, expenditure-side work to track revenues from government coffers to their point of destination. Since the inception of PWYP in 2002, local and international actors have collaborated to conduct a series of national and regional training programmes to meet these increasing needs, see: http://www.publishwhatyoupay.org/en/activities, accessed on 3 May 2009.
125. See chapter 6 (Private regulation) and chapter 4 (Annual report), Table 4.2.
126. Council Directive (EC) 2003/51.

companies in the EU[127] must now provide information on 'non-financial indicators', and the annual report should provide a description of the material risks and uncertainties that the company faces. The background to this change was among others the development of CSR. Various EP resolutions have promoted transparency concerning corporate behaviour, especially as regards the company's behaviour in other countries.[128] Th Modernisation Directive has been implemented by most EU Member States.[129] In the Netherlands, article 2:391(1) DCC reflects these new requirements. The Dutch Council for Annual Reporting has issued a guideline on the content of the annual report, which describes the CSR subjects that should be included in the annual report. Corruption is one of them.[130]

Taking stock of the developments since 2000 in the field of anti-corruption conventions, legislation, the creation of international CSR networks, the promotion of CSR codes of conduct, reporting guidelines, and the EU Modernisation Directive demanding transparency on worldwide corporate behaviour, one can observe that all of these documents and initiatives push for the prohibition and avoidance of corruption, and prescribe that transparency be provided on this matter.

5.5 Corporate anti-corruption programmes

5.5.1 Better to prevent than to defend

As has been demonstrated in section *5.3*, corruption involves considerable risks for companies. These risks include significant extra costs (bribes paid), damage to a company's reputation, multiple jurisdictional legal risks (criminal penalties

127. Companies not exceeding two of the following criteria: a balance sheet total of EUR 17.5 million, a net turnover of EUR 35 million and an average of 250 personnel during the book year (figures as amended by Council Directive (EC) 2006/46 amending Council Directives 78/660/EEC on the annual accounts of certain types of companies, 83/349/EEC on consolidated accounts, 86/635/EEC on the annual accounts and consolidated accounts of banks and other financial institutions and 91/674/EEC on the annual accounts and consolidated accounts of insurance undertakings [2006] OJ L 224/01-017).
128. This was reaffirmed by the resolution of the European Parliament, 'On Corporate Social Responsibility: A New Partnership', 2006/2133(INI); available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2007-0062+0+DOC+XML+V0//EN, accessed on 3 May 2010.
129. See Chapter 4, Table 4.3.
130. Guideline 400 (Annual Accounts 2008), sub (c), and 'Guide to sustainability reporting (2003 version)', comments 5.29 and 5.48, see: http://www.rjnet.nl/readfile.aspx?ContentID=51535&ObjectID=492464&Type=1&File=0000025166_HandreikingMVO_Engels.pdf, accessed on 3 July 2010.

and restitution payments), damage claims from shareholders, and the potentially personal liability of directors. In addition, when a company is under investigation for allegations of corruption, there are high hidden costs: a severe drain on management time, staff morale will be damaged, the company's integrity profile will be damaged, lawyers' and accountants' fees will be substantial, the company funders may choose to impose stricter conditions, the company may find itself barred from participating in government procurement programmes or may lose export or other licences to do business, and there will be a disruption to the company as a whole. In such a situation the organisation becomes 'semi-paralysed'. Pursuing 'business as usual' becomes increasingly difficult, and releasing energy to develop new projects almost impossible. Following legal proceedings, one of the outcomes is often that the company agrees to establish an anti-corruption programme. This happened in the ABB and Siemens cases described in section 5.1. Therefore, companies may wish to stay well clear of corruption. It would seem arguably cheaper for them to avoid corruption altogether rather than having to defend themselves against various allegations in legal proceedings. In this section, it will be explored what companies can do to prevent themselves from becoming a part of corruption; thereby focussing on best practices in corporate anti-corruption programmes. These programmes are incentivised by public and private regulation.

5.5.1.1 Public regulation

Public regulation such as the internal control requirements contained in corporate governance codes and US legislation, mandate the establishment of corporate anti-corruption mechanisms. Compliance is directly stimulated by SOX and its penalties system, or is fostered indirectly by means of corporate governance codes to which the public authorities have applied the 'comply or explain' method (see section 5.2). Although in-control requirements do not explicitly require companies to disclose information concerning their anti-corruption programmes, they do require management to assess and assume responsibility for the effectiveness of the company's internal control over the use of company assets and financial reporting. In an indirect way, the US and Dutch in-control requirements do refer to anti-corruption programmes because they refer to the COSO framework addresses corruption by giving guidelines for the safeguarding of assets. If companies maintain internal controls that ensure the reliability of financial statements, the possibility of undercover corrupt payments in the financial statements will be substantially reduced.

5.5.1.2 Private regulation

Self-regulation usually takes place by adopting or endorsing a code of conduct that prohibits corruption, such as those listed in section 5.4.1. For instance, the

ICC Rules on Bribery identify self-regulation by international business as a critical step in the fight against corruption.[131] These ICC Rules call on companies to draw up their own codes, consistent with the ICC Rules and tailored to the particular circumstances of their business. However, they also ask companies to go beyond simply developing codes of conduct, which is seen to be merely the first step in the anti-bribery programme. To make their codes effective, companies are urged to develop clear compliance policies, guidelines and training programmes for implementing and enforcing their codes. "A code without an effective follow-up programme may be regarded as simply a public relations exercise, having no teeth and serving essentially to reassure shareholders and to provide a cover for corporate management if violations occur."[132]

In order to increase compliance with a code of conduct, and in order to make its own conduct more transparent, a company can also publish a voluntary sustainability report. In doing so, it is the most practical to follow the GRI G3 reporting guidelines as these are the most widely used guidelines for sustainability reporting and are fast becoming the global standard. The company should include information on corruption-prevention programmes in its sustainability report. *E.g.* the GRI G3 guidelines suggest that companies make the following disclosures:

- SO2: the percentage and total number of business units analysed for risks related to corruption;
- SO3: the percentage of employees trained in the organisation's anti-corruption policies and procedures; and
- SO4: actions taken in response to corruption incidents.[133]

These three disclosures will show how the company tries to prevent corruption, thereby stimulating the company to implement adequate measures.

5.5.2 Best practices

The World Bank Institute recommends that companies adopt a two-pronged approach to combating corruption. The first perspective is the internal effort which consists of setting up internal mechanisms to prevent corruption. The internal efforts include implementing risk assessment mechanisms, anti-corruption policies and compliance programmes, as well as providing guidance to

131. ICC Rules on Bribery, p. 5, at: http://www.iccwbo.org/uploadedFiles/ICC/policy/anticorruption/Statements/ICC_Rules_of_Conduct_and_Recommendations%20_2005%20Revision.pdf, accessed on 7 July 2010.
132. *Ibid.*
133. GRI G3 Reporting Guidelines, *supra* note 119, p. 34.

managers. The second perspective is the external effort to reform the operating environment to reduce corruption opportunities. The external effort is directed at promoting the ethical behaviour of partners and competitors, as well as attempting to change the culture of doing business. This can be done by sharing internal policies, experiences, best practices and success stories with external stakeholders, as well as by reaching suppliers and other stakeholders via neutral facilitators and initiating joint activities aimed at fighting corruption.

The external effort is also known as 'collective action.'[134] A number of MNCs shared best practices at the 2nd Annual Anti-Corruption Summit held in October 2008 in The Hague (Anti-Corruption Summit 2008).[135] The actions taken by these multinationals include internal and external efforts recommended by the World Bank Institute. The core mechanisms will be presented in this section: implementing anti-corruption policies and specific anti-corruption accounting controls (internal effort), and establishing third parties' and intermediaries' anti-corruption policies (external effort).

5.5.2.1 Implementing anti-corruption policies (internal efforts)

Values versus rules. Anti-corruption and compliance programmes seem to work better when they are value rather than rule-based. A value-based policy is flexible and can adapt to unexpected situations. It is easier for all of the stakeholders within a company to base their behaviour on values rather than by having to assess a code of conduct with a large number of rules. Values such as 'integrity,' 'excellence,' and 'accountability' are just some examples that can be used to identify a company's culture. Companies such as Borealis AG,[136] Cisco Systems,[137] SAI Global,[138] and Tyco International[139] have implemented a value-based compliance programme.

Tone at the top. Anti-corruption and compliance programmes should be driven by top management. Top management should be accountable for the effective implementation and efficiency of the anti-corruption policies company-wide. It will be clear that in-control statements as discussed in section 2 stimulate the

134. Statement by Michael Jarvis, Private Sector Development Specialist of the World Bank Institute, presentation at the Anti-Corruption Summit, 2008.
135. Anti-Corruption Summit 2008, *supra* note 10.
136. Statement by Ruth Steinholtz, General Counsel & Group Security Coordinator, Borealis AG, presentation at the Anti-Corruption Summit, 2008, *supra* note 10.
137. Statement by Lyn Cameron, Director Ethics, Internal Control Services, Cisco, presentation at the Anti-Corruption Summit 2008, *supra* note 10.
138. Statement by Paula Davis, Global Head of Client Services, SAI Global, presentation at the Anti-Corruption Summit 2008, *supra* note 10.
139. Statement by Enrique Aznar, Deputy General Counsel & Chief Compliancy Officer, Tyco International, presentation at Anti-Corruption Summit, 2008, *supra* note 10.

top to take responsibility. However, 'tone at the top' also refers to creating an atmosphere where values outweigh greed.[140] Companies such as Intel,[141] SAI Global,[142] Halcrow Group,[143] Siemens (after the corruption scandals),[144] Dell[145] and Tyco International[146] have implemented a 'tone at the top' anti-corruption programme.

Training. The anti-corruption training should be easy to understand and accessible for all company stakeholders. BP, for example,[147] bases its anti-bribery training on the following core questions: what is bribery and corruption? Why should I (the employee) worry about it? How could I experience it? What should I do? It is important to make all of the stakeholders aware of the personal as well as the corporate consequences of corruption and of legal risks involved. Companies such as Intel[148] and Vetcogray/GE Oil & Gas[149] give specific training in certain FCPA and SOX regulations. Furthermore, monitoring and evaluating the effectiveness of the anti-corruption programme is indispensable to ensure the maintenance of an efficient programme. Compliance can be part of periodic personnel assessment. Companies such as Tyco International,[150] Siemens,[151] Dell[152] and BP[153] conduct periodical evaluations of employee awareness concerning their anti-corruption policies.

Risk assessment to develop the compliance programme and training. Conducting risk assessment provides a clear route map for developing a compliance programme and for determining training priorities. The level of exposure of

140. Ruth V. Aguilera and Abhijeet K. Vadera, 'The dark side of authority: antecedents, mechanisms, and outcomes of organisational corruption', 77, 2008, in *Journal of Business Ethics*, pp. 431-449.
141. Statement by Edward Chong, Corporate Services Asia Regional Risk & Controls Manager, Intel, presentation at Anti-Corruption Summit 2008, *supra* note 10.
142. Statement by Davis 2008, *supra* note 138.
143. Statement by Neil Holt, Group Board Director, Halcrow Group, presentation at Anti-Corruption Summit 2008.
144. Statement by Klaus Moosmayer, Compliance Operating Officer & Chief Counsel Compliancy & Investigations, Siemens AG, presentation at Anti-Corruption Summit, 2008, *supra* note 10.
145. Statement by Carole Mestre, Director of Ethics & Compliance EMEA, Dell. Presentation at Anti-Corruption Summit, 2008, *supra* note 10.
146. Statement by Aznar 2008, *supra* note 139.
147. Statement by Jeremy Bradshaw, Vice President of Segment & Function Compliance, BP, presentation at Anti-Corruption Summit 2008.
148. Statement by Chong 2008, *supra* note 141.
149. Statement by Thor Lovland, Director Global Supplier Due Diligence, Vetcogray/GE Oil & Gas, presentation at Anti-Corruption Summit 2008, *supra* note 10.
150. Statement by Aznar, *supra* note 139.
151. Statement by Moosmayer, *supra* note 144.
152. Statement by Mestre, *supra* note 145.
153. Statement by Jeremy Bradshaw, *supra* note 147.

staff to the risk of bribery will determine the intensity and specific needs of the training. The Association of Chartered Certified Accountants (ACCA) also recommends determining the risk exposure level as a first step to preparing an anti-corruption policy.[154] Companies such as BP,[155] the Coca-Cola Company,[156] Dell,[157] Intel,[158] Halcrow Group,[159] and Tyco International[160] conducted risk reviews before implementing their compliance programmes. They regularly provide specific risk-focus training. There are several risk assessment methods. Companies such as the Coca-Cola Company, BP and Siemens, in some specific cases, conduct forensic audits in order to assess the risk of corruption. There are advisory firms that specialise in these kinds of audits.[161] One of them is Daylight which conducted a comprehensive review of all known FCPA prosecutions since the passage of the Act in 1977, and identified the following corruption patterns:

– prevalent use of intermediaries. Approximately 65 per cent of enforcement actions were triggered by improper payments made by intermediaries. These intermediaries included freight forwarding, accounting and law firms, consultants, brokers and distributors;
– high-risk geographies are Kazakhstan, Nigeria, Brazil, China, Russia, India, South Korea and Mexico;
  high-risk industries are oil, gas, defence, pharmaceuticals and telecommunications; and
– approximately 35 per cent of bribes are paid by employees directly. Therefore, assessing employee risk ranking is an important element. Issues such as political exposure or the direct dealings of employees with foreign public officials may determine the risk ranking of employees.[162]

Red flags. The so-called 'red flags' are several factors that should warn companies of potentially improper payments. The existence of one or more of these factors could alert companies to the probability of an improper payment. Companies such as the Coca-Cola Company,[163] F&C

154. Statement by John Davies, Head of Business Law, ACCA, presentation at the Anti-Corruption Summit, 2008.
155. Statement by Bradshaw, *supra* note 147.
156. Statement by Mark Snyderman, Chief Ethics & Compliance Officer, The Coca-Cola Company, presentation at Anti-Corruption Summit, 2008, *supra* note 10.
157. Statement by Mestre, *supra* note 145.
158. Statement by Chong, *supra* note 141.
159. Statement by by Holt, *supra* note143).
160. Statement by Aznar, *supra* note 139.
161. *E.g.* KPMG Forensic Services and Daylight Forensic and Advisory LLC (Daylight).
162. Statement by Ellen Zimiles, Chief Executive Officer, Daylight Forensic & Advisory, presentation at Anti-Corruption Summit, 2008.
163. Statement by Snyderman, *supra* note156.

Management,[164] Tyco International[165] and Vetcogray/GE Oil & Gas[166] make sure that their anti-corruption programme makes it clear to all stakeholders of the company how to identify red flags. The following are some red flag examples: (a) is the type and location of the business a high-risk industry or location? Normally, the first thing that companies do in order to identify red flags is to look at Transparency International's Country Corruption Perception Index;[167] (b) complex, opaque ownership structures; and (c) suspect third party transactions.

5.5.2.2 Special anti-corruption accounting controls (internal efforts)

Companies such as the Coca-Cola Company and Siemens AG have implemented special accounting controls to prevent and detect corruption. The Coca-Cola Company has implemented special anti-corruption books and records auditing. In order to carry out this audit, specific activity accounts have been implemented. These accounts include a government official-specific general ledger; accounts of gifts, meals and entertainment; accounts of donations of company products; accounts of charitable donations. These specific accounts are reviewed on a quarterly basis. Furthermore, all expenses related to dealings with government officials have to be approved by the company's legal counsel.[168] Currently, Siemens AG is in the process of enhancing internal controls through the centralisation of its bank accounts and cash payment systems.[169]

5.5.2.3 Establishing third party anti-corruption policies (external efforts)

Taking supply-chain responsibility in respect of preventing corruption means that a company encourages business partners, including sub-contractors and intermediaries, to do business in a manner which is compatible with the company's own anti-corruption policies. A study has shown that two-thirds of FCPA investigations concern cases with third-party involvement.[170]

Companies such as the Coca-Cola Company[171] and Vetcogray/GE Oil & Gas[172] have included supply-chain responsibility in their third-party dealings as a mechanism aimed at preventing corruption. These two companies have

164. Statement by Litvack 2008, *supra* note 48.
165. Presentation by Aznar 2008, *supra* note139.
166. Presentation by Lovland 2008, *supra* note149.
167. CPI, *supra* note 16.
168. Statements by Zimiles, *supra* note 162; *Snyderman, supra* note 156.
169. Siemens, 2007, Annual Report, *supra* note 7, p. 166.
170. Statement by Lovland, *supra* note149.
171. Statement by Snyderman, *supra* note156.
172. *Ibid.*

implemented the following mechanisms: (a) agreements must all be in writing; (b) agreements must include an 'event of default' clause relating to bribery; (c) a contractual 'right to audit' is imposed. Furthermore, both companies conduct third-party forensic due diligence investigations, or audits prior to engagement if this is considered necessary.[173] Vetcogray/GE Oil & Gas conducts a risk assessment to determine the need for such a due diligence assessment.

Collective actions reinforce the individual action. Companies that have implemented internal measures to fight corruption may fear competitive disadvantages or a lack of leverage to change the business environment through their individual action. They therefore engage in collective initiatives. Furthermore, collective action creates a business environment with a reduced risk of corruption and it also brings vulnerable individual players into a stronger alliance. The collective action usually involves various stakeholders: companies, civil society and governments. According to the World Bank Institute, collective action may complement or temporarily substitute and strengthen weak local laws and anti-corruption practices.[174] The following are some examples of *collective initiatives* aimed at combatting corruption:

- EITI is a coalition of governments, companies, civil society groups, investors and international organisations that aim to improve transparency and accountability in the extractive sector in resource-rich countries through the verification and publication of company payments and revenues from oil, gas and mining. By disclosing the amounts that a company pays to the host government in connection with the exploitation of such countries' resources, the transparency of government income is established for the benefit of the people of that country. Currently 37 of the world's largest oil, gas and mining companies, including BP Group, Shell and Chevron Corporation, are supporting members of this initiative. Ten of the twelve supporting countries are European;[175]
- International Corporate Governance Network (ICGN) is the largest international institutional investors' network counting 500 members. In 2009, ICGN issued a policy solliciting appropriate anti-corruption controls and anti-corruption reporting by companies. Reporting on anti-corruption policies, due diligence investigations and instituting whistleblower policies are among the ICGN recommendations to companies. ICGN believes that corruption is incompatible with good governance and harmful to the creation of value. It promotes that investors engage with companies to

173. Statements by Snyderman, *supra* note 156; *Lovland, supra* note 149.
174. Statement by Michael Jarvis, *supra* note 134.
175. EITI: 'Supporting Countries', at: http://eitransparency.org/supporters/countries, accessed on 5 August 2010, and *EITI supra* note123 and 124.

ensure that they demonstrate to their owners that they have good systems in place to detect and deal with any corrupt practices. The ICGN policy establishes the importance of combating bribery and corruption as part of the corporate governance agenda, and will be referenced as part of the ICGN's Global Corporate Governance Principles in its next revision;[176] and

– Collective Action Against Corruption Guide – the World Bank Institute has issued guidelines in the form of a toolkit and an interactive web portal aimed at establishing a level playing field and assisting companies, such as small-sized companies, which might otherwise have to abandon doing business in a corrupt environment. The toolkit and interactive web portal provide multiple options for combatting corporate corruption based on proven 'how-to-do' examples from many regions and sectors. The guide was launched by a coalition made up of Grant Thorton International (a consulting firm), Siemens, Global Compact, the Center for International Private Enterprise, Transparency International and Global Advice Network. The World Bank Institute acted as a coordinator.

5.6 Concluding remarks

The key question posed in the Introduction to this chapter was "whether the act of not putting an anti-corruption programme in place, almost by definition results in misleading financial statements, an incomplete annual report, an untrue 'in-control statement' and, consequently, in poor corporate governance." The position of companies with regard to anti-corruption and certain corporate governance tools have been the focal point of this chapter.

In this chapter, the phenomenon of corruption has been described, thereby distinguishing between the demand and the supply side. Companies are usually part of the supply side, which means that they are among the actors that pay bribes to public officials. This costly practice sometimes seems to work to their advantage in the short run, but does not do so in the long run.

Corruption is now widely recognised as negatively impacting economies and the international market system. It also damages democratic political systems and obstructs the achievement of sustainable globalisation. A comprehensive anti-corruption strategy is being developed by the international community. Corporate compliance programmes play a key role in achieving this, as they enhance and support the effectiveness of government actions. Looked at from the perspective of companies, the use of bribes disturbs the competitive dynamic of competing on the basis of offering the best services and goods;

176. ICGN, 'Statement and Guidance on Anti-Corruption Practices', March 2009, p. 2, at: http://www.icgn.org/files/icgn_main/pdfs/best_practice/guidance_on_anti-corruption_practices/2009_anti-corruption_practices_%28march%29.pdf, 14 June 2010.

competition then depends on who pays the highest bribe. Moreover, as has been presented in this chapter, recent corruption scandals involving highly respected MNCs have seriously damaged their reputation. Moreover, the corruption scandals have led to questions about the validity of the short-term focussed business models that are currently still predominant.

Worldwide, public initiatives have emerged to counter corruption. The US marched ahead by enacting public regulation on this subject, the FCPA. International conventions by the Council of Europe, the OECD and the UN followed. Many jurisdictions now prohibit the corruption of both domestic as well as foreign public officials. Consequently, one act of corruption can be the subject of simultaneous legal investigations in various jurisdictions. That makes prosecution potentially extra burdensome and costly for the company concerned. The US legal system in particular imposes high fines on companies that violate the FCPA. In addition, directors and company officers can be prosecuted in person, or face damages claims from stakeholders.

Besides public regulation, other anti-corruption initiatives have emerged resulting in private regulation, *i.e.* guidelines or standards drafted by international organisations or business organisations, sometimes in cooperation with NGOs (MSIs). With CSR developing, more and more codes of conduct prescribing socially responsible conduct pay attention to corruption prevention. Changing corporate conduct includes becoming transparent about one's business activities, on a worldwide scale. The global standard for sustainability reporting represented by the GRI Guidelines also contains indicators on corporate corruption prevention. Preparing a sustainability report including information on corruption prevention and internal corporate ambitions helps an organisation to make this goal transparent and achievable.

However, only promoting anti-corruption goals through a 'top-down' approach within a company will not provide certainty that no corrupt activities occur. Certainty, and then still only relative certainty, can only be established by having complete control over one's assets. Therefore, the books and records must be correctly maintained and the management information systems, in particular concerning financial issues, must function properly.

As regards the efforts around the world to strengthen corporate governance, in particular in the US and the Netherlands, it has been noted that SOX and the Frijns Code require companies to be 'in control' of the accounting systems of their organisation in order to pursue good governance. The directors are required to express explicitly and in the annual report, that they are 'in control.' The 'in-control' statement can be seen as a 'signpost', where two paths converge:

(a) the corporate governance route set out by the capital market actors and governments, which was primarily intended to enhance confidence in the capital markets and aimed at increasing (long-term) shareholder value, and

(b) the anti-corruption movement commenced by NGOs such as Transparency International and others, predominantly based on ethical values and seeking to contribute to sustainable development, and since some years also joined by governments and international institutions such as the World Bank. Increasingly, the attention has been focussed on the role of private actors and how they can contribute to countering corruption.

In this chapter it has been argued that any one company or director cannot be 'in control' of the organisation if somewhere in that organisation one or more employees use company funds to pay bribes, thereby squandering company assets. By definition, such expenditures are not accounted for in the company books in a proper form. Consequently, the books and records do not reflect reality. Moreover, as recent history has demonstrated, corruption does not only occur in developing countries, Western companies such as Siemens, BAE and ABB have been among the accused. Furthermore, companies can no longer claim that they had no knowledge about unlawful business and government practices in foreign countries. For years Transparency International has prepared indices that reveal where corruption risks can be expected. There are also specialist accounting and consultant firms that can assist in carrying out due diligence investigations regarding the company's operations abroad or third parties with which the company is planning on doing business. Moreover, as stated above, many guidelines have been drafted for businesses on how to prevent corruption, and many in-house anti-corruption training programmes have been developed to assist companies in implementing corruption prevention programmes.

To conclude, without an anti-corruption programme having been implemented in the company's worldwide operations, a director of an internationally operating company can by no means attest to be in control of the financial systems of the company or of its assets and dealings, in the manner reflected in the COSO framework. This is the framework to which SOX, the SEC Rule on Internal Control, the FCPA, and the Frijns Code (the explanatory comments) refer either directly or indirectly. When a director has no knowledge of possible corrupt practices committed somewhere in the organisation, he cannot ascertain whether the financial statements reflect the true position and dealings of the company. However, even with an anti-corruption programme incorporated, there will be no certainty about avoiding corruption. However the directors will then have taken all reasonable steps in order to prevent corruption. Such a defence will then help them in any legal proceedings that may ensue. Being serious about corruption prevention will also contribute to the company's CSR profile and will save money otherwise spent on bribes. A next step for a company would be to join collective action initiatives in order to scale up good practices and to promote a value-based level playing field among businesses.

Annex 5.1 Overview of corruption regulation

Table I: Provision	FCPA	OECD	UNCAC	C.E. Criminal Law Convention	C.E. Civil Law Convention
Extraterritoriality	– Broad extraterritorial reach. – Applies to non-US "issuers". – Parent corporations or issuers may remain indirectly liable for violations by a foreign subsidiary, when "wilful blindness" to any action or fact that should reasonable alert a company's management to a "high probability" of a violation will be inferred as "knowledge", even if a company does not have actual knowledge of a payment.[i]	– Extraterritorial reach. – Aims that state parties establish as criminal offence the act of bribing a foreign public official (Art. 1).	– Extraterritorial reach. – Each State Party shall establish bribery to foreign public officials as a criminal offence (Art. 16.2). – Every State Party must permit another State Party to initiate civil action in its courts to establish title to or ownership of property acquired through the commission of an offence established in accordance with the Convention (Art. 53.1).	– Extraterritorial reach is permitted (not mandatory). – Permissive criminalisation of active and passive bribery of *foreign* public officials (Art. 36).	– Does not contain provisions on extraterritorial reach.

Table I: Provision	FCPA	OECD	UNCAC	C.E. Criminal Law Convention	C.E. Civil Law Convention
Public/Private Corruption *"Public Corruption":* illegal acts carried out by the private sector in order to buy a favourable decision from public officials (civil servants, political authorities or political parties).[ii] "*Private Corruption*": illegal actions directed not to those who are supposed to stand for the community's interest, but to private individuals entrusted with the furtherance of private interests.[iii]	– Only criminalises public bribery; it does not address private bribery.	– Only criminalises public bribery; it does not address private bribery.	– Addresses *public* and *private* bribery. – However, the criminalisation of *public bribery* is *mandatory*, while the criminalisation of *private* bribery is *permissive* (Art. 16.2).	– Requirement for State Parties to criminalise public as well as private bribery. – However, a State Party can at the time of signature of the Convention, reserve its right not to establish a criminal offence for *private* bribery (Art. 37).	– The definition of corruption under this Convention is not limited to either private or public bribery, but it is an open norm.[iv] – It is therefore applicable to both types of bribery (Art. 1 and 2).

Table I: Provision	FCPA	OECD	UNCAC	C.E. Criminal Law Convention	C.E. Civil Law Convention
Active/Passive Corruption *"Active Corruption":* the act carried out by the paying, offering premising party. "*Passive Corruption":* the act carried out by the receiving, requesting party.	– Only criminalises ***active*** bribery of foreign public officials.	– Only criminalises ***active*** bribery of foreign public officials.	– Addresses both, ***active*** and ***passive*** bribery and other corrupt acts. – However the criminalization of *active bribery* is *mandatory*, while the criminalization of *passive bribery and other corrupt acts* is *permissive*. (Arts. 16, 18, 21)	– Criminalises ***active*** as well as ***passive*** bribery. – However, parties can at the time of signature of the convention, reserve its right not to establish a criminal offence for *passive* bribery. (Art. 37)	– Addresses ***active*** and ***passive*** corruption. (Art. 2)
Facilitation Payments Exception *"Facilitation payment exception":* small payments to low-level officials to expedite routine approvals and that do not constitute payments made "to obtain or retain business or other improper advantages" are allowed or legal.[v] *I.e.* visas. This exception is not mirrored in many countries' domestic laws, rising conflict-of-law issues. Exception of very limited scope, since there is no parallel exception on the books and records side of the statute for such payments.[vi]	Provides for the facilitation payment exception (15U.S. C.§§78dd-1(b), 78dd-2 (b)-78dd-3(b).[vii]	– Facilitation payments are allowed. The Convention's Commentary suggests that facilitation payments do not fall within the scope of the definition of "The Offence of Bribery of Foreign Public Officials".[viii]	– Does not provide for the facilitation payment exception.	– Does not provide for the facilitation payment exception	– Does not provide for the facilitation payment exception

Table I: Provision	FCPA	OECD	UNCAC	C.E. Criminal Law Convention	C.E. Civil Law Convention
Liability of Legal Persons	The sanctions of FCPA apply to: – U.S. corporations (15U.S.C.§§78dd-2 (h)(1)). – Foreign issuers (15U. S.C.§§78dd-1).	– State Parties must establish liability of legal persons (Art. 2). – If under the legal system of a State Party, criminal responsibility is not applicable to legal persons, that Party shall be subject to effective, proportionate and dissuasive non-criminal sanctions (Art. 3.2).	– State Parties must establish criminal or civil or administrative liability for legal persons (Art. 26).	– State Parties must ensure that legal persons can be held criminally liable for active bribery, and other corrupt practices, committed for their benefit by any natural person (Art. 18).	– Does not make a distinction between personal or corporate liability. Therefore, we assume that corporate liability is included in the Convention (Art. 4).
Criminal/Civil Action	Criminal and civil actions proceed for violations to anti-bribery and accounting provisions.	– For violations to anti-bribery provisions, State Parties must establish criminal liability; the imposition of civil liability for these violations is permitted. – For violations to accounting provisions State Parties must establish either criminal or other type of liability (civil, administrative) (Art. 3 p. 4).	– State Parties must establish that criminal action proceeds for violations to anti-bribery provisions. – For violations to accounting provisions State Parties must establish either criminal or other type of liability (civil, administrative) (Art. 12). – State Parties must establish the right to claim compensation for damages that any person has suffered from corruption (Art. 53).	State Parties must establish that criminal action proceeds for violations to anti-bribery provisions. – For violations to accounting provisions State Parties must establish either criminal or other type of liability (civil, administrative), unless they have made a reservation or declaration on this provision.	The *Civil Law Convention* does not provide for any kind of criminal responsibility. – State Parties must establish the right to claim compensation for damages that any person has suffered from corruption (Art. 1).

Table I: Provision	FCPA	OECD	UNCAC	C.E. Criminal Law Convention	C.E. Civil Law Convention
Tax Deduction Prohibition	– The FCPA does not contain such a prohibition.	– The recommendation of the OECD Council urges "those Member countries which do not disallow the deductibility of bribes to foreign public officials to re-examine such treatment with the intention of denying this deductibility."[ix]	– State Parties shall disallow tax deductibility of bribes expenses (Art.12.4).	– This Convention does not contain such a prohibition.	– This convention does not contain such a prohibition.
Accounting Requirements	The FCPA requires *"issuers"* to maintain recordkeeping standards and internal accounting controls (15U.S.C. §§78m(b)(2)(A), 78m(b)(2)(B)(i).	State Parties are required to maintain accounting and auditing standards for corruption prevention (Art. 8).	Parties are required to *Enhance accounting and auditing standards in the private sector* to prevent corruptions (Art. 12).	Parties must establish as offences liable to criminal or other sanctions: a. creating or using an invoice or other document containing; false or incomplete information; b. unlawfully omitting to make a record of a payment. Art. 14.	Each State Party must provide in its internal law (a) for transparency on annual accounts; (b) for auditors' confirmation on the financial position (Art. 10).

[i] Low 2006, *supra* note 49.

[ii] Vincke 2003, *supra* note 6, p. 128.

[ii] *Ibid*.

[iv] The Civil Law Convention provides remedies for persons that have suffered damages as a consequence of corruption. The definition of corruption under this Convention is as follows: 'requesting, offering, giving or accepting, directly or indirectly, a bribe or any other undue advantage or prospect thereof, which distorts the proper performance of any duty or behaviour required of the recipient of the bribe, the undue advantage or the prospect thereof See articles 1 and 2 of the Convention.

[v] Vincke 2003, *supra* note 6, p. 43.

[vi] Low 2006, *supra* note 49.

[vii] The Foreign Corrupt Practices Act of 1977 was codified as amended in 2000 at 15U.S.C.§§78dd-1 to 3.

[viii] OECD, 'Official Commentaries to the OECD Convention on Combating Bribery of Officials in International Business Transactions' (commentary to Article 1, paragraph 9).

[ix] OECD, 'Revised Recommendation of the Council on Combating Bribery in International Business Transactions' (May 23, 1997, section IV).

Chapter 6.* Private regulation: setting the standards

[H]istory teaches us that markets pose the greatest risks – to society and business itself – when their scope and power far exceed the reach of the institutional underpinnings that allow them to function smoothly and ensure their political sustainability.

John Ruggie

6.1 Introduction

The current financial turmoil calls for a rethinking of the regulatory system on general grounds. Specifically, it has been argued that companies relying on private regulation have not been able to incorporate systemic risk into their risk management model.[1] Even the former American Federal Reserve Chairman Alan Greenspan has refuted his 2005 discourse that 'private regulation generally has proved far better at constraining excessive risk-taking than has government regulation'. He now suggests tighter public regulation of financial companies to better protect shareholders and investments.[2]

Is public regulation in general more successful than private regulation in regulating corporate conduct? In this light it is interesting to observe that an exponential number of private regulatory regimes are seeking to control 'socially responsible' corporate behavior. CSR promotes the integration of social and environmental concerns into companies' business operations as well as their

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1. House of Lords, 'The Global Economic Crisis: Reasons, Repercussions and Remedies'. UK, 29 October 2008, at: www.parliament.uk/documents/upload/econseminar081029.pdf, accessed 10 April 2010. One could also question whether the US legislation as set out in the Sarbanes-Oxley Act 2002 (section 404) has succeeded in controlling the risk management of banks.
2. S. Lanman and S. Matthews, 'Bloomberg, Greenspan Urges Tighter Regulation after "Breakdown"', Update1, at: http://www.bloomberg.com/apps/news?pid=washingtonstory&sid=aOOSejLq_BSM, accessed on 10 April 2010.

interaction with stakeholders.[3] However, it is often questioned whether legislators should step in to regulate the transnational conduct of private actors rather than relying on CSR by self-regulation. Fabrizio Cafaggi, a leading scholar in the field, proposed another approach: to consider private regulation more a pre-stage of public regulation than an alternative thereto.[4] But how does that work?

This chapter aims to answer this question by examining three well-known private regulatory regimes in the field of CSR: the UN Global Compact Principles, the OECD MNE Guidelines and the GRI Guidelines.[5] These three regimes will be assessed against the following four criteria, which have been found to impact companies' compliance with regulation: (1) quality of the regulation, (2) enforcement possibilities, (3) its (perceived) legitimacy and (4) its effectiveness.[6] Prior to this analysis, the spectrum of CSR private regulation will be defined and classified. The emergence of public and private regulation on CSR and sustainability reporting, along with their motives, will also be discussed. Furthermore, the impact of certain private regulatory regimes on public regulation and their inter-linkage will be demonstrated. This chapter will conclude with observations resulting from the analysis, and some comments on the usefulness of private regulation in general.

6.2 The spectrum of CSR private regulation

'Private regulation' is commonly defined as a set of norms regulating individual (corporate) conduct that did not, or at least did not originally, stem from public

3. See *eg.* European Commission, 'Corporate Social Responsibility, National Public Policies in the European Union', 2007, at: http://ec.europa.eu/enterprise/csr/documents/stakeholder_forum/ms_csrpolicies2007.pdf, accessed on 10 April 2009.
4. See F. Cafaggi, 'Rethinking Private Regulation in the European Regulatory Space', EUI Law Working Paper No. 2006/13, 2006.
5. See: UN Global Compact Principles, at: http://www.unglobalcompact.org; OECD MNE Guidelines, at: www.oecd.org/daf/investment/guidelines and GRI Guidelines, at: http://www.globalreporting.org/ReportingFramework/G3Guidelines/, accessed on 10 April 2010. The selection of these private regulatory regimes is based on the fact that they all cover various CSR areas, such as human rights, governance, and the environment. For instance, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy has not been included because it mainly focuses on labour rights. Moreover, the three elected regimes have received support of governments and international institutions such as the UN (eg. UNGA 'Towards global partnerships' 62th Session, Resolution A/RES/62/211 (2008)) and the European Union (*eg*. EP Resolution, note 43). The codes of conduct issued by the International Chamber of Commerce also play an important role in this field, however, they are less cross-referenced as the mentioned private regulations.
6. See: Hague Institute for the Internationalisation of Law (HiiL), 'Concept Paper: The Added Value of Private Regulation in an Internationalised World? Towards a Model of the Legitimacy, Effectiveness, Enforcement and Quality of Private Regulation' (2007-08), at: http://www.hiil.org, accessed 21 May 2009.

authorities' formal legislative powers.[7] It has also been described as 'bottom-up lawmaking'. An initial distinction is often made between 'internal' and 'external' private regulation. Internal private regulation refers to self-regulatory systems that companies set to regulate their own behavior, whereas external private regulation includes norms adopted collectively by private actors to regulate their conduct and that of third parties. Common examples of external private regulation are industry and cross-sector regulation as well as multi-stakeholder initiatives.[8]

Regulation runs the gamut from public to private, in its multiple variations and combinations. For instance, the Dutch *Arbeidsomstandighedenwet 1998* [Dutch Working Conditions Act 1998] employs a 'co-regulatory regime'. Since the governmental authorities do not have sufficient staff to verify and control the day-to-day health and safety conditions at all workplaces in the Netherlands, the system relies on self-action: an employer has to establish an action plan concerning the health and safety conditions pertaining to all work carried out at his enterprise. The Labour Inspectorate will examine the plan and, when found adequate, approve it. It is up to the employer to implement it and account for it before the Works Council.[9] This hybrid constructionis a combination of public legislation (adopted without the direct participation of private actors) andpure self-regulation.

Another term that is frequently used in the context of private regulation is 'soft law'. This term refers to those instruments of international law that do not have the status of an international treaty, ratified by States. Examples of soft law instruments are declarations, recommendations, and resolutions.[10] The OECD MNE Guidelines may also fall into this category; they were primarily drafted by OECD Member States' representatives, but with contributions from the business community and NGOs.[11] They nonetheless qualify as private regulation,

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7. *Ibid*, p. 8. For further explanation on the different categories of regulations, see also N. Gunningham and D. Sinclair, 'Regulatory Pluralism: Designing Policy Mixes for Environmental Protection', 21(1),1999, in *Law & Policy* 49; W. Witteveen, I. Giesen, J.L. de Wijkerslooth, *Alternatieve regelgeving* [Alternative regulation], (Kluwer, Deventer, 2007), pp. 15, 25 and 77, also referring to J. Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a 'Post-Regulatory' World', 2001, p. 54 Current Legal Problems p. 103; and I. Giesen, *Alternatieve regelgeving en privaatrecht* [Alternative regulation and private law], (Kluwer, Deventer, 2007), pp. 7-16.
8. HiiL, *supra* note 6, p. 9.
9. Arbeidsomstandighedenwet 1998 [Dutch Working Conditions Act 1998] and *Wet op de Ondernemingsraden* [Dutch Works Councils Act] s 27(d).
10. M.N. Shaw, '*International Law*' (5th edn Cambridge University Press, Cambridge: 2003), pp. 110-112 and J. O'Brien, '*International Law*' (Cavendish Publishing, London: 2001).
11. OECD, 'The OECD Guidelines for Multinational Enterprises: Frequently Asked Questions', at: http://www.oecd.org/document/58/0,3343,en_2649_34889_2349370_1_1_1_1,00.html, accessed on 10 April 2009.

since they have not been implemented in formal legislation by the public legislative authorities.

As demonstrated in a 2008 joint report entitled 'Overview of Selected Initiatives and Instruments Relevant to Corporate Social Responsibility' by the OECD and the ILO, CSR related private regulations differ in their objectives, origins, areas covered and implementation mechanisms.[12] Some address a wide range of issues, such as human rights and labour rights, community development, the use of security forces, bribery and corruption and environmental standards.[13] Others focus on one or a few issues, usually more in depth.[14] The 2008 report provides a useful classification, including definitions and illustrative examples of existing private regulation in the field of CSR. It distinguishes between the following categories:[15]

1. *Corporate codes of conduct*, described as directive statements which provide guidance and prohibit certain kinds of conduct, eg internal codes of conduct drafted and adopted by multinational or national companies;
2. *Multi-stakeholder initiatives*, which involve the cooperation of various social partners, including companies, workers' and employers' organisations, NGOs and governments to address a specific issue or a whole range of issues related to CSR, generally resulting in some form of guidelines, sometimes by region or by sector;
3. *Certifications and labeling* (including reporting) that provide purchasers, ie consumers, investors and businesses, with reliable information in order to make purchasing decisions;[16]
4. *Model codes*, which are codes of conduct laid down by a multi-stakeholder initiative, an NGO, a trade union, an international organisation or other actors – including governments – which companies can use as a basis to develop their own codes. These codes establish a list of minimum standards that all corporate codes of conduct covering certain issues should consider. They address different issues such as whether multinational companies bear

12. OECD/ILO, 'Overview of Selected Initiatives and Instruments Relevant to Corporate Social Responsibility', OECD-ILO Conference on CSR, Employment and Industrial Relations: Promoting Responsible Conduct in a Globalising Economy, Paris, 23-24 June 2008, pp. 5-6.
13. See *eg*. OECD MNE Guidelines and UN Global Compact Principles.
14. For example, the Forest Stewardship Council has set up a sustainably harvested timber certification programme, at: http://www.fscus.org/, accessed on 1 July 2010. Another example of a single issue regulation is the Voluntary Principles on Security and Human Rights, which have been developed by the governments of US, UK, Norway and the Netherlands as well as companies operating in the extractive and energy sectors and NGOs: Voluntary Principles on Security and Human Rights, 'Participants', at: http://www.voluntaryprinciples.org//participants/index.php, accessed on 10 April 2009.
15. OECD/ILO *supra* note 12, pp. 6-7 and see Annex 6.1.
16. Certification is also subject to social auditing that is carried out by accredited audit companies.

responsibility with respect to human rights violations, environmental protection or bribery and corruption in business;[17]
5. *Sectoral initiatives*, depicted as initiatives that address common challenges in a specific sector and that provide a common approach in direct operations or at the supply chain management level, ie a certain level of uniformity across the industry, and set standards for companies *vis-à-vis* suppliers;
6. *International frameworks*, including agreements negotiated between national and global trade union federations with major multinational enterprises in order to ensure uniformity in labour standards in all countries and throughout the supply chain; and
7. *Socially responsible financial investments*, ie initiatives developed in the financial sector, focusing on the operations of financial institutions but also on social responsibility concerning investment decisions by investors.[18]

From this classification, it should be noted that certain private regulations can fall within more than one category. For instance, the Fair Wear Foundation is an initiative concerning the textile industry, but it has resulted in a code of conduct that can also be included under the category 'certification and labeling'. Annex 6.1, *in fine*, shows a few concrete examples for each category. From this categorisation, it can be further noted that the various CSR private regulatory regimes embrace different goals and ambitions, such as offering a concrete certification system to facilitate the purchase of sustainable products, or – less concretely – formulating general universal minimum standards for corporate behavior. It should also be added that, although the initiatives mentioned mainly originated from the US and Europe, other initiatives are springing up around the globe, reflecting different cultures and concerns. Among them, *Madrasati* has recently been launched by Queen Rania Al Abdullah of Jordan to focus on CSR in the field of education across the

17. See: D. Shelton, 'Protecting Human Rights in a Globalized World', Symposium: Globalisation & the Erosion of Sovereignty in Honor of Professor, Lichtenstein, in *Boston College International and Comparative Law Review*, 25, 2002, p. 273. See also M.K. Aldo, 'Human Rights and Transnational Corporations – an Introduction' in M.K. Aldo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations*, (Kluwer Law International, The Hague 1999).
18. OECD/ILO *supra* note 12, p. 7. It is indicated that on the lending side, social responsibility concerning investment decisions is being stimulated by the International Financial Corporation (IFC) – the private-sector lending arm of the World Bank – which has adopted Performance Standards to guide its investments. Furthermore, the Equator Principles aid banks in formulating sustainable lending criteria for infrastructural projects. The UN Principles for Responsible Investments (UN PRI) stimulate pension funds and other institutional investors to incorporate social, environmental, ethical and governance considerations in their investment policies. See: Equator Principles, at: http://www.equator-principles.com> and UN PRI, at: http://www.unpri.org, both websites accessed on 15 May 2010.

Arab world.[19] The Ethos Instituto in Brazil promotes CSR in Brazil; in India, Tata Steel has been recognised for its initiatives in the areas of AIDS awareness and its commitment to provide better standards of living for the communities in which it operates.[20]

6.3 The reasons behind the emergence of private regulation

Transnational corporate conduct is increasingly being guided by private regulation, particularly by international codes of conduct such as the UN Global Compact Principles and the OECD MNE Guidelines. Globalisation can be cited as one prime reason for this growing influence of private regulation. The rapid expansion of the global market has created governance gaps in a number of policy domains, in particular between the scope of economic activities of private actors and the capacity of governments to manage their negative externalities on society and the environment.[21] Moreover, national legislators face significant challenges in trying to regulate corporate transactions transcending the borders of multiple national legal systems. Difficulties arise when enforcing formal norms on transnational corporate activities, especially in weak governance zones, in so-called 'Failed States', or in developing countries where some governments have been reluctant to adopt

19. Although not developed as a private regulation *per se*, this initiative represents a positive CSR development in the region. It aims to encourage the efforts of the private sector in rejuvenating schools and strengthening the education sector, including teacher training, in Jordan and across the Arab world. See: http://www.madrasati.jo/index.html, accessed on 10 April 2009.
20. The Ethos Instituto in Brazil is a civil society organisation, created in 1998, which organises various activities to assist companies in putting CSR in practice. Corruption is also an important theme which the Ethos Instituto focuses on, see: http://www1.ethos.org.br/EthosWeb/pt/31/o_instituto_ethos/o_instituto_ethos.aspx, accessed on 17 July 2009. According to a press release, Tata Steel has created a corporate sector model to prevent the spread of STD/HIV/AIDS, globally and nationally, which is being shared through forums like ILO, Global Business Coalition on HIV/AIDS, Global Compact Initiatives, WHO-SE Asia Regional Office, GRI and so on. Tata Steel, Press Release, 'Tata Steel wins TERI Corporate Award for its HIV/ AIDS initiative', 1 June 2008. See: http://www.tatasteel.com/newsroom/press443.asp, accessed on 10 April 2009.
21. See: UN, General Assembly, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises', (A/HRC/8/5), 2008, at: http://www2.ohchr.org/english/issues/trans_corporations/reports.htm, accessed on 10 April 2009, p. 3.

and/or enforce norms that they fear might compromise the competitiveness of their economy.[22]

As stressed by Francis Fukuyama, another cause for the increased influence of private regulation is the absence of a leading political power or international institution that can initiate (new) ethical norms. He explained:[23]

> The Iraq war exposed the limits of benevolent hegemony on the part of the United States. But it also exposed the limits of existing international institutions, particularly the United Nations, that were favored by the Europeans as the proper framework for legitimate international action. …. The world today does not have enough international institutions that can confer legitimacy on collective action, and creating new institutions that will better balance the requirements of legitimacy and effectiveness will be the prime task for the coming generation.

This absence of a world leader that aligns all States to approve a supranational authority providing for measures and mechanisms to fill in these governance and regulatory gaps has led to the present situation. In an attempt to address the existing gaps, various private initiatives have emerged around the globe. Some initiatives offer practical solutions to existing legal and financial transnational issues for international business partners;[24] others strive to 'control' the impact and consequences of economic globalisation.[25] Some have resulted in a form of public regulation,[26] but most involve private regulation, as illustrated in section 6.2.

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22. Ibid 5 and 8, regarding bilateral investment treaties and weak governance zones, referring to International Organisation of Employers, ICC, Business and Industry Advisory Committee to the OECD, 'Business and Human Rights: The Role of Government in Weak Governance Zones', December 2006, see: http://www.reports-and-materials.org/Role-of-Business-in-Weak-Governance-Zones-Dec-2006.pdf, accessed on 20 May 2009, § 15. See also: HiiL *supra note* 6, p. 2, referring to W. Cragg, 'Ethics Codes: The Regulatory Norms of a Globalized Society' in W. Cragg (*ed*.), *Ethics Codes, Corporations and Challenges of Globalisation* (Edward Elgar, Cheltenham 2005).
23. F. Fukuyama, *America at the Crossroads, Democracy, Power and the Neoconservative Legacy* (Yale University Press, New Haven 2006) pp. 155-58; keynote speech by F. Fukuyama, Session 1, World Legal Forum Seminar, 'Public and Private Actors in International Lawmaking', The Hague, Peace Palace,11 December 2008. See also: R. Steenvoorde, *Regulatory Transformations in International Economic Relations* (WLP, Nijmegen 2008), p. 36. Steenvoorde demonstrates relevant dimensions of interaction between international law and international relations.
24. See *e.g*. ICC Rules of Arbitration, see: http://www.iccwbo.org/court/english/arbitration/pdf_documents/rules/rules_arb_english.pdf, accessed on 10 April 2009.
25. See: FSC standards for forest management and UN PRI, note 14 and note 18 and MSC's certification program for sustainable fishing, at: http://www.msc.org, accessed on 15 May 2009.
26. Council Directive (EC) 2003/87 of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC [2003], OJ L275/32. See also: Steenvoorde, *supra* note 23, pp. 87-105 on the Kyoto Protocol negotiations.

A growing private regulatory regime, especially in the field of CSR, also reflects the increased legitimate authority of private actors in the global economy. This phenomenon is a result of the initiatives from companies, partly in response to global social activism by international organisations, States and NGOs.[27] Another underlying reason for the increase in self-regulatory regimes is the trend of *deregulation* which started in the 1980s, fed by the belief that too much regulation causes a disturbance of markets. For some authors, these developments also imply the recognition of a form of global 'complementary governance', a concept which promotes the shared responsibility of civil society and business, together with governments, for the well-being of society and the environment.[28]

Along the same lines, John Ruggie,[29] the Special Representative of the UN Secretary-General on the issue of human rights and transnational corporations and other business enterprises, indicated in his report released in April 2008 (the Ruggie Report):[30]

> The root cause of the business and human rights predicament today lies in the governance gaps created by globalisation – between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation. How to narrow and ultimately bridge the gaps in relation to human rights is our fundamental challenge.

The Ruggie Report highlights the fact that the legal rights of transnational companies have been expanded significantly over the past generation. It explains that while encouraging foreign investment and international trade flows, this has also 'created instances of imbalances between firms and states that may be detrimental to human rights'. To reduce these adverse human rights consequences, the Ruggie Report draws up a *principle-based framework* based on the concept of 'differentiated but complementary responsibilities' – well known in the field of international environmental law – for the social actors, ie States, companies and civil society. It focuses on three foundational principles: (1) the State's duty to protect against human right abuses by third parties, includingcompanies, affecting persons within their territory or jurisdiction; (2) the corporate responsibility to respect human rights and (3) the need for

27. D. Vogel, 'Private Global Business Regulation', in *Annual Review of Political Science*, 11, 2008, p. 261.
28. See: R. Lubbers, W. van Genugten and T.E. Lambooy, *Inspiration for Global Governance: The Universal Declaration of Human Rights and the Earth Charter* (Kluwer, Amsterdam 2008). See also Witteveen, *supra* note 7, p. 15.
29. John Ruggie is a professor at Harvard John F. Kennedy School of Government.
30. Ruggie, *supra* note 21. In particular, the Special Representative was commissioned to develop a framework for providing more effective protection against corporate-related human rights harms.

more effective access to remedies. These three principles – Protect, Respect and Remedy – are stated in the Ruggie Report to form a complementary whole in that each actor supports the others in achieving progress.[31] The Ruggie Report also points to relevant CSR private regulations including remedy mechanisms, *e.g.* the NCP mechanism to support the OECD MNE Guidelines (see section 6.12 below).

In sum, for the reasons explained in this section 6.3, public legislation alone does not seem fully capable of governing responsible corporate conduct at the international level, hence opening the door for many initiatives of private regulation.

The following four sections of this chapter will address the interplay between public legislation and private regulation with respect to (i) sustainability reporting and (ii) responsible transnational corporate conduct. In regard of both themes, firstly public legislation will be examined, following which the question of how private regulation has complemented sustainability reporting and responsible transnational corporate conduct will be examined.

6.4 Public legislation on sustainability reporting

At an EU level, a directive has been adopted that imposes an obligation on corporations to consider non-financial matters in the preparation of their annual reports – the Modernisation Directive. The Modernisation Directive stipulates that companies shall report annually on 'non-financial key performance indicators relevant to the particular business, including information relating to environmental and employee matters' related to the worldwide operations of that company.[32] This is meant to cover CSR issues.[33] When implementing the Modernisation Directive into national law, Member States may choose to waive the obligation to provide such non-financial information for companies below a certain size threshold. Most of the EU Member States have already implemented the Modernisation Directive.[34] This Directive upholds that companies shall provide information that 'should lead to an analysis of environmental

31. Lubbers, *supra* note 28, pp.63-64.
32. Council Directive (EC) 2003/51 of the EP and of the Council of 18 June 2003 amending Directives 78/660/EEC, 83/349/EEC, 86/635/EEC and 91/674/EEC on the annual and consolidated accounts of certain types of companies, banks and other financial institutions and insurance undertakings, OJ L178/16, 2003.
33. See section 4.2 of this book.
34. See section 4.3 of this book.

and social aspects necessary for an understanding of the company's development, performance or position'. It does not, however, impose a mandatory disclosure of comprehensive information on matters of CSR, nor does it give clear guidance on the specific information to be disclosed by companies.[35] The Modernisation Directive is seen rather as containing a general obligation of sustainability reporting, although its preamble refers to an earlier set of detailed recommendations adopted by the Commission that recommended the disclosure of specific information concerning the reduction of corporate environmental impact.[36] The general nature of the Directive's text does not provide much guidance to companies as to how they must report on CSR issues in their annual reports.[37] This fact is especially true when this obligation is compared to the detailed regulation on financial information applicable to annual accounts.

A few European countries have legislated CSR reporting somewhat differently:

1. An amendment to the *Danish Financial Statements Act* came into force on 1st January 2009. It requires the country's largest 1,100 companies – listed companies, state-owned companies and institutional investors – to include information on CSR policies and practices in their annual reports. The law has a 'report or explain' clause, meaning that a company can choose not to report on CSR, but in that case it has to disclose that fact, as well the reasons for not reporting. For the purpose of this Act, 'CSR' means that companies 'include considerations for human rights, societal, environmental and climate

35. T. Wouters and L. Chanet, 'Corporate Human Rights Responsibility: A European Perspective', in *Northwestern University Journal of International Human Rights*, 6, 2008, p. 262. These authors consider regrettable that the EU has not provided for mandatory reporting on social and human rights matters.
36. Commission Recommendation of 30 May 2001 on the Recognition, Measurement and Disclosure of Environmental Issues in the Annual Accounts and Annual Reports of Companies, OJ L156/33, 2001, at: http://www.iasplus.com/resource/0105euroenv.pdf, accessed on 23 July 2010. This recommendation calls on EU companies to disclose specific environmental information such as the company's policy and programmes; environmental improvements in key areas; resource, water, and energy use; emissions and waste disposal; material environmental liabilities; significant fines and payments resulting from non-compliance with environmental regulations or tort liability; and government environmental incentives received by the firms in their annual reports; C. Rechtschaffen, 'Shining the Spotlight on European Union Environmental Compliance', in *Pace Environmental Law Review*, 24, 2007, p. 161.
37. A. Kamp-Roelands and T.E. Lambooy, 'Maatschappelijk verantwoord ondernemen' [Corporate Social Responsibility], in *Het jaar 2007 verslagen: onderzoek jaarverslaggeving ondernemingen* [The annual reports on the year 2007: study corporate annual reporting], NIVRA-geschrift 78 (Kluwer, Deventer 2008), pp.119-21.

conditions as well as combating corruption in their business strategy and corporate activities';[38]

2. *Sweden* has also adopted mandatory non-financial reporting legislation but it is limited to its state-owned companies. According to the Swedish *Annual Reports Act*, the annual report includes information on non-financial objectives, the company's ethical principles, codes of conduct and gender equality policies. Moreover, the company has to use the GRI Guidelines, and publish an externally assured sustainability report on the company's website as a separate report or as an integrated part of the annual report;[39] and
3. In *France*, the *Nouvelles Regulations Économiques*, adopted by Parliament in 2001, requires disclosures on social and environmental issues in the annual reports of companies listed on the French stock exchange.[40]

Outside of Europe, the Canadian government also strongly encourages sustainability reporting by Canadian companies in the extractive industry.[41]

Considering the existing public regulation of sustainability reporting, it has to be concluded that only general and vague terminology has been used by legislators, although the Swedish government gives explicit mandatory guidance on GRI Guidelines usage.

38. GRI, 'New Danish law requires CSR disclosure', at: http://www.globalreporting.org/NewsEventsPress/LatestNews/2009/NewsJanuary09DanishLaw.htm, accessed on 21 May 2010; P. Hohnen, 'Non-financial Reporting: Denmark Ups the Ante', Ethical Corporation, 13 January 2009, at: http://www.ethicalcorp.com/content.asp?ContentID=6280, accessed on 2 July 2010; Danish Center for CSR, 'New Law Brings Denmark in the Lead concerning CSR', 16 December 2008, at: http://www.samfundsansvar.dk/sw42800.asp, accessed on 10 April 2009. As the latest article indicated, it is however still up to companies to decide if or how they want to work in compliance with CSR.
39. Ministry of Enterprise, Energy and Communications of Sweden, 'Guidelines for External Reporting by State-owned Companies', at: www.regeringen.se and http://www.sweden.gov.se/content/1/c6/09/41/25/56b7ebd4.pdf, both websites accessed on 10 April 2009. This requirement is limited to the companies owned by the Swedish state, which includes 55 companies, of which 40 are wholly owned and 15 partly owned. Among them, four companies are listed on the stock exchange.
40. Law No. 2001-420 of 15 May 2001, J.O., 16 May 2001, Article 116.
41. Foreign Affairs and International Trade Canada, 'Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector', March 2009, at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/ds/csr-strategy-rse-stategie.aspx#3, accessed on 21 May 2010. In this policy document, the Canadian government also promotes the use of the GRI Guidelines for sustainability reporting.

6.5 Private regulation on sustainability reporting

Despite the near absence of public regulation in this field, sustainability reporting has gone mainstream among the largest multinational companies. A KPMG International Survey showed that nearly 80 per cent of the largest 250 companies worldwide have issued sustainability reports in 2008, while another four per cent integrated CSR information into their annual reports (KPMG Survey).[42] The drivers for reporting seem to be ethical considerations, innovation, risk management and investors. It has also been reported that the integration of CSR information into annual reports is increasing. On average, among the largest companies in 22 countries from different continents, the rate of reporting is 45 per cent.

It is highly likely that this upward trend is the result of more specific criteria and guidance on sustainability reporting that have been developed at the *private* regulation level. A number of international CSR initiatives are now deeply rooted and have reached a new maturity.[43] In this section, some of these initiatives will be examined. In particular, the GRI's Sustainability Reporting Framework, which includes the GRI Guidelines, provides clear guidance for organisations in disclosing their sustainability performance.[44] In the following sections of this chapter the most important initiatives for corporate sustainability practice will be explored.

The GRI was initiated in the US in 1997 by the UNEP and CERES, a national network of investment funds, environmental bodies and other public interest groups. The purpose was to develop a framework for businesses concerning sustainability issues.[45] Its creation also involved the participation of companies, consultants, NGOs and universities. Research conducted by the French sustainability rating agency Vigeo indicated that the GRI has now become the most widely-used sustainability reporting framework around the globe (Vigeo

42. KPMG International (KPMG Survey), 'Survey of CSR Reporting 2008', pp. 3, 4, 13 and 33, see: http://www.kpmg.nl/Docs/Corporate_Site/Publicaties/Corp_responsibility_Survey_2008.pdf, accessed on 23 July 2010. The sample totalled a number of 2,200 companies including the Global Fortune 250 (G250) companies and the 100 largest companies by revenue (N100) in 22 countries. The purpose of this survey was to track reporting trends in the world's largest companies. At national level, the increase of CSR reporting was observed particularly in France, Norway, Switzerland, Brazil, and South Africa.
43. EP Resolution on corporate social responsibility: a new partnership (2006/2133(INI)), § 58, 13 March 2007. In the Netherlands, the Guideline 400 (Annual Report) and the Explanatory Guide [*Handreiking Maatschappelijke verslaggeving*] were developed and published by the Dutch Council for Annual Reporting in 2003. They can be qualified as private regulation. They were amended in 2008 to reflect the changes in Dutch financial reporting law pursuant to the implementation of the Modernisation Directive. See Kamp-Roelands, *supra* note 37.
44. GRI, 'About GRI', at: http://www.globalreporting.org/AboutGRI/, accessed on 10 April 2009.
45. CERES works with companies to address sustainability challenges.

Research).[46] More than 1,500 companies, including many of the world's leading companies, have declared their voluntary adoption of the GRI Guidelines.[47]

The GRI Guidelines outline the core content of sustainability reporting, which is generally relevant to organisations of all sorts and sizes. The GRI Sector Supplements aim to complement the GRI Guidelines by providing sector specific guidelines for 12 sectors that require specialised guidance, including the automobile sector, financial services, mining and metals and NGOs. Their objective is to capture 'the unique set of sustainability issues faced by different sectors'.[48] Indeed, their development represents genuine progress because it allows a comparison between similar organisations with fixed and comparable indicators that better reflect the integration of internationally recognised objectives and principles of social responsibility.[49] Furthermore, additional indicators for specific themes (*e.g.* human rights, biodiversity) were developed. The GRI also promotes functional coherence with other instruments, such as the Global Compact and the Earth Charter.[50]

Companies can register their GRI Report with the GRI, which report will subsequently become available to the GRI network. A list of the companies that have registered GRI reports since 1999 is accessible to the public through the GRI website.[51] Moreover, the GRI can verify the 'Application Level' of a company by providing information regarding the extent to which the GRI Guidelines have been utilised. However, in order to remain independent and avoid potential conflicts of interest (*i.e.* consulting on its own Guidelines), the GRI does not provide consulting services for reporting. Furthermore, the GRI

46. F. Benseddik and A. Szwed: Vigeo, SRI Research, 'International Public Standards in the Conception and Practice of Social Responsibility by Large European Companies: A Survey of Voluntary Adherence to International Instruments by European Companies Committed to Social Responsibility', 2008, p. 20, at: http://www.vigeo.com/csr-rating-agency/images/PDF/081125_international%20_public_standards.pdf, accessed on 10 April 2009. According to this research, GRI offers a tool to aid reporting that is appreciated and recognised by companies; 86% of the companies interviewed by Vigeo (i.e. 262 companies) declared that they use the GRI framework for their reporting on CSR or sustainable development. In the Netherlands, 16 out of 25 companies from the top 25 Dutch companies listed at NYSE Euronext have prepared their annual reports for 2007 based on the GRI. See Lambooy, *supra* note 33.
47. *Ibid.*
48. *Ibid.*
49. *Ibid*, p.17.
50. See GRI, 'The Earth Charter, GRI, and the Global Compact: Guidance to Users on the Synergies in Application and Reporting', 2008, pp. 12-13, at: http://www.globalreporting.org/Learning/ResearchPublications/Tools.htm, accessed on 15 May 2009.
51. This list includes an option to sort the reporting organisations by country, region, adherence level and sector as well as hyperlinks to some actual reports; at: http://www.globalreporting.org/GRIReports/GRIReportsList/, accessed on 15 May 2009.

'does not engage in any assurance, auditing, verification [or] certification'.[52] Therefore, the so-called Application Level merely informs readers of a particular GRI report of the extent to which the GRI Guidelines and other reporting framework elements have been applied in the preparation of that report. The Application Level does not assess the value or the quality of the report's content.[53] The GRI does offer an 'application level check'. In addition, a 'plus' mark (+) can be declared by the reporting company itself if external assurance has been applied to its GRI report.[54] This is certainly an incentive for companies to carry out an external audit of their GRI reports.[55] It goes without saying that the auditing of non-financial information differs substantially from financial auditing, considering the type of expertise and methods involved.[56]

In this regard, AccountAbility, an international think-tank and advisory group, has created the AA1000 AccountAbility principles intended for use by organisations developing an accountable and strategic approach to sustainability. In particular, these principles require that an organisation actively engage with its stakeholders, fully identify and understand the sustainability issues that may have an impact on its performance, and then use this understanding to develop responsible business strategies and performance objectives.[57]

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52. GRI, 'About GRI's Services', at: http://www.globalreporting.org/AboutGRI/FAQs/FAQs-Services.htm, accessed on 10 April 2009.
53. For further information about the Application Levels, see GRI: 'Application Levels', at: http://www.globalreporting.org/NR/rdonlyres/FB8CB16A-789B-454A-BA52-993C9B755704/0/ApplicationLevels.pdf, accessed on 10 April 2009.
54. GRI: 'a report maker should only declare a 'plus' (+) level if it believes that it has applied external assurance mechanism'. Compare this with the strict accounting rules applicable to the auditing of the annual report and consolidated accounts: Fourth Council Directive 78/660/EEC of 25 July 1978 based on article 54 (3) (g) of the Treaty on the annual accounts of certain types of companies, [1978] OJ L122/11 and Seventh Council Directive 83/349/EEC of 13 June 1983 based on article 54(3)(g) of the Treaty on consolidated accounts, [1983] OJ L211/31.
55. See: The Auditing Roundtable, 'About the Roundtable', at: http://www.auditing-roundtable.org/fw/main/Overview-70.html, accessed on 10 April 2009.
56. The audit carried out with regard to financial information is mainly based on accounting methods. Non-financial information auditing involves different expertise, such as environmental experts, personnel and organisational professionals, or human rights lawyers. Examples of auditing firms are Ernst & Young, CSR Knowledge Center, at: http://www.eyi.com>; and KMPG Global Sustainability Services, at: http://www.amr.kpmg.com/NR/exeres/1A058B00-3AC6-49CB-BB29-9419D390F657.htm, accessed on 15 May 2009. The most frequently used standards of assurance are: the International Standard for Assurance Engagements (ISAE 3000) which is obligatory for accounting firms performing corporate responsibility assurance if there is no national alternative (62 per cent of the world's largest companies use the ISAE 3000), and the AA 1000 AS (used by 33 per cent of the same group). Source: KPMG Survey, *supra* note 42, p. 65.
57. AccountAbility, 'Who we are', at: http://www.accountability21.net/default.aspx?id=54, accessed on 10 April 2009. In the Netherlands, the *Koninklijk Nederlands Instituut van Registeraccountants* (NIVRA) [Royal Dutch Institute of Registered Accountants] has developed the 3410 Standard. See: Kamp-Roelands, *supra* note 37, pp. 118-119.

The UN Conference on Trade and Development (UNCTAD) also works to improve sustainability reporting by companies. It promotes the use of comparable responsibility reporting indicators. In 2008, UNCTAD published the 'Guidance on Corporate Responsibility Indicators in Annual Reports' as a voluntary tool to incorporate concise and comparable CSR indicators within annual financial reports.[58] The guide consists of 16 indicators, along with a reporting methodology, designed to provide quantitative and comparable information on CSR issues. The objective of this guide has been developed with reference to the GRI Guidelines and IFRS.[59] In 2008, a Memorandum of Understanding was signed between UNCTAD and the GRI, whereby UNCTAD formally endorsed and recommended the GRI to all of its Member States and its corporate sector.

As illustrated above, private regulation has produced more concrete tools for sustainability reporting than the limited number of general guidelines imposed on companies by means of public regulation mentioned in section 6.4. In addition, it is relevant that private regulation has also impacted the further development of public regulation on sustainability reporting. For example, in the case of the Danish legislation on CSR reporting (seesection 6.4), supporting explanatory material directly refers to a number of international guidelines such as the GRI Guidelines and the UN Global Compact Principles.[60] Furthermore, the sustainability reporting imposed on state-owned Swedish companies must be prepared in accordance with the GRI Guidelines. An explicit reference to this requirement can be found in the Swedish Guidelines for external reporting by state-owned companies:[61]

> State-owned companies shall apply these [GRI] guidelines. In those cases where the state is one of a number of joint owners, the Government intends, in consultation with the company and the other owners, to endeavour for these guidelines to be applied in the jointly-owned companies. These guidelines are based on the principle of 'comply or explain', which means that a company can deviate from the guidelines if a clear explanation and justification of this departure is provided. This design enables the guidelines to be applicable and relevant to all companies, regardless of size or industry, without having to abandon the main purpose of the accounting and reporting. The board shall describe in the annual report how the guidelines have been applied during the past financial year and comment on any deviations.

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58. UNCTAD, 'ISAR – Corporate Transparency – Accounting', at: http://www.unctad.org/Templates/Startpage.asp?intItemID=2531, accessed on 10 April 2009. It would be interesting to analyse comparative information on usage levels.
59. UNCTAD, 'Guidance on CSR Indicators in Annual Reports' (2008), at: http://www.unctad.org/en/docs/iteteb20076_en.pdf, accessed on 10 April 2009. It would be interesting to analyse comparative information on usage levels.
60. Hohnen, *supra* note 38. T. Fogelberg (GRI), 'Requiring transparency from all our companies', speech of 13 May 2009, at: http://blog.csrgov.dk/?p=22, accessed on 17 July 2009. See also the Canadian government policy referred to at note 41.
61. Government of Sweden, *supra* note 39, pp. 1 and 2.

It is interesting that the Swedish legislator makes use of the 'comply-or-explain' mechanism when requiring that state-owned companies comply with the GRI Guidelines in their sustainability reports. The same mechanism is also used in the legislation of many European countries where companies have been obliged to report on their compliance with the national corporate governance code in their annual reports.

Another salient aspect is the fact that CSR reporting initiated by private regulation is not used exclusively by shareholders. Actually, several internal and external stakeholders of a company also benefit from the accessibility of this information, namely: rating agencies, pension funds, banks, NGOs, employees and consumers. They use sustainability reporting as follows:

1. *Rating agencies*: as a source of information on which to base the rankings that they provide to sustainability indices and institutional investors regarding the environmental, social and governance factors (ESG) that determine the sustainability level of a company;[62]
2. *Pension funds, institutional investors and asset managers*: to gather ESG information on companies they invest in and to use this information in line with set sustainability criteria integrated in their asset management policies ('socially responsible investment');[63]
3. *Banks*: to assess and manage the reputation, environmental and social risks of their corporate customers, especially in project financing,[64] and to comply with the Equator Principles;[65]
4. *Employees*: to 'feel good' about their company, and to know what is going on in their company from a CSR perspective;

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62. For example, Vigeo Group, a supplier of extra-financial analysis and specialist in social responsibility audits, uses such reports, among other sources of information, to design the ASPI Eurozone Index and the Ethibel Sustainability Indexes. The asset management company SAM Group also uses them to prepare the Dow Jones Sustainability World Indexes (DJSI), in collaboration with the Dow Jones Indexes and STOXX Limited, http://www.vigeo.com/csr-rating-agency/, accessed on 21 May 2009.
63. For instance, the Dutch pension fund ABP uses information on sustainable economic growth – often of a non-financial nature – in its analyses of the quality of companies to invest in. See ABP: 'Statement of Investment Principles', 2005, at: http://www.abp.nl/abp/abp/images/Statement%20of%20investment%20principles_tcm108-49563.pdf, accessed on 3 July 2010. See also BNP Paribas' policy on sustainable investment, at: http://www.bnpparibas.com/en/sustainable-development/, and F&C's governance and sustainable investment, at: http://www.fandc.com/us/Default.aspx?id=87472, accessed on 10 April 2009.
64. For example, the bank Rabobank has considered (since 2007) a number of CSR aspects in many of its lending decisions to identify risks and opportunities inherent in large credit facilities and transactions, <http://www.rabobank.com/content/about_us/corporate_social_responsibility/> accessed 10 April 2009.
65. The Equator Principles are used by banks to ensure that the projects financed are developed in a manner that is socially responsible and reflect sound environmental management practices. A screening process is used to classify project financing into Category A, B or C →

5. *NGOs*: to collect information on the companies in order to address specific issues they disapprove of, but also to make proposals for partnerships or joint projects, eg environmental NGOs can cooperate with companies in the fields of water management, sustainable fishing or oil exploration;[66]
6. *Consumers*: to assist consumers in responsible purchasing,[67] for example by providing information on environmental and social aspects related to the production of consumer goods, including energy consumption, recycling and sustainable disposal of products.[68]

As sustainability reporting provides transparency regarding corporate matters, ie a focal point of CSR, and fulfils a need of many stakeholders, it can be concluded that the developing private regulation outlined in this section 6.5 is valuable and important.

6.6 Public legislation and policies on responsible corporate conduct

In general, the extent to which the transnational conduct of internationally operating companies is socially responsible is not specifically regulated by *public* legislation. There are, however, a few notable exceptions.. In particular, the UK Companies Act 2006 (Chap. 46) states that the duty of a company executive 'to promote the success of the company' includes, *inter alia*, the impact of corporate operations on the community and the environment and the desirability for the company of maintaining a reputation for high standards in business conduct

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(ie high, medium or low environmental or social risk). Category A and B projects require an environmental assessment, addressing issues such as sustainable development, socio-economic impact, land acquisition, involuntary resettlement and pollution prevention. In addition, where appropriate, an environmental management plan for mitigating environmental and social risks may be required. A list of institutions that have adopted the Equator Principles can be found on its website. The Equator Principles, 'A Matter of Principles', at: http://www.equator-principles.com/gfm2.shtml, accessed on 10 April 2010.

66. See eg OECD Watch and Centre for Research on Multinational Corporations (SOMO) and Child Rights Information Network (CRIN), at: http://oecdwatch.org/; http://somo.nl/; http://www.crin.org/, all websites accessed on 10 April 2009.
67. On responsible purchasing, see: The Hartman Group, 'Sustainability: The Rise of Consumer Responsibility', 2009, http://www.hartman-group.com, accessed on 10 April 2009.
68. For instance, Philips has identified certain of its products that have a better environmental performance (Philips Green logo). It also informs its consumers about product recycling and reuse services offered in Europe, see: http://www.philips.com/about/sustainability/recycling/productrecyclingservices/index.page, accessed on 10 April 2009.

(article 172). Indonesian Company Law No. 40/2007 also incorporates certain provisions on CSR directed towards the extractive industry (article 74).[69]

At an EU policy level, it is stressed that CSR is 'fundamentally about voluntary business behavior. An approach involving additional obligations and administrative requirements for business risks is considered counter-productive and would be contrary to the principles of better regulation'.[70] For the EU, emphasis should be placed on the greater political visibility of CSR in order to acknowledge what European enterprises already do in CSR and to encourage them to do more.[71] It is thought that CSR policies can be enhanced by a better awareness and application of existing legal instruments, such as Directive 84/450/EEC on misleading advertising and Directive 2005/29/EC on unfair business-to-consumer commercial practices, as these Directives add value to companies' adherence to their voluntary codes of conduct.[72] Directive 2005/29/EC stresses that 'it is appropriate to provide a role for codes of conduct, which enable traders to apply the principles of this Directive effectively in specific economic fields'.[73] The policies of some European countries in respect of CSR are addressed below:

1. In *the Netherlands*, the government refrains from imposing CSR legislation on companies: 'Legislation will lead to companies doing only the bare

69. Article 74 of the Indonesian Company law No. 40/2007 provides: (1) Companies conducting business activities in the field of and/or related to natural resources have the obligation to carry out Social and Environmental Responsibility; (2) Social and Environmental Responsibility as referred to in paragraph (1) is the company's obligation, which is budgeted for and calculated as a cost of the company, and which is implemented with attention to appropriateness; (3) Companies which do not carry out their obligation as referred to in paragraph (1) shall be subject to sanctions according to the provisions of laws and regulations; (4) Further provisions on Social and Environmental Responsibility shall be regulated by Government Regulation.
70. Commission (EC), Communication from the EP, the Council and the European Economic and Social Committee, 'Implementing the Partnership for Growth and Jobs: Making Europe a Pole of Excellence o Corporate Social Responsibility', COM (2006) 136 final, 22 March 2006. See also *supra* note 3.
71. European Commission, 'Activities to promote CSR 2007-2008, European Multi-stakeholder Forum on Corporate Social Responsibility', Plenary Meeting, 10 February 2009, at: http://ec.europa.eu/enterprise/csr/documents/stakeholder_forum/csrcom_summaryfinal.pdf, accessed on 10 April 2009.
72. E.P. Resolution (2007), *supra* note 43. This resolution was based on the principle that 'increasing social and environmental responsibility by business, linked to the principle of corporate accountability, represented an essential element of the European social model, and for the purposes of meeting the social challenges of economic globalisation'.
73. Under this Directive, 'code of conduct' means 'an agreement or set of rules not imposed by law, regulation or administrative provision of a Member State which defines the behaviour of traders who undertake to be bound by the code in relation to one or more particular commercial practices or business sectors'.

minimum, whereas the Dutch Government sees CSR as part of a company's core business'.[74] The Dutch policies aim to promote CSR at the local, national but also at the international level, which includes supporting the development and use of private regulatory regimes in the field of CSR.[75] The Dutch government also actively supports business networks aimed at promoting CSR. It should be noted that this position – refraining from imposing CSR legislation – is not one of unanimous consent. Some members of the Dutch Parliament support the adoption of a public regulation on the corporate duty to provide information on societal aspects of company activities and products to Dutch consumers. Their goal is to encourage more sustainable consumption;[76]

2. The *Italian Ministries* of Labour and Social Affairs have started to develop a CSR-SC (Social Commitment) project in cooperation with Bocconi University (Milan). The project intends to promote companies' *voluntary* ethical behavior and participation in national and local welfare schemes. This involves the creation of modular standards – based on predefined guidelines and indicators – that companies can adopt on a voluntary basis to identify socially responsible behavior;[77] and

74. European Commission (2007), *supra* note 3, p. 58.
75. For instance by introducing sustainable purchase policies regarding products acquired by the Dutch government, which will be applied as of 2010, see: http://www.senternovem.nl/duurzaaminkopen/wat_is_duurzaam_inkopen/index.asp, accessed on 21 May 2009. The Dutch government has also incorporated references to the OECD MNE Guidelines in its export credit insurance facility, *'Periodieke evaluatie van de Exportkredietverzekeringsfaciliteit van de Staat; Beleidsevaluatie over de periode 2001 – 2006'* [Periodic evaluation of the Export credit insurance facility of the state; Policy evaluation over the period 2001-2006], 15 February 2007, p.4, see: http://static.ikregeer.nl/pdf/BLG11289.pdf, accessed on 21 May 2010.
76. *Wet openbaarheid van productie en ketens*, 10 December 2002. Pressure in favour of this draft regulation was reinitiated by M.L. Vos (Partij van de Arbeid [Labour Party]) and H-E. Waalkens (Labour Party) in April 2008. See also MVO Platform, letter to the chairman and members of the Dutch Parliament (Second Chamber) Commission for Economical Affairs, Second Chamber of the States-General (4 March 2009). Among others, this letter recommends the adoption of extra legislation and strengthening compliance with regard to transparency in product processes at the consumer level and supply-chain responsibility.
77. European Commission (2007), *supra* note 3, pp. 39-41. Other measures to promote CSR are also under discussion by the Italian government, including providing fiscal and financial benefits for organisations practising CSR. On the mentioned CSR-SC project, see also F. Perrini, S. Pogutz and A. Tencati (Bocconi University), *Developing Corporate Social Responsibility: a European Perspective* (Edward Elgar Publishing, Cheltenham 2006), p. 156.

3. In *Norway*, the government published a White Paper in 2009 on responsible business, which was adopted with minor changes in May 2009.[78] Among other goals, it aims to strengthen the Norwegian NCP for the OECD's MNE Guidelines.[79] The Norwegian government will furthermore propose amendments to the Norwegian Accounting Act that extend the duty of Norwegian companies to provide information on what they are doing to implement ethical guidelines. Some critics have pointed out that this publication refrains from proposing mandatory national CSR guidelines in recognition of the *global* competitive environment in which Norwegian companies operate.[80]

Although the precise nature of CSR approaches varies among EU countries along national and cultural lines, it mainly involves voluntary measures rather than binding legislation. In general, and with a few exceptions, the political will to enact public legislation requiring EU-based companies to act responsibly in their international business activities seems to be lacking.

6.7 Private regulation on responsible corporate conduct

Private regulation also appears to outweigh public regulation in the guidance of responsible corporate conduct. Section 6.2 defined the spectrum of types of private CSR regulation, as illustrated by Annex 6.1, such as the ICC Business Charter for Sustainable Development, the Forest Stewardship Council, the UN Global Compact Principles and the OECD MNE Guidelines. The private regulatory regimes mentioned in Annex 6.1 are but a few of those that have been initiated. It should be noted that a myriad of other initiatives exist, or are currently in the process of being developed, such as the ISO 26000 standard on CSR.

Since the OECD MNE Guidelines and the UN Global Compact Principles will be the subject of further elaboration, it is useful to mention that the latter represents a policy initiative for businesses which is comprised of ten universally accepted principles in the areas of human rights, labour, the

78. Minister of Foreign Affairs of Norway, 'Report No.10 to the Storting: Corporate social responsibility in a global economy (2008-2009)', 23 January 2009; and Minister of Foreign Affairs of Norway, 'CSR Abroad', 23 January 2009, at: http://www.regjeringen.no/en/dep/ud/press/News/2009/social_responsibility_abroad.html?id=543620, accessed on 21 May 2009. This White Paper was adopted on 5 May 2009.
79. For more information on NCPs, see: sections 6.10 and 6.12 below.
80. Forum for Environment and Development, 'Norway's first white paper on CSR', at: http://www.forumfor.no/Artikler/5142.html, accessed on 21 May 2009. See also T. Fogelberg, 'Isn't it good, Norwegian Wood?' Ethical Corporation, 19 February 2009, at: http://www.ethicalcorp.com/content.asp?ContentID=6349, accessed on 10 April 2009.

environment and anti-corruption. The UN Global Compact Principles aim to help ensure that markets, commerce, technology and finance advance in ways that benefit economies and societies everywhere.[81]

For their part, the OECD MNE Guidelines are recommendations addressed by governments towards multinational enterprises operating in or from OECD countries. They provide voluntary principles and standards for responsible business conduct in a variety of areas including employment and industrial relations, human rights, the environment, information disclosure, combating bribery, consumer interests, science and technology, competition, and taxation.[82] Complaints about the behavior of companies in host countries can be submitted to the NCPs. This will be discussed in more detail in section 6.12 below.

6.8 Private contracts regulating CSR behaviour

As is becoming apparent, public legislation and private regulation are not alone in impacting corporate conduct. Indirectly, private regulation also results in companies imposing requirements on other companies to behave responsibly. They do so by including clauses to that end in their bilateral contracts. This phenomenon can be seen in loan agreements, in which lenders impose on borrowers the obligation to refrain from human right abuses, to prevent corruption by company employees and to avoid environmental damage. A similar trend in supply agreements confirms this development. This can best be explained as follows. Globalisation is changing the way corporations obtain materials and sell their products and services. Western companies outsource parts of their production to low-income countries; they also transfer whole factories to resource-rich areas to reduce transport costs. At the same time, they source services in, such as call centre facilities and ICT services, from foreign subsidiaries or other companies. Moreover, globalisation is leading to increased industry concentration, which implies that suppliers are fighting more aggressively to sell to fewer, larger multinational companies. As a result, buyers have the power to impose conditions of purchase, including CSR-related policies.

The KPMG Survey revealed that over 90 per cent of the 250 largest companies in the world have a supply chain code of conduct. As an illustration of the bargaining power of multinational companies at the supply-chain level, several authors have pointed to the importance of the giant American retailer

81. Global Compact, 'Overview of the UN Global Compact', at: http://www.unglobalcompact.org/AboutTheGC/index.html, accessed on 10 April 2009. See: Steenvoorde, *supra* note 23, pp. 125-147.
82. OECD, 'Guidelines for Multinational Companies', at: www.oecd.org/daf/investment/guidelines, accessed on 10 April 2009.

Wal-Mart as an important emerging private actor in the transformation of lawmaking, referring to it as a 'global legislator'.[83] They highlight how Wal-Mart is able to use its contractual relationships to regulate behavior among its suppliers around the globe with respect to product quality, working conditions for the suppliers' employees, ethical conduct, etc.[84] This technique of requiring compliance with certain codes of conduct or contractual norms can produce important global regulatory effects, the so-called 'domino effect', when an industry leader decides to impose its code on its suppliers.[85] This is an example *par excellence* of 'bottom-up internationalisation of legal standards'.

Can a company be held legally responsible for violations of its code of conduct due to the behavior of its foreign suppliers? This question was examined through the class action for injunctive relief and damages filed against Wal-Mart in 2005. The plaintiffs invoked a breach of Wal-Mart's supply contracts with garment factories located outside the US that require foreign suppliers to adhere to Wal-Mart's code of conduct (the Standards for Suppliers Agreement) as a condition for supplying merchandise to Wal-Mart. They alleged a violation of Wal-Mart's obligation to ensure suppliers' compliance with this code of conduct and to diligently monitor working conditions in supplier factories.[86] This case – which is still pending – actually uses an

83. KPMG Survey, *supra* note 42, p. 41. See also *e.g.* M.P. Vandenbergh, 'The New Wal-Mart Effect: the Role of Private Contracting in Global Governance', in *UCLA Law Review*, 54, 2007, p. 913.

84. It has even been suggested that this transformation 'challenges the regulatory monopoly of states and may contribute to the construction of a global system of customary law as powerful as the English common law was in its day'. L. Catá Backer, 'Economic Globalisation and the Rise of Efficient Systems of Global Private Lawmaking: Wal-Mart as Global Legislator', Symposium: Wal-Mart: The New Superpower, in University of Connecticut Law Review, 39 (4), 2007, p.1739.

85. L. Hennebel and G. Lewkowicz, 'Corégulation et responsabilité sociale des entreprises' in T. Berns *et al*. (eds.), *Responsibilités des entreprises et corégulation* (Bruyland, Bruxelles, 2007), p. 176. Cp. with Lex Mercatoria, see K.P. Berger, 'The New Law Merchant and the Global Market Place: a 21st Century View of Transnational Commercial Law' in K.P. Berger (ed), *The Practice of Transnational Law* (Kluwer Law International, The Hague, 2001); A.C. Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (Cambridge University Press, Cambridge, 2003).

86. The class action was filed on behalf of two groups of plaintiffs: American and non-American. The non-American plaintiffs – who work at Wal-Mart's foreign suppliers – invoked being subjected to forced overtime, payments below the legal minimum and forced to work in conditions which are detrimental to health and safety and in violation of human rights. The American plaintiffs (California residents) work for competitors of Wal-Mart in the US. They alleged that pay and benefits were cut as a result of Wal-Mart's entry into the market; their employers had to compete with Wal-Mart. Plaintiffs stated that they have been harmed by Wal-Mart's unfair business practices under California's Unfair Business Practices Act §17200 and alleged unjust enrichment under California state law. All claims were brought in the US because Wal-Mart's Standard for Suppliers Agreement is premised and controlled by American law; Wal-Mart claims that it monitors and enforces its Code of →

innovative theory that Wal-Mart's code of conduct created a contract, and that the workers at the supplier factories are third party beneficiaries of that contract.[87] Another example of how this 'domino effect' can work can be seen when looking to the international home products retailer IKEA. Following severe criticism from the public concerning its environmental and social behavior, IKEA adopted a code of conduct for its suppliers: the IKEA Way on Purchasing Home Furnishing Products (IWAY).[88] IWAY covers IKEA's minimum requirements relating to the environment as well as social and working conditions, including child labour. Concerning the environment, IKEA has implemented certain measures for a more sustainable use of forest resources. The company now purchases its wood exclusively from suppliers which meet its sustainability requirements for sourcing and producing timber, which include regular compliance check-ups and supply-chain audits. IKEA's wood suppliers must follow a four-step programme requiring, among other things, developing forest management standards certifiable by the Forest Stewardship Council.[89] IKEA cooperates with the World Wild Fund for Nature (WWF) in promoting responsible forestry and better cotton production. They

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Conduct from its headquarters in the US, and the Standard for Suppliers is advertised as its Code of Conduct for foreign suppliers. The non-American plaintiffs also alleged that they would be subjected to reprisal if they were to pursue claims in their home countries. Wal-Mart Watch, 'Global Labour Complaints about Wal-Mart Stores, Inc.', at: http://walmart-watch.com/research/documents/global_labor_complaint_against_wal_mart_stores_inc/, accessed on 10 April 2009. The official filing can be downloaded from the website. See also <http://laborrights.org> accessed 15 May 2009.

87. The claim was dismissed on 30 March 2007. According to information provided by International Rights Advocates (a USA-based non-profit organisation) in October 2008, the plaintiffs are in the process of filing an appeal (*Jane Doe et al v. Wal-Mart Store, INC*., Case No. CV-05-7307 AG, US District Court, Central District of California). International Rights Advocates, Cases: Wal-Mart, at: http://www.iradvocates.org/walmartcase.html, accessed on 10 April 2009. Under Dutch law, the relevant question would be whether the Wal-Mart code of conduct, or the supplier contract referring to this code of conduct, is capable of creating rights for third parties such as the foreign suppliers' employees. Furthermore, one could think of tort or unfair trade practices including misleading communications. See also: *Gebroeders Beentjes BV v. Pays-Bas*, 20 September 1988, C-31/87, European Court of Justice, on the imposition of conditions of a social nature relating to the employment of long-term unemployed persons in awarding a public works contract, and the direct effect of the Directive.

88. IKEA, 'Suppliers', at: http://www.theikeaway.ca/en/wwd-worldwide-suppliers.shtml, accessed on 10 April 2009. IWAY is based on provisions included in the United Nations Universal Declaration of Human Rights, the ILO Declaration on Fundamental Principles and Rights at Work, and the Rio Declaration on Environment and Development.

89. IKEA, 'Our position on Forestry', at: http://www.theikeaway.ca/en/wwd-worldwide-suppliers-forestry.shtml, accessed on 10 April 2009. IKEA explains about forestry: 'IKEA has foresters working in different locations around the world to check up on suppliers' compliance with our forestry rules. We also require all of our wood suppliers to complete →

are teaching cotton farmers in Pakistan and India to apply production techniques that use water more efficiently and reduce the use of pesticides and fertilizers.[90]

Considering that IKEA represents one of the bigger purchasers of raw materials in the world, its policy can have a considerable practical impact. However, one can question whether this is the correct way in which to ensure worldwide sustainable and responsible supply-chain management. Is it appropriate to leave vital international matters, such as labour rights and environmental protection, in the hands of multinational companies? The adoption and enforcement of private regulation to govern the international conduct of companies around the world raises several questions.

6.9 Successfulness of private regulation

The question posed in section 6.8 above, whether it is correct for public regulators to rely on private regulatory regimes to ensure sustainable economic development,is also connected with the question of whether private norms are generally successful in regulating corporate conduct. Although, arguably, this matter should be addressed on a case-by-case basis, some general criteria have been identified as conditions for the regulation to be efficient and effective, *i.e.* successful.

HiiL has been developing a theoretical model as part of its research programme on Private Actors and Self-Regulation, which the author helped found.[91] This model aims to assist governmental policy-makers as well as private regulators in assessing the appropriateness of public or private or, rather, co-regulation in different contexts. Some main principles, also referred to as 'pillars', have been identified for measuring the success of regulation, namely:

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our annual Forest Tracing System questionnaire, which asks for the origin, volume and species of all wood used in IKEA products. Based on the results of this questionnaire, we send our foresters to audit selected wood suppliers. A third-party auditor also conducts wood supply chain audits for IKEA'.

90. WWF, 'WWF and IKEA co-operation', at: http://www.wwf.se/source.php/1121494/wwf_ikea_cooperation_leaflet_april2007.pdf, accessed on 10 April 2009. See also: www.panda.org/ikea, accessed on 21 July 2010.

91. T.E. Lambooy and M-È. Rancourt, 'Inventory Report in Relation to HiiL's Concept Paper: The Added Value of Private Regulation in an Internationalised World? Towards a Model of the Legitimacy, Effectiveness, Enforcement and Quality of Private Regulation', HiiL Report, May 2008, at: http://www.hiil.org/uploads/File/1-6848-Microsoft_Word_-_HIIL_n6833_v2_PA_Inventory_Report_with_Annexes.pdf, accessed on 15 May 2009. The Inventory Report provides an overview of recent academic publications and research programmes pertaining to the field of private regulation and co-regulation as well as an indication of the areas that warrant further research. See also: HiiL, 'Call for research proposals', September 2008, at: www.hiil.org, accessed on 5 June 2010.

(1) quality, (2) enforcement, (3) legitimacy and (4) effectiveness.[92] Each code of conduct or other type of regulation can be examined in relation to each of the pillars. Concerning the criteria of quality, enforcement and legitimacy, a theoretical analysis can be used. With respect to the effectiveness criterion, an empirical analysis would better serve the purpose of measuring the impact on compliance. An empirical study could consist of performing an analysis of existing practices of companies that claim to adhere to specific private regulation. This could be done by means of questionnaires, conducting interviews with company employees and stakeholders, conducting due diligence investigations, and examining publicly available information concerning the private actor's behavior, such as websites, sustainability reports or stakeholder comments.

All of the pillars influence the level of compliance with a specific norm. Some of them overlap to a greater or lesser degree.All are interrelated: when the quality of regulation is poor, its enforcement will be difficult. Also, when regulation is not perceived as being legitimate, effectiveness will be difficult to establish. Consequently, all four pillars deal with compliance in a broad sense; ie not only compliance with the provisions of the regulation (out of fear of enforcement measures), but also compliance because the regulation is legitimate, workable and enforceable because of its sufficient quality.

A complicating factor in the analysis of the successfulness of private regulation is the fact that compliance with a private regulatory regime might depend on the area or subject addressed, eg on the degree of internationalisation of the subject, or on the urgency in finding solutions to international societal and environmental problems. The more urgent the problem, the higher the level of compliance that can be achieved. Examples of such international problems that presently cannot be fully resolved by formal national legal systems are raised by the UN Millennium Development Goals (MDGs) and by the current change to our climate.

Evaluating the success of a private regulation regime is also made more challenging by the phenomenon of public regulation and private regulation influencing each other. Some are of the opinion that the pressure of law being developed would encourage the private sector to adopt self-regulation in a certain field, for instance, in order to avoid detailed and complicated public legislation. It has been stated that self-regulation 'has its foundation in the possibility or fear of government regulation'.[93] Moreover, private regulation may also eventually lead to incorporation in public legislation. Thus, approaches based on public law and private regulation are not mutually exclusive.[94]

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92. HiiL *supra* note 6, pp. 4-7.
93. M.E. Price and S.G. Verhulst, *Self-Regulation and the Internet* (Kluwer Law International: The Hague, 2005), referring to T. Gibbons, *Regulating the Media*, Chapter 1, (2nd edn, Sweet & Maxwell, London, 1998), pp. 275-285.
94. See K. de Feyter, 'Self-regulation' in W. van Genugten, P. Hunt and S. Mathews (eds), *World Bank, IMF and Human Rights* (Wolf Legal Publishers, Nijmegen, 2003).

Another complicating issue is that private and public norms dealing with the same subject matter often coexist. It would be relevant to research this phenomenon, especially considering the increase of private regulation promoted by globalisation and raised awareness relating to CSR. This is, however, the object of a different study and is outside the scope of this chapter.

The following sections discuss the main criteria and elements that should be considered when examining each of the afore-mentioned pillars, *e.g.* quality, enforceability, legitimacy and effectiveness. In order to demonstrate their application, certain recognised and mature private norms will be examined: the UN Global Compact Principles, the OECD MNE Guidelines and the GRI Guidelines. Since the HiiL research programme is 'work in progress', many questions relating to each of these four pillars remain open to discussion.

6.10 The quality of the regulation

The quality element of regulation basically relates to the question whether regulation is practicable, workable and enforceable. The quality principle is found to be relevant for the process of drafting a regulation, for the content of the regulation as well as for its implementation and enforcement. In particular, it is assumed that the quality of a norm is better guaranteed when the regulation is (jointly) drafted by legal experts and professional experts from the relevant sector. Such experts are more familiar with complex and technical issues.[95] Furthermore, private regulation is said to be more flexible and rapidly adjustable to societal changes than public regulation. As such It would be better equipped to track more closely the actual and current needs of a particular sector in comparison to public regulation.[96] Public legislation is, by comparison, drafted with a long-term perspective and with a broader audience in mind.

A certain contradiction can be noted between this need for flexibility and the criteria of (legal) certainty and predictability, which are also important elements for ensuring 'quality' of a regulation. When private norms are changed too rapidly or frequently this will have a negative impact on their predictability. Striking the right balance between these criteria can therefore become challenging.

In most countries, public regulation must follow strict legislative procedures to ensure legal quality control.[97] This also guarantees the consistency of the

95. HiiL *supra* note 6, p. 23.
96. T.E. Lambooy and M-È. Rancourt, HiiL, 'Conference Report, Private Actors and Self-regulation' (HiiL Conference Report), Second HiiL Meeting, The Hague, 27 May 2008, p. 23 at: http://www.hiil.org/index.php?page=private-actors-and-self-regulation, accessed on 21 May 2009.
97. *Ibid.*

new norms with the existing system of norms. The absence of a complete legislative process when introducing private regulation raises the question whether there are sufficient mechanisms in place to ensure adequate quality control and maintenance. Moreover, since many private regulatory regimes address multinational companies operating in various countries, it will be difficult to assure consistency with existing national norms. In this respect, it should nevertheless be noted that many of the values addressed by private regulations covering CSR derive from international conventions and declarations endorsed by many countries. These private regulatory regimes are hence built on a normative framework that has already been widely accepted. This remark certainly applies to the UN Global Compact Principles, the OECD MNE Guidelines and the GRI Guidelines. An important question here is whether technical and normative conflicts exist between a certain private regulation and public norms. For instance, human rights norms that have been publicly legislated and are thus applicable to companies – related to non-discrimination or non-violence – do not apply on an extraterritorial basis. However, private regulation, which promotes the same norms to control the conduct of companies, applies worldwide (such as the Global Compact and the OECD MNE Guidelines). In the case of regulation concerning anti-corruption and bribery, a series of norms in different legal systems can be simultaneously applicable: national laws; extraterritorial American law (FCPA),[98] ICC Rules of Conduct and Recommendations to Combat Extortion and Bribery (2005), ICC Guidelines on Whistleblowing (2008), the Earth Charter (Principle 13), the GRI Guidelines (SO2, SO3, SO4), Global Compact Principle 10 and the OECD MNE Guidelines (Chapter VI). The content and interpretation of these norms are divergent, eg with regard to facilitating payments (sometimes allowed, sometimes prohibited).[99] In this regard, it seems important that private regulation also provides for mechanisms for the interpretation and implementation of the norms as well as for dispute settlement.

It is interesting to transpose the characteristics of 'quality' to the three most widely-used private regulations in the CSR – the UN Global Compact Principles (2000); the OECD MNE Guidelines and the GRI Guidelines:

1. *UN Global Compact Principles* (2000): one might wonder whether these could be considered to be flexible and easily adaptable to any current needs, since they are as it were carved in stone. The nature of the UN Global

98. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213. The anti-bribery provisions of this Act make it unlawful for American individuals and companies (and those foreigners or companies who/which have a functional connection with the US) to pay bribes to non-US government officials for the purpose of obtaining or retaining business.
99. See: Chapter 5 (Corruption). Annex 5.1 provides a brief comparative overview of the core provisions of the above-mentioned instruments.

Compact Principles is predetermined; they represent universally accepted basic principles that are unlikely to be subject to change overnight. Moreover, they are directly derived from well established international legal instruments that have enjoyed universal consensus for years, namely the UDHR, the ILO Declaration on Fundamental Principles and Rights at Work, and the Rio Declaration on Environment and Development. It should also be noted that a Principle on corruption was included in 2004, thus indicating a limited openness to adapting to important new developments. There was resistance against including a new principle because 'the deal' was that there would be no more principles.[100] Since the UN Global Compact Principles have been defined so broadly that they can be used widely, they have been criticised for lack of clarity. Vagueness does not enhance quality of a regulation. In response to these criticisms, the Global Compact website now provides an explanatory text to each Principle as well as tools and guidance materials. This effort can be seen as increasing the level of interpretation and predictability. The text describes, for instance, the scope of application to companies, and the minimum compliance required. It also provides some examples for each Principle of how companies are expected to support and respect the Principles through their daily activities;[101]

2. *OECD MNE Guidelines* (1976; revised in 2000): generally, these are well adapted to modern needs. However, as stressed by Ruggie, the current human rights provisions in the OECD MNE Guidelines are said not only to lack specificity, but in key respects to have fallen behind the voluntary standards of many companies and business organisations.[102] Indeed, a revision of the Guidelines to address these concerns has been recommended, and the OECD is considering this.[103] Concerning 'quality control', the OECD Investment Committee has oversight responsibility for the OECD

100. Although the UN Global Compact Principles are silent on relatively new issues such as climate change, its network has set up an action platform for UN Global Compact participants who seek to demonstrate leadership on the issue of climate change. It provides a framework for business leaders to advance practical solutions and help shape public policy as well as public attitudes. Chief executive officers who support the statement are prepared to set goals, develop and expand strategies and practices, and to publicly disclose emissions as part of their existing disclosure commitment within the UN Global Compact framework, that is, the Communication on Progress. A number of multinational companies are signatories to this platform. See: 'Caring for Climate: The Business Leadership Platform', at: http://www.unglobalcompact.org/Issues/Environment/Climate_Change/, accessed on 21 May 2009.
101. UN Global Compact, 'Tools and Resources', at: http://www.unglobalcompact.org/About-TheGC/publications.html, accessed on 10 April 2009.
102. Ruggie *supra* note 21, p. 13. Others argue that the OECD MNE Guidelines should not be changed in order to avoid confusion, but that companies should juststart using them.
103. Information obtained from the Dutch Ministry for Economic Affairs by telephone on 21 May 2009.

MNE Guidelines. The so-called NCPs, established on a national level by each OECD Member State, are responsible for encouraging the observance of the Guidelines at the national level. The NCPs also ensure that the Guidelines are known and understood by the different parties.[104] In addition, the OECD MNE Guidelines are complemented by 'Commentaries', which provide explanations of the text and the implementation procedures. Clarifications also provide interpretations of how certain provisions of the Guidelines should be understood, as a result of deliberations by the Investment Committee.[105] Since the OECD MNE Guidelines are recommendations addressed by governments to companies, they can also be seen as being more in harmony with existing systems of norms than other initiatives coming from international organisations or private actors alone. Actually, they refer to local law, which may support the coherence of applicable rules;[106] and

3. *GRI Guidelines* (since 2000; the 'G3' version was launched in 2006): these can be considered the most flexible and up-to-date of the three private regulatory regimes discussed here, due to the continuous improvement of their framework and its universal application.[107] Supplements have also been newly developed by activity sectors in consultation with sector experts, companies and consultants. This development has improved the way complex and technical issues are dealt with, thereby enhancing the possibility of putting them into practice. The GRI Guidelines' adoption and their maintenance and revision, have also involved the participation of several experts from relevant fields. In addition, the GRI has developed some learning programmes and other tools on reporting and on how to use the GRI Guidelines; this can add to the level of the norms' predictability by providing an explanation to the text and to the procedures to be followed. With respect to the question of consistency with existing legislation it should, however, be noted that the GRI framework has not been linked to legislation concerning financial reporting. The GRI sustainability reporting is complementary to financial reporting by companies, but the two forms of reporting are not legally connected. This is a weakness of the GRI Guidelines which should be addressed as soon as possible, since investors are interested in learning how responsible corporate conduct influences

104. OECD, 'National Contact Points for the OECD Guidelines for Multinational Enterprises', at: http://www.oecd.org/document/60/0,3343,en_2649_34889_1933116_1_1_1_1,00.html, accessed on 10 April 2009.
105. OECD *supra* note 11.
106. *OECD MNE Guidelines*: 9, 12-14, 16, 17, 19, 24, 25, 34 and 42.
107. GRI, 'What we do', at: http://www.globalreporting.org/AboutGRI/WhatWeDo/, accessed on 10 April 2009.

financial results. We recommend that (empirical) research in this field be expanded, accelerated and be made widely accessible.[108]

In summary, the quality of private norms relies on a fine balance between their degree of flexibility or adjustment to societal changes and the certainty or predictability of the norms. When compared to public regulation in this field, private CSR regulations are generally better adaptable to changes and the current needs of a particular sector. However, the level of predictability remains limited. Despite efforts to communicate information on their application, the fact that private norms are generally not interpreted and applied by a constant judiciary power cannot offer the same level of predictability as is the case with public norms. On the other hand, the integration of private regulatory regimes in new public regulations, sometimes by cross-reference to the GRI Guidelines and/or OECD MNE Guidelines, such as those mentioned in section 6.5 (Sweden and Denmark), represents an interesting new development in the CSR field, which increases the quality of both private and public regulation.

6.11 The legitimacy of the regulation

The criterion of legitimacy addresses the question whether a regulation is effective in the sense that the underlying goals, ideals and basic reasons for introduction of the regulation are accepted by the addressees (and others). Voluntary adoption could be used as an indicator of legitimacy. This description relates to the legitimacy of a regulation in the eyes of the regulated parties.

As regards the legitimacy of a regulator, we turn to Julia Black. For her, legitimacy means social credibility and acceptability: 'a generalised perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions'.[109] In a regulatory context, a statement that a regulator is legitimate

108. An interesting development is the XBRL movement towards interactive reporting and data. XBRL stands for eXtensible Business Reporting Language. It was originally developed for transmitting financial information and is currently focused around the buildup of XBRL. The US Security and Exchange Commission support the development of XBRL. Since 2006, GRI started to work with XBRL and convened a group of investors and companies to identify how to further improve this system of inter-active company information exchange, at: http://www.globalreporting.org/ReportingFramework/G3Guidelines/XBRL/; and http://www.accountancy.com.pk/newsprac.asp?newsid=649, accessed on 17 July 2009.

109. J. Black, 'Constructing and contesting legitimacy and accountability in polycentric regulatory regimes', *Regulation & Governance*, 2(2), 2008, pp. 137 and 144, referring to M. Suchman, 'Managing Legitimacy: Strategic and Institutional Approaches', in *Academy of Management Review*, 20(3), 1995, pp. 571 and 574 and W.R. Scott, *Institutions and Organisations* (2nd edn, SAGE, Thousand Oaks, CA 2001).

means that it is perceived as having a right to govern both those it seeks to govern and those on whose behalf it purports to govern.[110]

In general, it has been observed that the principle of legitimacy of a private regulation relates to: openness, participation,[111] transparency, accountability, effectiveness and democratic control.[112] These elements resemble,more or less, the standard requirements of a democratic law development process. It can also be noted that most of these criteria focus on the *process* (of regulating) rather than on the product (the regulation).

One way to fulfill these criteria is to ensure the adequate involvement of stakeholders directly affected by a specific regulation. A difficult question is how to determine whether the norm creation process has indeed been inclusive: were all relevant parties included in the process? All parties include both the parties that will be affected because they have to adjust their conduct in order to comply with the new rules (eg employers in the Netherlands have to ensure a smoke-free environment for their employees), and the parties that have an interest in compliance with the newly introduced rules because they will benefit from the new standard (eg the non-smoking employees, their families and health-insurance companies). This concern also applies to the maintenance and enforcement of the norm. In addition, when establishing a new norm, sufficient safeguards should be built in to guarantee the independent and impartial adjudication or arbitration, which in turn will enhance the perception of legitimacy.

MSIs might contribute to the establishment of a dialogue leading to the emergence of internationally shared values, thereby contributing to the acceptance of private regulation thus developed.[113] In other words, the involvement of stakeholders creates a sense of 'ownership' among the participants that can improve the level of their compliance with the private regulation. Attention should also be paid to the question whether some of the parties involved are more 'powerful' – politically or economically – than others in the rule-making process. When some players have the power to push for the inclusion of their interest at the expense of others, the latter will be less inclined to comply with the regulation. Another question relates to the credibility of the players: do they

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110. *Ibid*, referring to R. Barker, *Political Legitimacy and the State* (Oxford University Press, Oxford 1990) and D. Beetham, *The Legitimation of Power* (Macmillan, London, 1991).
111. E. Meidinger, 'Competitive Supragovernmental Regulation: How could it be Democratic?', Symposium: Global Networks: The Environment and Trade, in *Chicago Journal of International Law*, 8, 2008, p.513. Steenvoorde, *supra* note 23, p. 156.
112. S. Kirchner, '*Legal Culture, Conference Report'*, in *German Law Journal*, 4(8), 2003. See: J. Freeman, 'The Private Role in Public Governance', in *New York University Law Review*, 2000, p. 75; A. Vedder, 'Morality and the Legitimacy of Non Governmental Organisations' Involvement in International Politics and Policy Making' in E. Nieuwenhuys (ed), *Neo-Liberal Globalism and Social Sustainable Globalisation* (Brill, Leiden, 2006) pp. 181-193.
113. HiiL Conference Report *supra* note 96, p. 29.

indeed represent the stakeholders whose interests they claim to promote? Another concrete way of assessing legitimacy is to identify initiatives that have been launched to improve the legitimacy of a particular regulatory process (eg are there any working groups in which stakeholders may be engaged?).

Private regulation can also pose pressing questions related to the principles of reasonableness and fairness. Developed countries in particular have so far dominated the development and standard-setting processes of private regulatory programmes. Therefore, some authors conclude that private regulatory programmes (*e.g.* certification) 'will have to successfully address equity questions if they hope to gain worldwide legitimacy'.[114] Concerns have also been expressed by some scholars with regard to the failure of certain private regulatory regimes to respect deeply-held local or national values.[115] When private regulation has binding force for its addressees, legitimacy concerns should be addressed all the more carefully.[116]

Another legal matter arises from the interplay between private and public actors: how should the phenomenon of formal legislation encompassing private regulation be qualified in terms of the legitimacy and/or legality of the rule-making?

This background, which is relevant in assessing the legitimacy aspect of a specific private regulation, can be applied to the three elected private regimes as follows:

1. *UN Global Compact Principles:* the UN Global Compact Principles are addressed to companies ('those it seeks to govern'). The Global Compact initiative by Kofi Annan (the former Secretary-General of the UN) seems to incorporate relevant stakeholders by establishing local networks of corporate participants, NGOs and public officials ('those on behalf of whom it purports to govern'), which form an integral part of the overall governance. These networks assist in the management of, and facilitate the progress of, companies implementing the Principles.[117] They also organise different events to foster corporate participation in these local networks and share mutual experiences. Another interesting aspect of these networks is the goal that the Global Compact take root in different national, cultural and language contexts. To a certain extent, this aim can also contribute to the acceptance of the Global Compact and, therefore, to its legitimacy. Significantly, civil

114. E. Meidinger, 'Private Environmental Regulation, Human Rights, and Community', in *Buffalo Environmental Law Journal*, 2000, p. 123.
115. H. Perritt, 'Toward a Hybrid Regulatory Scheme for the Internet', University of Chicago Legal Forum, 2001, p. 215.
116. HiiL Conference Report *supra* note 96, p. 10.
117. UN Global Compact, 'Networks around the World', at: http://www.unglobalcompact.org/NetworksAroundTheWorld/index.html, accessed on 10 April 2009.

society organisations (including NGOs), labour organisations, cities and academia are also said to be an integral part of the Global Compact.[118] Finally, the Global Compact incorporates a transparency and accountability policy, the Communication on Progress;

2. *OECD MNE Guidelines:* the OECD MNE Guidelines were drafted by the OECD, an international organisation including 30 Member States. Hence, the Guidelines do not benefit from the degree of legitimacy afforded by the UN to the Global Compact with its universally adhered-to set of rules. Besides the OECD Member States, 11 'Adhering States' have endorsed the OECD MNE Guidelines. The Guidelines apply to all companies from these 41 countries, wherever in the world they operate from. The institutional set-up of the Guidelines consists of three groups representing different stakeholders: the OECD Investment Committee and the advisory committees of business and labour, the Business and Industry Advisory Committee (BIAC) and the Trade Union Advisory Committee (TUAC). Companies (*i.e.* the addressees of the Guidelines) played a role during the drafting process. The same is true for the developing countries where the investments take place (ie the beneficiaries of the Guidelines). For the OECD MNE Guidelines, a forum has also been set up through the national NCPs to encourage discussion and to assist the business community, labour organisations and other stakeholders with specific issues arising from its implementation.[119] Nevertheless, one might question whether the participation of companies and other stakeholders, such as NGOs, is established to a sufficient degree, considering the predominant role of the OECD countries' governments in the establishment and maintenance of the OECD MNE Guidelines. A wider consultation would probably be welcomed. The Guidelines could benefit if their level of legitimacy increased, considering the aim of this initiative, ie to strengthen the basis of mutual confidence between multinational enterprises and the societies in which they operate, as well as to improve the climate for foreign investment and to enhance the contribution to sustainable development; and
3. *GRI Guidelines:* the initial development of the GRI was characterised by a high degree of legitimacy because it involved a myriad of stakeholders such as investment funds, environmental bodies, companies, consultants and universities. Partnerships and alliances with different stakeholders today still form an integral part of the GRI's governance and decision-making process. It has been stressed that the GRI does this primarily not for moral, but for instrumental, reasons, most notably to enhance the quality of its results and to ensure that 'stakeholders are satisfied that they are influencing the

118. *Ibid.*
119. See: OECD Council Decision of June 2000.

standard'.[120] It is worth mentioning that a study shows that the organisations more closely involved in the GRI's decision-making process are also the ones reporting more often and adhering more closely to the reporting framework. Moreover, the corporate sustainability reports based on the GRI Guidelines have recently been made publicly available directly through the GRI website, thereby increasing the transparency of this initiative.[121] As mentioned in section 6.5, the GRI Guidelines' Application Level, which gives an opinion on the extent of use of the GRI Guidelines in a specific report, also aims to promote transparency, openness and accountability.

In sum, these examples illustrate different options for maintaining and enhancing the level of legitimacy of a private regulation. Addressing legitimacy concerns is certainly considered to be a serious objective by each of the three initiatives examined, such with a view of ensuring compliance of the addressees with the private norms.

6.12 The enforcement of the regulation

First of all, enforcement is a means to an end, not an end in and of itself. The goals of enforcement could be the compliance with the regulation and the achievement of the underlying goals of the regulation.

Often, a private regulation contains norms that are also included in formal and hence legally enforceable legislation. At the same time, the regulation usually contains other norms that prescribe higher standards of corporate conduct than the formal legislation does. In assessing the enforceability of a private regulation, this distinction should be taken into account.

In examining the enforcement of private regulation, two types of enforcement should be distinguished: (1) enforcement outside the legal arena, for instance, by pressure from NGOs, consumers or trade unions or by applying a compliance mechanism within the group or sector to which the private regulation pertains (eg cancellation of the membership or de-certification of a private regulatory regime); and (2) enforcement within the legal arena (including litigation, arbitration, government pressure for new legislation, or applying different tax treatment to actors that do not comply with a certain privately

120. M. Beisheim and K. Dingwerth, 'Procedural Legitimacy and Private Transnational Governance, Are the Good Ones Doing Better?' SFB-Governance Working Paper Series, June 2008, p. 14, referring to: D. Dickinson, 'Guidelines by Stakeholders for Stakeholder. Is it Worth the Effort?' 2005, p. 18. SDI Issues – CSR & Accountability. The latest article mentioned some difficulties in engaging with globally-dispersed and constituency-diverse stakeholders.

121. *Ibid.*

established standard).[122] Enforcement in the legal arena can also be found via private contract law, such as that described in section 6.8 in relation to Wal-Mart and IKEA. Furthermore, this can be done through tort law, as was demonstrated by the decision in *Kasky* v. *Nike*. In this case, Kasky sued Nike for unfair and deceptive practices based on the fact that Nike had made a number of 'false statements and/or material omissions of fact' – including in its privately established 'supplier code of conduct' – concerning the working conditions under which its products are manufactured.[123]

This gives rise to the following questions: have any specific legal *or non-legal mechanisms* been created to enforce private regulation, and, if so, how effective are they? Furthermore, a relevant factor in assessing enforcement is whether private regulation reflects the industry sector's best practices or rather intends to stimulate the sector to develop such best practices. The bottom line is that the codification of best practices would be expected to result in better compliance by the sector since most addressees of the norms already act in accordance with those best practices and, moreover, they will put pressure on their peers that do not yet comply with the regulation to do so.[124]

There are also some distinctions at the enforcement level between 'principle-based' and 'rule-based' regulation. Rule-based instruments are said to provide guidance for desired conduct in a clearer way than principle-based regulation. Some consider this lack of clarity in principle-based regulation to pose a number of challenges and risks for compliance and enforcement because it relies on interpretation and fosters a less clear regulatory environment.

Another element is whether there is state involvement in the enforcement of private norms, and, if so, to what extent. An example of this are corporate governance codes. The process of drafting them is usually initiated by the government. Various actors in the private sector itself subsequently participate in formulating the norms. Subsequently, the government sanctions the application of the codes by obliging companies to include a 'comply-or-explain' statement in their publicly accessible annual reports regarding the corporate governance code. Such a statement informs the reader that the company complies with the applicable corporate governance code. If the company does not fully comply, the statement explains to what extent the applicable code has indeed been followed by the company and why the company has not complied with the other parts of the code (compare section 6.5 above). The fact that the government imposed the 'comply-or-explain' measure supports compliance with the privately developed corporate governance code; this is an example of indirect government involvement. Empirical research shows that the 'comply-or-explain' mechanism has worked very well in corporate governance

122. HiiL Conference Report *supra* note 96, pp. 10, 31-32.
123. *Nike v. Kasky*, 539 U.S. 654 (2003).
124. HiiL Conference Report *supra* note 96, pp. 10, 31-32.

practice.[125] This mechanism was introduced by the UK Combined Code and has been followed by many European governments, with respect to their national corporate governance codes.[126] This development has improved the dialogue on corporate governance in shareholder meetings, as well as the transparency concerning corporate governance practices.

Another interesting question concerns the situation in which there is a (potential) normative conflict between certain public and private norms: how does this affect the process of enforcing each of the public and private norms?[127] Section 6.10 on the quality of the norms included examples of conflicting private and public regulations.

Finally, the enforcement of private regulation is often said to be more effective in comparison to the enforcement of formal regulation, because of the voluntary nature of the process and perhaps also because of peer pressure when the regulated subjects have been involved in its creation.[128]

These general observations regarding enforcement will now be applied to the three selected private regimes:

1. *UN Global Compact Principles:* first of all, the UN Global Compact Principles can be seen as difficult to enforce, since they constitute a *principle-based* instrument rather than a rule-based instrument. The Principles are broadly defined, eg 'undertake initiatives to promote greater environmental responsibility', which makes it rather laborious to ascertain whether a company subscribing to the UN Global Compact Principles fully complies with them. Furthermore, the Global Compact relies on voluntary compliance and self-policing on the part of its corporate participants, and does not involve mechanisms of external monitoring, verification or sanctioning to ensure compliance in line with certain commitments and claims. The Global Compact lacks legally binding enforceable mechanisms to ensure that companies 'are accountable for their actions and inactions'. They must only disclose on their websites their progress concerning compliance with the Principles.[129] Nevertheless, it should be pointed out

125. See the annual reports of the Dutch Corporate Governance Monitoring Committee; at: http://www.commissiecorporategovernance.nl/Information%20in%20English, accessed on 15 May 2010.
126. Statement of the European Corporate Governance Forum on the comply-or-explain principle, 22 February 2006, at: http://ec.europa.eu/internal_market/company/docs/ecgforum/ecgf-comply-explain_en.pdf, accessed on 21 May 2009.
127. HiiL Conference Report, *supra* note 96, p. 32.
128. HiiL, *supra* note 6, p. 24.
129. G. Knight and J. Smith, 'The Global Compact and Its Critics: Activism, Power Relations, and Corporate Social Responsibility' in J. Leatherman (ed), *Discipline and Punishment in Global Politics: Illusions of Control* (Palgrave Macmillan, New York, 2008).

that according to its Communication on Progress policy, corporate participants can be *delisted* for a repeated failure to disclose their progress. This is not only the case in theory: as of March 2009, nearly 1,000 companies have been delisted on these grounds, which demonstrates the seriousness of this mechanism. This system can be considered 'enforcement outside the legal arena'. The Global Compact is also subject to pressure from different organisations, such as NGOs, to delist companies.[130] Interestingly, GRI-based sustainability reports are also recognised by the Global Compact as Communication on Progress, thereby interlinking these private regulatory regimes.

2. *OECD MNE Guidelines:* a new enforcement mechanism has been established outside the legal arena: the afore-mentioned NCPs (section 6.10). The NCPs are generally part of a government office, although the Dutch NCP consists of people who are independent from the government. An NCP is responsible for the observance of the OECD MNE Guidelines at the national level. Its role is to gather information on national experiences with the Guidelines, to handle enquiries and to assist in solving problems. The NCP is expected to offer a forum for discussion and to assist the business community, labour organisations and other parties concerned in dealing with the issues at stake.[131] In fact, the Guidelines provide any interested person or organisation with the right to submit complaints – the so-called 'specific instances' concerning alleged breaches of the Guidelines by multinational companies. Since 2000, NGOs can also submit their complaints. If it has been determined that a company has breached the Guidelines, the NCP issues a public statement providing recommendations to the company on how it could bring its future practices into line with the OECD MNE Guidelines.[132] Furthermore, the NCPs are held accountable for their actions, and must submit an annual report of their activities to the Investment Committee.[133] Pressure from different organisations, such as the OECD Watch and other civil society organisations, is also considered part of enforcement outside the legal arena. According to Ruggie, NCPs are potentially an important vehicle for providing a remedy. For him, however,

130. See *e.g.* Global Compact Critics, at: http://globalcompactcritics.blogspot.com/, accessed on 21 May 2009.
131. OECD, *supra* note 104.
132. T. Baines, 'Integration of Corporate Social Responsibility through International Voluntary Initiatives' (2009), p. 16, *Indiana Journal of Global Legal Studies*, p. 223. According to the OECD, as of June 2005, over 100 complaints had been filed by NGOs and trade unions since the Guidelines were revised. OECD Watch, 'Five years on: Review of the OECD Guidelines and National Contact Points' (2005) p. 5. OECD Watch is a coalition of 84 civil society organisations and has highlighted a number of perceived deficiencies in the implementation of the Guidelines and recommend reforms.
133. OECD, *supra* note 104.

with a few exceptions, experience suggests that in practice many of them have too often failed to fulfill this potential.[134] It will be noted that some OECD countries have also adopted policies to support compliance with the OECD MNE Guidelines. For instance, the observance of the Guidelines is included as a condition for export credit guarantees by certain governments; eg Dutch and German companies have to state that they have read and comply with the Guidelines,[135] while French enterprises have to sign a letter verifying that they are aware of them. Such a condition is also being discussed in the Czech Republic, Finland and Sweden. In 2006, the UK Government adopted significant reforms for handling complaints under the OECD MNE Guidelines;[136] and

3. *GRI Guidelines*: the GRI Guidelines and Sector Supplements reflect the industry's and the sector's best practices. For certain sectors or themes, they even stimulate 'more ambitious' best practices than the ones presently in use. This is the case, for instance, for the GRI Sector Supplement for public agencies.[137] With regard to an internal enforcement mechanism, the GRI does *not* engage in any assurance, auditing or verification. However, as explained in section 6.5, companies are nevertheless encouraged by the GRI to carry out an external audit of their sustainability reports. The KPMG Survey showed that 40 per cent of the sustainability reports of the world's 250 largest companies were reviewed by an independent professional assurance provider. Key drivers for independent assurance are the credibility of the report and quality of the reported information.[138] The GRI provides the Application Level regarding the extent to which the GRI Guidelines have been utilised for reporting and, in addition, the company indicates whether external assurance has been carried out. In the case of sustainability

134. Ruggie, *supra* note 21, p. 26.
135. Periodic evaluation of the Export credit insurance facility of the state see *supra* note 75, p. 4. In 2004, some Dutch Members of Parliament proposed to include in the mandatory corporate annual reporting a new obligation for companies to express whether they 'comply-or-explain' with the OECD MNE Guidelines. Such proposal was withdrawn in 2005. See section 4.4.5 of this book.
136. J. Evans, ILO: 'OECD Guidelines – one tool for corporate social accountability', 2003, at: http://www.ilo.org/public/english/dialogue/actrav/publ/130/4.pdf, accessed on 10 April 2009. See UK Department for Business, Enterprise & Regulatory Reform (BERR), United Kindom National Contact Point for OECD Guidelines for Multinational Enterprises, at: http://www.berr.gov.uk/whatwedo/sectors/sustainability/nationalcontactpoint/page45873.html, accessed on 4 April 2009.
137. R. Leeson, J. Ivers and D. Dickinson, 'Sustainability Reporting by the Public Sector: Practice, Uptake and Form', GRI G3, at: http://www.globalreporting.org/NR/rdonlyres/FAFD9A06-702A-4AA8-988C-979DBCCBC948/0/LeesonEtAlSustReortingByPublicSector.pdf, accessed on 10 April 2009. They explained that 'the case for sustainability reporting by public agencies is only starting to be articulated'.
138. KPMG Survey *supra* note 42, pp. 55 and 62. At the national level, 39 per cent of the companies surveyed choose for independent assurance.

reporting, certain additional forms of enforcement outside the legal arena can be foreseen; for instance, false or misleading information contained in GRI reports can be targeted by NGO campaigns. Enforcement in the legal arena is also possible – indirectly – through contractual relationships. For instance, this can be the case with a company borrowing money from a bank where reporting pursuant to the GRI Guidelines has been stipulated as a condition in the loan agreement. From another perspective, companies will be induced to disclose only correct information in a GRI report in order to avoid tort claims for misleading information or claims based on unfair trade practices.[139] In addition, the functional cross-references in the GRI indicators to compliance with the UN Global Compact Principles and the Earth Charter make the use of the GRI Guidelines more relevant as consistency improves.

In conclusion, enforcement mechanisms regarding compliance with private regulation exist outside and within the legal arena. They can be characterised by a wide diversity in their methods and approaches. To increase compliance with private regulation, some recommend that governments include private regulations, such as the OECD MNE Guidelines, as conditions for subsidies, procurement contracts and public-private partnerships, thus not limiting their application to export credits only. For example, the NGO OECD Watch emphasizes that 'such use of the [OECD] guidelines would not only remove ambiguity of its status and reward good business conduct, but it would also sanction those companies behaving unsustainably and act as an incentive for improvement'.[140] Another interesting move was the call by the GRI in March 2009 on the G20 governments convening to discuss the financial and economic crisis to take leadership by 'introducing policy requiring companies to report on ESG [Environmental, Social, Governance] factors or publicly explain why they have not done so'.[141]

6.13 The effectiveness of the regulation

The criterion of effectiveness concerns the question whether the regulation's goal has indeed been achieved: does the regulation actually work? Have the stakeholders succeeded in creating a working solution to problems in need of regulation? Is the private regulatory arrangement as effective as, or even better than, formal legislation? Relevant factors are: the normative strength of a

139. *Kasky, supra* note 123, Wal-Mart, *supra* note 86, Council Directive (EC) 2005/29 on unfair business-to-consumer commercial practices in the internal market, OJ L149/22,2005.
140. T. Steinweg and J. Oldenziel, SOMO/OECD Watch Secretariat, 'The OECD Guidelines for Multinational Enterprises: A modest proposal', at: http://www.ethicalcorp.com/content.asp?ContentID=5299, accessed on 10 April 2009.
141. The Amsterdam Declaration on Transparency and Reporting, March 2009, at: http://www.globalreporting.org/CurrentPriorities/AmsterdamDeclaration/, accessed on 3 May 2009.

regulation, transparency concerning its application and accountability. Effectiveness can be conceived as the degree to which norms succeed in regulating the conduct of a specific group of actors.[142] As noted above, the preferred method for ascertaining a change in conduct is to assess the conduct itself by *empirical research*. In this section 6.13, we will therefore make use of the Vigeo Research, carried out in consultation with the OECD and the GRI, and of the KMPG Survey on corporate responsibility reporting.[143] We eagerly await the results of the empirical studies of the HiiL research group, which will conduct research on Private Actors and Self-Regulation. Furthermore, we will take into consideration companies' own statements in their public reporting and website communications (see also section 6.5). Interestingly, the Vigeo Research revealed the trend of companies using more than one CSR instrument to develop their CSR approach, *e.g.* 30 per cent of the companies surveyed referred the OECD MNE Guidelines and the Global Compact in their sustainability reports. Also, using the GRI together with the OECD MNE Guidelines and/or the Global Compact is common. This shows a degree of normative strength.

Although many of the companies surveyed indicated that they use one of the three private regulatory regimes evaluated in the foregoing sections of this chapter, this is not an indication of the level of awareness on a worldwide scale or of how comprehensively these private regulations are adhered to.[144]

Effectiveness also focuses on the question whether the private norms strengthen or weaken the existing formal legal system.[145] What are the relevant criteria?

As Cafaggi stressed, effectiveness is actually interlinked with the other pillars mentioned. In general, it should be measured in relation to different addressees: what is the ability of a regulation to solve conflicts of interest between different stakeholders? Moreover, what can be said about the cost-effectiveness of achieving regulatory goals, which is to say, can a regulation's objectives be attained in the most efficient way, thus at minimal cost?[146]

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142. HiiL Conference Report, *supra* note 96, p. 25. Steenvoorde, *supra* note 23, p. 157.
143. Benseddik (Vigeo), *supra* note 46, and KPMG Survey, *supra* note 42. The Vigeo Research reveals that companies make reference in their sustainability reports to the codes of conduct or guidelines on which their CSR conduct is based or by which it is inspired.
144. OECD Watch, a coalition of civil society organisations, has highlighted a number of perceived deficiencies in the implementation of the OECD MNE. See *e.g.* OECD Watch, 'Guide to the OECD Guidelines for Multinational Enterprises', Complaint Procedure: Lessons from Past NGO Complaints', <http://oecdwatch.org/publications-en/Publication_1664/at_download/fullfile> accessed 15 May 2009.
145. HiiL Conference Report, *supra* note 96, p. 26.
146. HiiL Conference Report, *supra* note 96, pp. 8 and 26. See F. Cafaggi, *Reframing Self-Regulation in European Private Law* (Kluwer Law International, Dordrecht, 2006); F. Cafaggi and H. Muir-Watt (eds.), *Making European Private Law: Governance Design* (Edward Elgar, Cheltenham, 2008).

The effectiveness of private regulation – and its limitations – might be further revealed by the following characteristics: enforcement, government participation, user participation, international cooperation, independence from private firms, transparency, and political instruments.[147]

Regarding the effectiveness of a co-regulatory system, research conducted by the University of Hamburg (Germany) showed that the following assessment factors might be of relevance: regulatory culture within a State or among the industry (ie the general legal environment, the application of the Rule of Law); incentives for co-operation and enforcement; state resources used to influence the outcome of the non-state regulatory process; a clear legal basis and a clear division of work (between non-state regulators and state regulations); process objectives like proportionality, openness, clarity of regulation; and regulatory objectives suitable for co-regulation.[148] Based on these factors, research has evaluated co-regulation measures in the media sector. As far as effectiveness is concerned, the study concluded that systems like the Netherlands' Institute for the Classification of Audiovisual Media (NICAM) show high ratings in the impact assessment. As an illustration, the following evaluation is useful:

> NICAM is a highly reflective system internalized by the actors. Experts across all relevant groups of actors agree to a high degree on the way the NICAM system functions. […] NICAM system provides for a good basis for regulation and supervision. […] Only two experts see weaknesses in transparency and proportionality. No expert sees the pace of the decision making process as being inadequate. […] the rules are sufficiently clear according to the expert survey. Judging by the experts' answers, the performance of the NICAM system is generally rated highly. This is true for both the outcome of avoiding generally the accessibility of content unsuitable for minors and for the consistency of rating. […] 77 % of the parents use the advice of 'Kijkwijzer' [*Guidance for TV watching*] under the NICAM system. […] Overall NICAM is seen as a co-regulatory system created by the state with inherent strengths and weaknesses.[149]

The three selected private regulatory systems will now be discussed from an effectiveness perspective:

1. *UN Global Compact Principles:* they can strengthen existing legal systems, especially in relation to sustainability reporting when encouraging participating companies to publicly communicate their progress in implementing the Principles on an annual basis (Communication on Progress). Companies

147. J.P. Kesan, 'Private Internet Governance', in *Loyola University Chicago Law Journal*, 5, 2003, p. 87.

148. University of Hamburg, Hans-Bredow Institute for Media Research (at the request of the European Commission), 'Final Report: Study on Co-Regulation Measures in the Media Sector', June 2006, at: http://www.hans-bredow-institut.de/en/node/877, accessed on 10 April 2010.

149. *Ibid.*

can also be encouraged to take concrete steps in developing and implementing CSR policies. As the Global Compact also functions as a network, the number of users is recorded and can therefore be reasonably accurately monitored (whereas concerning other CSR initiatives like the OECD MNE Guidelines, it is difficult to obtain information on the number of users). Although some consider the UN Global Compact Principles to be lacking in clarity when it comes to the meaning of the standards,[150] others believe that they are becoming 'the international gold standard for CSR performance'.[151] The latter statement is based on the fact that the Global Compact enjoys a high level of participation – over 4,700 business participants worldwide and other stakeholders from over 130 countries – making it the largest voluntary corporate CSR initiative in history. This achievement, in terms of the numbers of addressees, tends to affirm its effectiveness. The Vigeo Research noted that 87 per cent of the respondent companies had stated that they make reference in their sustainability reports to the UN Global Compact Principles;[152]

2. *OECD MNE Guidelines:* as already mentioned, these Guidelines were created by governments which set voluntary recommendations for multinational companies operating in or from OECD countries. Although governments and businesses were initially involved, the OECD is also seeking the support of labour representatives and NGOs in order to increase the Guidelines' effectiveness.[153] The Vigeo Research indicated that 39 per cent of the respondents made reference to the OECD MNE Guidelines in their sustainability reports. One quarter of the companies listed at the Dow Jones Sustainability Indices refer to the guidelines in their sustainability reports.[154] However, an analysis by Schuler of the implementation of the OECD MNE Guidelines in the US, the Netherlands and France concluded that implementation in areas outside of labour relations was not substantial.[155] This explains why the implementation of the Guidelines has been depicted as 'piecemeal

150. Human Rights Watch, 'Letter from Human Rights Watch to the Global Compact', 29 July 2000, at: http://www.hrw.org/, accessed on 10 April 2009.
151. Innovest, 'Innovest Launches Global Compact Assessment Tools', 2005, at: http://www.innovestgroup.com/pdfs/2005-09-23_Global_Compact.pdf, accessed on 21 May 2009. Innovest is now part of RiskMetrics Group. Innovest, a US-based strategic value advisor, has designed a tool to assist investors in assessing companies' capabilities in addressing the competitive risks, challenges, and opportunities posed by the ten Principles of the Global Compact.
152. Benseddik (Vigeo), *supra* note 46, p. 8.
153. OECD, *supra* note 11.
154. Benseddik (Vigeo), *supra* note 46, p. 8. See also P Hohnen, 'OECD MNE Guidelines: A responsible business choice', OECD Observer, at: http://www.oecdobserver.org/news/fullstory.php/aid/2689/OECD_MNE_Guidelines.html, accessed on 15 May 2009.
155. G. Schuler, 'Effective Governance through Decentralized Soft Implementation: the OECD Guidelines for Multinational Enterprises', in *German Law Journal*, 9l, 2008, p. 1774, →

and inconsistent' in its impact.[156] Nevertheless, it is noteworthy that labour relations represent a very significant chapter in the context of multinational companies' behaviour during investment activities. The fact that the Guidelines are regularly cited by businesses leads to the assumption that they have some inherent business value as well as a recognised special status; and

3. *GRI Guidelines:* the aim of the GRI is to promote transparency and accountability by organisations. The Guidelines are intended to provide guidance to organisations in disclosing their sustainability performance and to provide stakeholders with a universally applicable, comparable framework from which to understand disclosed information. Consequently, one should not expect the GRI Guidelines to be more than a sustainability reporting tool: they cannot replace regulation of CSR practices. The addressees are companies and other stakeholders. However, the fact that more and more organisations follow the GRI Guidelines directly, shows its effectiveness in this case. The Vigeo Research showed that 86 per cent of the surveyed companies use the framework of the GRI Guidelines for their CSR/sustainability reporting while the KPMG Survey indicated that 75 per cent of the Fortune Global 250 companies use the GRI Guidelines for their sustainability reporting.[157] Both studies concluded that the GRI Guidelines have become the leading standard for reporting. In addition, the contribution of the GRI Guidelines to the application of public regulation, as was mentioned with regard to the Danish and Swedish legislation of CSR reporting, underlines their potential to augment the existing system. Besides, the GRI Guidelines represent a cost-effective solution; the cost of the further development of the framework and the Guidelines is supported by the GRI's global network of Organisational Stakeholders as well as by an impressive list of donors coming from foundations, international organisations and governments. The cost is then shared among different stakeholders around the globe rather than being strictly assumed at the national level by individual governments and companies.

In short, the level of compliance with a specific private regulation depends on various circumstances. Each regulation can be examined for its 'quality', 'legitimacy' and 'enforcement' in a theoretical way, as suggested, and in relation to its 'effectiveness' in an empirical way. Applying the criterion of effectiveness to the three elected regimes, we could state that the Global

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referring to Report by the Chair, '2007 Annual Meeting of the National Contact Points', 2007, at: http://www.oecd.org.proxy.library.uu.nl/dataoecd/23/26/39319743.pdf, accessed on 10 April 2009. This study was based on an analysis of the most frequently addressed NCPs, in other words, the NCPs that have received the most complaints.

156. *Ibid.*, referring to J.A. Zerk, *Multinationals and Corporate Social Responsibility* (Cambridge University Press, Cambridge, 2006), p. 243.

157. Benseddik (Vigeo), *supra* note 46, p. 13; KPMG Survey, *supra* note 42, p. 4.

Compact seems highly effective measured by its high number of participants. However, at the same time, the generality of this principle-based instrument undermines its effectiveness since that makes it difficult to ascertain the precise degree of compliance. Regarding the OECD MNE Guidelines, one could conclude that they seem quite effective in view of their wide spectrum of clearly formulated norms, most of them derived from international treaties, hence reflecting internationally accepted normative values. The provisions also relate to existing local laws in the countries where the investments are made, which is an important effort to avoid a divergence of norms. In addition, the OECD recommends that its members promote these Guidelines and integrate them into government policies, which has occasionally been done. Furthermore, the new enforcement mechanism, ie the NCPs' complaint procedure, offers an interesting non-legal incentive for compliance which enhances effectiveness as well. Concerning the GRI Guidelines, they seem to be the most effective: not only are many stakeholders involved in their development, but a substantial number of large multinational companies actually use them. Furthermore, governments and the financial sector support their further development and expansion of their usage. Effectively, they are currently the only standard for sustainability reporting that is promoted internationally, and they have now also been referred to by some European legislators.

6.14 Concluding observations and remarks

In this chapter 6, the spectrum of existing private regulations in the field of CSR has first been outlined, followed by an explanation of the exponential growth of new private regulations and initiatives aimed at influencing responsible corporate behavior. For various reasons, public regulation does not seem adequate to govern responsible corporate conduct at an international level. Also, a strong political will is lacking for the most part. There is a tendency for national governments, as well the European Union, to consider CSR a voluntary practice that should not affect the competitiveness of 'our' companies in the globalised economy.

As a consequence, international and national public norms on sustainability reporting by multinational companies are poorly regulated, if there is any regulation at all. Despite the near absence of public regulation in this field, sustainability reporting is increasing notably among the largest multinational companies in terms of the quantity and quality of information provided, as a result of (mostly) private regulation, in particular the GRI Guidelines. The positive impact of this development is not limited to shareholders; a myriad of stakeholders also benefit from sustainability reporting in accordance with the GRI Guidelines. CSR reporting facilitates increase access to corporate information, thereby improving the tools for *risk* management, at the same time creating new opportunities for evaluating investments as well as offering a more informed basis for tailoring an efficient dialogue for NGOs and other groups in society which are affected by the operations of companies. It is also considered particularly helpful by stakeholders that a number of sustainability reports make reference to other private regulatory regimes that the company adheres to. However, sustainability reporting should not be considered a 'magic wand' for controlling the behavior of companies, but it can certainly have a positive impact by encouraging companies to adopt policies and to set concrete targets (eg water use, the amount of recycled materials, waste management, etc.). Interestingly, the government of Sweden has recently made use of a 'cross-reference' to the GRI Guidelines to implement its newly developed legislation on non-financial reporting.[158]

These types of tangible impacts of private regulation give rise to the question of how to measure the successfulness of a private regulatory regime or how to ensure its effectiveness. The financial turmoil and scandals have shown – to a certain extent – the risks imposed by a private regulation-based system.[159]

158. See Ministry of Enterprise, Energy and Communications of Sweden, *supra* note 39, referring to the 'Guidelines for External Reporting by State-owned Companies'.

159. See House of Lords, *supra* note 1, and Lanman, *supra* note 2.

In light of existing international private norms, this chapter 6 has proposed to define and analyse certain major elements that have an impact on compliance with private regulation, namely: quality, legitimacy, enforcement and effectiveness. These elements have been applied to three private regulatory regimes that have reached a certain level of maturity – the Global Compact, the OECD MNE Guidelines and the GRI Guidelines. Generally speaking, these initiatives have demonstrated a certain degree of flexibility in adapting to new societal needs, thereby increasing the quality level of the regulation. All three regimes are based on values which are in large measure derived from existing international treaties and principles, which in turn enhances their quality and legitimacy. They have involved an important number of addressees and stakeholders concerned with the norms ensuring their legitimacy; each has created an internal mechanism to improve compliance with the norms and has, in practice, strengthened the existing formal legal system. Although, with respect to the GRI Guidelines, the connection between financial and non-financial reporting still needs be more firmly established.

Even though a respectable number of companies are using the three private regimes discussed in the previous sections of this chapter, it should be pointed out that the majority of the companies worldwide are still not using any CSR regulation at all. This raises the question of whether – even when existing public and private regulation is regarded as being complementary – we will succeed in avoiding various menacing global implosions in the field of biodiversity and ethics, and explosions of poverty, pollution and climate change impacts. This is the central policy issue of the century for governments, and one that cannot be put off for much longer. One might therefore wonder why the private norms covered in this chapter have not yet moved to the sphere of public regulation considering the vital social, environmental and governance-related issues involved.[160] Should governments wait for the front-runners to request the incorporation of the best practices currently embodied in private regulation into formal legislation, in order to create a level playing field?[161]

This stage will probably come as a 'natural' step within the next five years. The best illustration is probably the GRI Guidelines which have started to be integrated in public norms.[162] As an intermediate step to 'full' legislation, a

160. Benseddik (Vigeo), *supra* note 46. See also '*Het Appel van Antwerpen'* [The Appeal of Antwerpen], at: http://www.economischegroei.net/index.php?topic=Antwerpen-Appel, accessed on 15 May 2010.

161. For example, the American Generally Accepted Accounting Principles (GAAP) norms and the International Financial Reporting Standards (IFRS) are now compatible due to requests by the private sector that had to work in a very inconvenient and costly manner with European and American standards at the same time.

162. See Ministry of Enterprise, Energy and Communications of Sweden, *supra* note 39.

government can use the 'comply-or-explain' mechanism.[163] This is a hybrid constellation whereby private actors set up certain rules and the State provides them with support in the area of enforcement. The Swedish government did so with respect to the GRI Guidelines which are to be used by state-owned companies in their CSR reporting: these companies are obliged to disclose in their annual reports or on their websites whether, and, if so, to what extent, they follow the GRI Guidelines. This disclosure will facilitate the dialogue with their stakeholders about CSR matters.

An example of integration in public policies was presented in section 6.12 in respect of the OECD MNE Guidelines, pointing to the fact that these have been cross-referenced in the national export credit facilities of the Dutch and German governments.[164]

These types of co-regulation will stimulate the further development of best practices in industry and international trade. Generally, it can be argued that the development and acceptance of non-mature initiatives – as is often the case with CSR instruments – profit best from trial and error in a non-formal setting as are the private regulatory regimes. After an experimental phase in which best practices can be developed, the results can be included in formal legislation. This will then contribute to a level playing field and deter free-riders.

The initial development of the three private regulations discussed in this chapter, involving multiple stakeholders coming from various regions of the world and different industry sectors, would probably have been impossible without the effectiveness and openness of a private initiative. The most important role of private regulation, then, seems to be the development of internationally adhered-to best practices.

163. *Ibid* and GRI, *supra* note 38. This process has been recently undertaken by the Swedish and Danish governments.

164. See section 6.12 *supra* and notes 75 and 135.

Annex 6.1 Categories of private regulation

1) **Codes of conduct:** a) Internal corporate codes of conduct drafted and adopted by multinational or national companies.	2) **Multi-stakeholder initiatives:** a) Global Reporting Initiative (GRI); b) Ethical Trading Initiatives (ETI);[165] c) Earth Charter; d) Social Accountability International; e) ISO 26000 Social Responsibility Standard (under development).[166]
3) **Certifications and labeling (including reporting):** a) GRI Initiative Sustainability Reporting Guidelines; b) International Social and Environmental Accreditation and Labeling Alliance; c) Eco-Management and Audit Scheme (EMAS);[167] d) Kimberly Process Certification Scheme;	4) **Model codes:** a) ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy; b) ICC's Guidance on Supply Chain Responsibility; c) ICC Rules of Conduct for Combating Extortion and Bribery; d) ICC Business Charter for Sustainable Development;

165. ETI promotes the implementation of corporate codes to ensure that the conditions of workers producing for the UK market meet or exceed international labour standards, see: http://www.ethicaltrade.org/, accessed on 12 July 2010.
166. See: http://www.iso.org/iso/socialresponsibility.pdf, accessed on 15 May 2009. ISO 26000 is 'the designation of the future International Standard giving guidance on social responsibility', which is intended for use by organisations of all types, in both public and private sectors, in developed and developing countries. In particular, ISO 26000's Annex will provide examples of the types of existing initiatives and tools for social responsibility and will also serve as a source of further information for users to help them comparing what is being done *per* sector and in different parts of the world. According to its website, ISO 26000 is targeted for publication in late 2010.
167. Established under Council Regulation (EEC) 1836/93 allowing voluntary participation by companies in the industrial sector in a Community eco-management and audit scheme [1993] OJ L168/1 and revised by Regulation (EC) 761/2001 allowing voluntary participation by organisations in a Community eco-management and audit scheme (EMAS) [2001] OJ L114/1, it aims to improve corporate environmental performance, at: http://ec.europa.eu/environment/emas/index_en.htm, accessed on 21 May 2010.

e) Fair Wear Foundation (FWF);[168] f) Marine Stewardship Council; g) Forest Stewardship Council; h) Worldwide Responsible Accredited Production; i) SA 8000 Certification.[169]	e) OECD MNE Guidelines for Multinational Enterprises; f) UK Combined Code on Corporate Governance; g) Dutch Corporate Governance Code (Frijns Code); h) UN Global Compact Principles; i) Global Sullivan Principles; j) ISEAL Code of Good Practice for Setting Social and Environmental Standards; k) Transparency International's Anti-Corruption Handbook.
5) **Sectoral initiatives:** a) GRI sector supplements (*e.g.* automotive, electric utilities, financial services, public agency, *etc.*); b) Responsible Care (the chemical industry's initiative); c) Petroleum Industry (IPIECA) Guidelines for Reporting Greenhouse gas Emissions; d) Extractive Industries' Transparency Initiative (EITI); e) Voluntary Principles on Security and Human Rights.[170]	6) **International framework:** a) Over 60 international framework agreements (involving a wide variety of sectors: from agriculture to extractives). 7) **Socially responsible financial investment:** a) Equator Principles (investment in project finance); b) UN Principles for Responsible Investment (PRI); c) CERES Principles.[171]

168. FWF supports good labour conditions in garment production. The member companies are requested to implement the FWF Code of Labour Pratices in their entire supply chain, at: http://en.fairwear.nl/, accessed on 1 August 2010.
169. SA 8000 is an international standard for improving working conditions that is promoted by Social Accountability International (SAI). It is based on ILO standards and UN Human Rights Conventions.
170. These Principles were developed to guide companies in the extractive and energy sectors in maintaining the safety and security of their operations within a framework that ensures respect for human rights and fundamental freedoms, see: http://www.voluntaryprinciples.org, accessed on 1 July 2010.
171. The CERES Principles are 'a ten-point code of corporate environmental conduct' for which companies are invited to publicly endorse a mission statement and are mandated to report periodically on environmental management structures and results, see: http://www.ceres.org, accessed on 12 May 2010.

Chapter 7.* Corporate due diligence as a tool to respect human rights

"From Individual Rights to Common Responsibilities"
Ruud Lubbers in 'Inspiration for Global Governance'**

7.1 Introduction

The human rights doctrine has long focussed upon what States should do to further promote the enforcement of human rights standards. In this chapter, the attention will shift to the role of business. The work of Professor John Ruggie[1] – who first served with the UN Global Compact and was appointed in 2005 as the Special Representative of the UN Secretary-General on the issue of human rights and transnational corporations and other business enterprises – is pertinent in this regard. The establishment of this position is indicative of the wide recognition of the relevance of business in the advancement of human rights.[2]

In April 2008, Ruggie proposed a policy framework 'Protect, Respect, Remedy' to the UN Human Rights Council (Ruggie Report or Report).[3] The framework rests on three pillars: (i) the State duty to protect against human rights abuses by third parties, including businesses; (ii) the corporate responsibility to

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** Ruud Lubbers, 'Epilogue – From Individual Rights to Common Responsibilities', in: Ruud Lubbers, Willem van Genugten, Tineke Lambooy, *Inspiration for Global Governance – The Universal Declaration of Human Rights and the Earth Charter* (Kluwer: Deventer, 2008), pp. 89-96.

1. John Ruggie is a Professor at Harvard John F. Kennedy School of Government.
2. See also an introduction on this subject by the author and Professor Willem van Genugten in Chapter 2: "The Universal Declaration of Human Rights: Catalyst for Development of Human Rights Standards," in: Ruud Lubbers, Willem van Genugten, Tineke Lambooy, *Inspiration for Global Governance – and the Universal Declaration of Human Rights and the Earth Charter* (Kluwer: Deventer 2008), pp. 55-66, esp. §14.
3. UN HRC (General Assembly), 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, "Protect, Respect and Remedy: a Framework for Business and Human Rights"', 7 April 2008, UN Doc A/HRC/8/5.

respect human rights, which means – according to Ruggie – to act with 'due diligence' to avoid infringing on the rights of others, and (iii) greater access by victims to an effective remedy, judicial and non-judicial. The policy framework was unanimously welcomed by the Members of the UN Human Rights Council. The suggested policy framework has furthermore been widely appreciated: governments have referred to this framework in new policy documents, leading business organisations have endorsed the framework, and civil society organisations have expressed support. Ruggie's mandate has been extended for three years to operationalise his framework.[4] This marks the first time in 60 years that the Council[5] and the international community have taken a substantive policy position on the combination of business and human rights.

The Report addresses the complex question of the scope of corporate social responsibility. This chapter will explore the second pillar of the Ruggie framework: in which way can corporate due diligence contribute to achieving human rights compliance? It will be contended that Ruggie – by using the term 'due diligence', a concept commonly used in corporate law practice – established a link between two areas of law, *i.e.* human rights law and corporate law, which were long considered unrelated. The main focus of this chapter is to further affirm this link. Both areas of law have long been familiar with 'due diligence', each in a different way. It will be interesting to investigate the setting in which the framework proposed by Ruggie found itself.

Section 7.2 of this chapter will address the history and practice of 'due diligence' as this concept has been used in securities law practice (*i.e.* the law applicable to the trading of shares and debt paper). This will be followed in section 7.3 by an account of the process and the timing of corporate due diligence investigations performed as part of preparing a private transaction or a capital market transaction. Attention will thereby be paid to the legal reasons for performing this type of corporate assessment as well as other reasons for doing so. It will also be evaluated whether the subject of human rights can fit into the present practice. Although the central perspective of sections 7.2 and 7.3 is grounded in international transactions, the legal base of the argumentation can be found in Dutch law. For a US law perspective, reference is made to the

4. HRC Resolution 8/7, 'Mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises' (18 June 2008) A/HRC/Res/8/7 [§§1, 4]; UN HRC (General Assembly), 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises' (22 April 2009) A/HRC/11/13. See also: the websites of Shell, at: http://www.shell.com/; Akzo Nobel, at: http://www.akzonobel.com/ and Amnesty International, at: http://www.amnesty.org/; all websites accessed on 12 August 2010.
5. And its predecessor, the UN Commission on Human Rights (UNCHR).

interesting paper of John Sherman III and Amy Lehr on the same topic.[6] Section 7.4 will then attend to 'due diligence' as utilised in international law, thereby especially focussing on how to determine the content of the State duty to protect its citizens from human rights violations infringed upon by private actors. Since the Ruggie Report does not contain clear references to existing corporate and human rights law, it is important to examine what is meant when Ruggie uses the term 'due diligence'. Section 7.5 will therefore elaborate on this. Subsequently, to establish a concrete bridge between theory and practice, section 7.6 will mention existing HRIA tools and evaluate how they can provide guidance to comply with the corporate responsibility to respect human rights. Legal and practical dilemmas will be highlighted in section 7.7. The last section will conclude with a summary of the previous sections and integrates them, thereby suggesting how HRIAs can become part of existing corporate due diligence processes.

7.2 Corporate practice – History 'due diligence'

Due diligence is not a new concept. The term 'due diligence' in corporate practice stems from American securities law. When a company wishes to attract capital from the public at large – *i.e.* by issuing shares or notes, in general: securities – it has to involve a bank. The bank can offer the new securities to the public and arrange for the listing thereof at a stock exchange (the so-called 'lead manager'). After the initial public sale of the securities, the Initial Public Offering (IPO), the securities can be resold through the stock exchange trading systems. For the listing, the lead manager – usually jointly with the company that issues the securities (the issuer) – has to prepare a 'prospectus', *i.e.* a brochure which introduces the issuing company and the securities to be offered to the public. The lead manager acts as an intermediary between the issuer and the investors who are buying the shares. The prospectus itself is 'an offer to sell'; hence it is a legal document stating the purpose of the security issue. It contains a description of the business of the company, the product groups, the geographical regions in which it operates, the principal officers, the securities offered and how they can be purchased, the financial results and prospects, such as the return on the investment: the expected annual dividend. The prospectus also contains a chapter on business risks. Investors will base their decision to buy the new securities on the prospectus; hence the lead manager has to carefully draft the content of the prospectus.

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6. J. Sherman III and A. Lehr, 'Human rights due diligence: is it too risky?', Corporate Social Responsibility Initiative Working Paper No. 55, February 2010, Cambridge, MA: John F. Kennedy School of Government, Harvard University; at: http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_55_shermanlehr.pdf, accessed on 12 August 2010.

Countries employ different systems to supervise the quality of a prospectus. In the US, federal and state securities laws as well as stock exchange rules give detailed instructions on how to prepare a prospectus.[7] In the EU, the Prospectus Directive, implemented in national legislation in EU Member States, prescribes which subjects need be covered in a prospectus.[8] Typically, a draft of the prospectus has to be approved by a national supervisory authority before it can be made public.[9] The rationale of this system is to protect investors against misleading or fraudulent information on securities sales.

However, even when the procedures have been followed, it sometimes occurs that new shareholders are disappointed about the results of the company or the value of the securities, and want to cancel their purchase or receive compensation. They institute legal proceedings against the issuer and/or the lead manager. This was for example the case after the IPO of World Online (WOL) in the Netherlands in March 2000. WOL was a European Internet Service Provider (ISP), which came to prominence in the late 1990s dotcom

7. See: The Securities Act of 1933, sections 5 (registration securities) and 10 (content prospectus). Sections 11 and 12 impose liability on the issuer and underwriters (*i.e.* the bank/lead manager) if a prospectus contains incorrect information (of a material nature) or is incomplete. The prospectus, or 'offering circular,' and the Registration Statement have to be submitted to the Securities and Exchange Commission (SEC). The SEC can object to the offering, ask for more information, or allow the prospectus to go public. Most jurisdictions regulate listing requirements in a similar way. *E.g. re* UK, see: the Public Offers of Securities Regulations 1995, section 4 and Schedule I (content prospectus), section 8 (liability issuer and offeror); Financial Services Act 2000 (FSA), Listing Rules PR 2.3.1 and 3.1.1 (requirement and minimum content prospectus); article 90 FSA (compensation for false or misleading particulars); preceding common law jurisprudence-based prospectus liability on deceit or negligent misrepresentation and the assumed duty of care by the issuer towards the investor). See further: Lucinda A. Low *et al* (ed.), *The International Practitioners,* Deskbook Series, 2nd Ed. (ABA Publishing, Chicago 2003) 167. In the Netherlands, The EU Prospectus Directive has been incorporated in the Wet op het Financieel Toezicht (Wft, Financial Supervision Act). See: Articles 5.13-5.19 (content prospectus); Euronext Rule Book I, section 6.5 (preparation prospectus).
8. Directive 2003/71/EC: Directive of the European Parliament and the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC [2003] OJ L345/64, and Commission Regulation (EC) 809/2004 of 29 April 2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and the dissemination of advertisements. See also: J.P. Franx, Chapter 15, '*Inhoudelijke prospectusvereisten*' [*requirements regarding the content of prospectuses*], in: D. Busch *et al* (ed.), *Onderneming en Financieel Toezicht* [Company and Financial Supervision] (Kluwer: Deventer, the Netherlands, 2007).
9. In the Netherlands, the prospectus has to be approved by the AFM pursuant to article 5.21 Wft. Subsequently, it can be used to offer securities throughout the EU, provided that the AFM as the representative of the host Member State has provided a certificate of approval. In the UK, the Financial Services Authority has to approve a prospectus (FSA Listing Rules PR 3.1.7 referring to Article 87(1) FSA).

boom. After the IPO, the value of the newly listed shares dropped dramatically. Moreover, the financial results of WOL lagged behind the projections communicated in the prospectus, and the internet bubble collapsed. Legal claims were instituted against WOL, the issuer of the shares, and against the Dutch bank ABN-AMRO and the US investment bank Goldman Sachs, the joint lead managers of the IPO. Basically, the claims alleged that WOL and the lead managers had failed to adequately disclose certain information necessary to correctly inform the investors. In 2009, the Dutch Supreme Court (DSC) judged that WOL and the lead managers had misled the investors.[10]

Often, when an issuing company performs poorly, and does not offer sufficient recourse, the investors turn to the bank that organised the public sale of the shares. They will state that they were misled, *i.e.* that the bank had drawn a too positive picture of the company, and claim compensation for their losses. As a defence, the bank will explain that it has carried out an extensive investigation into the affairs and business of a company on which to base its prospectus. The bank will state that the company's subsequent negative results could not have been foreseen. In short, the bank will explain that it has adequately assessed the company's affairs, and that any business or other risks found were clearly described in the prospectus, implying that the investor consciously took the risk to buy the shares. In other words, the bank claims that it performed the IPO 'diligently', 'with due care', 'with sufficient diligence' (*met de nodige waakzaamheid)*.

The standard to be measured against is what other banks would have done, how they would have investigated this company if they had done so with due diligence, and whether any information disseminated about the new shares and the company, in the prospectus or in any other manner in view of an IPO, would have misled a normal, prudent investor in his decision to buy the shares.[11]

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10. See for example: *WOL*, DSC, 27 November 2009, JOR 2010/43 (LJN: BH 2162, Dutch only) 4.14.3-5, 4.26.3, 4.32.3, 4.33, 4.36.4, 4.39.1; Amsterdam Court of Appeal (CoA), the Netherlands, 3 May 2007 (LJN: BA4343, Dutch only) 2.12.3-5, 2.24.3. The DSC resolved that the difference between the price for which Nina Brink, the incorporator and CEO of WOL, had sold a substantial number of her shares before the IPO, in December 1999 (*i.e.* USD 6.04) and the share issue price at the IPO in March 2000 (*i.e.* EUR 43) was considered material and should have been disclosed in the prospectus. By the end of 2000, the WOL shares were worth less than EUR 10. Furthermore, the DSC confirmed the Amsterdam CoA's findings that the value and the future results of WOL were presented too optimistically by WOL and the lead managers, and that they had misled the investors. Compare also: *Baan*, Arnhem CoA, the Netherlands, 16 October 2007 (LJN: BB5511), in which case the Appellate Court decided that the fact that statements by the company which – with hindsight – could be considered too optimistic, in itself, alone, could not be qualified as disseminating incorrect or misleading information.

11. Besides *WOL* (note 10), other Dutch case law on this subject includes: *ABN-AMRO CoopAG*, DSC 2 December 1994, NJ1996/246 regarding the responsibility of a lead manager for misleading annual accounts prepared and approved by accountants and →

7.3 Due diligence in corporate practice

The concept of 'due diligence' emerged from securities law. It also found its way to other areas of corporate law. Today, corporate lawyers spend much time on organising and performing due diligence investigations when they advise on establishing a merger between two or more companies; an acquisition of a business; a management buy-out (an MBO is the acquisition of a business by its existing management, usually in cooperation with outside financiers); an investment in another company (*e.g.* a private equity investment); or in setting up a joint venture with other parties. Some of these transactions take place through a capital market transaction, *e.g.* the issuing or sale of publicly traded securities or a public offer; others concern the preparation of a private transaction, *i.e.* a transaction that is not concluded via the stock exchange.

Divestments, selling off part of a business or a subsidiary company, or a privatisation, *e.g.* through organising a 'controlled auction', also involve due diligence investigations. A controlled auction is a process whereby the company is marketed to a specific target group, creating a process where multiple potential buyers can bid for it. The seller controls the process. Before the auction begins, commonly, the seller performs a due diligence assessment on the basis of which a so-called 'Information Memorandum' is prepared concerning the business and particulars of the business or company for sale (*i.e.* the 'seller's due diligence'). Potentially interested parties receive the Information Memorandum and they can then make a preliminary price offer for the business concerned. In a second phase, the seller narrows down the list of potential bidders to a few preferred bidders. They are given access to the documents collected in the seller's due diligence process in order to conduct their own due diligence investigation (*i.e.* the 'buyer's due diligence'). Based on this information, these bidders will confirm their preliminary bid or withdraw from the process. Ultimately, the seller will decide with which party it enters into the final negotiations.

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contained in a prospectus; *MeesPierson BoterenBrood*, DSC 8 May 1998, JOR 98/110 (regarding incomplete information in a private placement memorandum); DAF, The Hague CoA 29 June 2004 (LJN: AP4593) regarding a misleading prospectus on notes issue; *TMF Financial Services*, DSC 30 May 2008, JOR 2008/209 (LJN: BD2820) regarding the standard which is used to identify the capacity of the investor to understand whether the facts presented in a brochure should be considered as misleading or not ("*vermoedelijke verwachting van een gemiddeld geïnformeerde, omzichtige en oplettende gewone consument tot wie de brochure zich richt of die zij bereikt").* The Unfair Trade Practices Directive of 11 June 2005, 2005/29/EG, PbEU L149 [§§ 22-39], also underlines the responsibility of a seller of financial products. Implemented in the Netherlands in the *Wet oneerlijke handelspraktijken* [Act on the unfair trade practices], which introduced articles 6:193a – 193j DCC a definition of the 'normal consumer' who – according to the Directive and the legislative history – will be assumed to be a person who, on average, is prudent and well informed (Stb. 2008, 397).

Furthermore, finance transactions usually involve a due diligence investigation as well as situations in which companies enter into a large operational agreement, such as an exploration or exploitation agreement (*e.g.* concerning natural resources); a management agreement (*e.g.* the exploitation of a chain of cinemas or hotels); turn-key projects (*e.g.* building a power plant); transport contracts; and infrastructural contracts (*e.g.* building a bridge, a road or constructing a gas or oil pipeline).

There are multiple reasons for a company to perform a due diligence investigation. Some are embedded in legislation or stock exchange rules, others are of a more practical nature. The results of a due diligence process can assist the negotiators in shaping the deal, and will uncover any material risks. The following subsections will provide an answer as to why, how and when companies perform a commercial due diligence investigation in order to create a base for reflecting on the question whether a human rights assessment could be integrated in such a process. The next subsection will first explain which actors can be involved in a due diligence process.

7.3.1 Who performs the due diligence process?

Due diligence is a catch-all concept. Every professional will first think of due diligence in his own field of expertise. It depends on the scope and purpose of the project or transaction which experts will be engaged for the due diligence process. For a full due diligence investigation, many different experts can be involved. Multidisciplinary teams will work on: business issues (this work will typically be performed by commercial lawyers and the company's commercial staff); financial position and forecast (the company's financial staff, investment bankers, accountants); technical aspects (in-house and external technical experts); tax risks (tax lawyers); corporate structure and legal liabilities (lawyers and notaries); real estate (notaries; real estate agents' valuation experts); pension issues (lawyers, tax lawyers, accountants and actuaries); IT issues (IT consultants); environmental issues (environmental law and administrative law specialists, technical environmental consultants); insurance issues (insurance or actuarial experts); and fraud and corruption (forensic accountants). Presently, few due diligence investigations include an assessment on human rights issues.[12] To add them in, human rights lawyers and experts would need to be engaged.[13]

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12. Based on the author's experience as a practitioner. Sample due diligence questionnaires demonstrate this; see e.g. S. Pickard, Due Diligence List: www.duediligencelist.com, (Writers Club Press, New York Lincoln Shanghai, 2002) or see: http://www.meritusventures.com/template_assets/pdf/diligence.pdf, accessed on 12 August 2010, included in Annex I in fine.
13. *E.g.* the Danish Institute for Human Rights, at: http://www.humanrights.dk/; and the consultancy firm Aim for Human Rights, at: http://www.humanrightsimpact.org/; both sites were accessed on 12 August 2010; AidEnvironment, at: http://www.aidenvironment.org/landingpage.aspx, accessed on 17 July 2009. See further section 7 below on HRIAs.

A due diligence investigation renders the best results when the experts work together as a team in which information is shared and issues are discussed. Together with the company that commissioned the due diligence process, the team members should decide which issues to pursue more deeply and which issues to put aside. Communication by the team members can best take place by organising a kick-off meeting in which the company sets out the intended project or transaction, and explains what its goals are in respect of the due diligence process. Company representatives or the lead counsel co-ordinating the process will explain the procedural and the substantial parameters for the project. Subsequent meetings can take place physically or via video conferencing, which is usually more practical when team members are spread out all over the world.

7.3.2 Why due diligence?

Why do companies take the effort to arrange for a costly and cumbersome due diligence investigation? There are various legal reasons to do so.

7.3.2.1 Capital markets transactions – legal reasons and scope

As section 7.2 explained, a due diligence investigation in the context of issuing new securities is usually, directly or indirectly, obligatory under the law, or recognised by case law. Where a jurisdiction requires the issuer and lead manager to issue a prospectus, it indirectly implies that they should execute a due diligence process to collect the information needed to prepare the prospectus. Moreover, as argued, conducting a due diligence process in view of an IPO can constitute a defence against claims from investors who allege that they were misled by false or incomplete information contained in the prospectus.

Regarding the scope of a capital market due diligence, it was recorded in section 7.2 that the EU Prospectus Directive details the information which has to be included in a prospectus.[14] This indirectly determines the main subjects that are to be addressed in the diligence process. Since capital market transactions usually concern the sale of securities in the capital of a holding company, the due diligence has to cover all operations of the company and its subsidiaries. Any miscalculation or business problem in any part of the world could affect the value of the securities. Still, in practice, the lead manager, the issuing company and their lawyers have to decide on the scope and level of the due diligence investigation. For instance: may the lead manager rely on a company secretary's communication stating that no substantial litigation is pending anywhere in the world? Or do the lead manager's lawyers have to

14. Articles 5 (content prospectus) and 13 (approval prospectus).

assess this for themselves? In that case, do they have to examine all court documents, or can they rely on communicating with the counsels who actually litigate such cases? These types of issues need to be agreed on to make the due diligence process transparent and workable. Best practices in the market will lead the way in this respect. No lead manager or lawyer wants to take the risk of performing an insufficient due diligence assessment. Commonly, the standard applied to determine professional liability is whether the professional has acted in the same professional manner as another skilled professional would have done in his place. Consequently, it is important to keep up-to-date with best practices.[15]

7.3.2.2 Capital markets due diligence – integrating human rights?

The EU Prospectus Directive does not specifically mention potential human rights impacts as a subject to report on in a prospectus. The European Parliament and Friends of the Earth had advocated this in the pre-stages of the Directive.[16] It is interesting however, to note that the Prospectus Directive stipulates under (48) of the Recitals: "This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union." It thus refers to the European Charter of Fundamental Rights adopted in 2000.[17] The Preamble to this Charter reads:

> This Charter reaffirms, (…) the rights as they result, in particular, from (…) the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of (…) of the European Court of Human Rights. Enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations. The Union therefore recognises the rights, freedoms and principles set out hereafter.

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15. *ABN-AMRO CoopAG* (note 11). In short: the lead manager of the sale of the Coop notes argued in court that it relied on the information contained in the Coop AG annual accounts which were approved by German accountants. The Court held that a lead manager itself should evaluate such accounts to ensure that they provide a correct picture. In this case, the annual accounts did not reveal that a number of subsidiaries were loss-making. This was considered misleading by investors. For further reading: M. Brink, '*Due diligence. Een beschouwing over het due diligence onderzoek volgens het Nederlandse recht*' [*A reflection of due diligence under Dutch law*] (Boom Juridische uitgevers: The Hague, 2009), pp. 320-334. *Ibidem* on professional liability, pp. 443-482, esp. p. 445.
16. Friends of the Earth, *Consultation Paper: CESR's Advice on Possible Level II Implementing Measures for the Proposed Prospectus Directive* (2003); EU Parliament (Committee on Employment and Social Affairs) 'Report on Corporate Social Responsibility: a new partnership' (2006/2133(INI)).
17. *I.e.* the Charter of Fundamental Rights of the European Union, 2000/C 364/01-22.

The fundamental rights set out in the Charter encompass all internationally recognised human rights such as dignity, freedom, equality, solidarity, citizens' rights and justice. From the reference to the Charter in the Prospectus Directive, it could be inferred that the EU considers human rights important in the context of capital market transactions. Consequently, it would not be illogical if a prospectus were to contain information about the human rights aspects of the business activities of the issuer. This view also aligns with Ruggie's approach, *i.e.* to encourage businesses to exercise due diligence with regard to respecting human rights. In addition, one could say that, in practice, any risks related to (potential) human rights violations will be regarded as general risks that need to be disclosed because they can negatively influence the company's position, reputation and income-generating capacity.

Another factor that might incite the inclusion of human rights aspects in capital market due diligence investigations, is the fact that the market for sustainable investments is growing. Sustainability-rating agencies and institutional investors welcome more information on human rights aspects relating to companies' activities.[18] This information can be provided in the prospectus, but it can also be communicated in other ways, *e.g.* through annual reports, sustainability reports, and websites.

18. Information received from sustainability-rating agencies and institutional investors during interviews in the course of the Nyenrode International Research on Biodiversity and Capital Markets, 2009 – an ongoing project in which the author participates. Furthermore, please see: www.UNPRI.org, accessed on 12 August 2009, to find out which institutional investors are signatories to the Principles for Responsible Investment (PRI), and for information on socially responsible investment (SRI). PRI signatories have pledged that they will integrate environmental, social and governance factors (ESG) in their investment decisions. Human rights are specifically mentioned. The importance of SRI was also confirmed in the PRI Academic & Practitioners Conference 2010 'Mainstreaming responsible investment' (May 2010, Copenhagen), in which the author participated. The growing importance of sustainability indices of stock exchanges such as the FTSE4 Good for raising the standards for best practices in corporate behaviour has been highlighted by Catharina (Rieneke) Slager, 'What gets measured gets managed? Responsible Investment indices and responsible corporate behavior', paper available at: http://www.unpri.org/academic10/Paper_15_Rieneke_%20Slager_What%20gets%20measured%20gets%20managed.pdf, accessed on 12 August 2010. Furthermore, see: *e.g.* D. Brooksbank, 'Norway's €1.9bn Nestlé stake under scrutiny', in *Responsible Investor*, 21 September 2009, at: http://www.responsible-investor.com/home/print/norway_nestle_stake/, accessed on 12 August 2009. See also: E. Umlas, *Human Rights and SRI in North America: An Overview*, PhD; January 2009, at: http://www.reports-and-materials.org/Umlas-Human-Rights-and-SRI-Jan-2009.pdf, accessed on 12 August 2010 *re* due diligence in relation to SRI, and referring to the framework of Ruggie.

7.3.2.3 Private transactions – legal reasons and scope

Under Dutch law as well as in other jurisdictions, buyers and sellers owe each other a certain degree of respect. By entering into negotiations they create a new ambiance – a pre-contractual stage – that requires care towards each other.[19] Part of this doctrine prescribes that a party should provide the other party with correct and complete information as to the object of the transaction. This applies to the prospective seller and buyer in different ways. For example, under Dutch law: the seller must disclose the positive but also the negative features (*'mededelingsplicht*' [disclosure duty]);[20] however, the buyer must clearly communicate which facets are important for him, so that the seller understands which information he needs to provide the buyer with.[21] Moreover, on the buyer rests a duty to enquire and investigate whether the target-object or business fulfils his expectations (*'onderzoeksplicht*' [investigation duty]).[22] An exchange of information by the parties as part of the preparation for the transaction, and to discharge their duty of care, is usually called a 'due diligence' investigation.[23] If a party has not adequately performed such due diligence, this may have repercussions for its rights after concluding the transaction. If the buyer has not performed a sufficient due diligence investigation, it will be more difficult for him to rescind the transaction, or claim damages, in the event that some factual

19. Article 6:248 DCC *re* pre-contractual good faith. See further: B. Wessels, *Precontractuele aspecten van een bedrijfsovername* [Pre-contractual aspects of a business acquisition], in *Bedrijfsovername* [Acquisition of a business], 2nd ed. (Kluwer: Deventer, 2005), pp. 3-9.
20. *Offringa/Vinck & Van Rosberg*, DSC 10 April 1998 (NJ1998/666) regarding a seller which had to inform the buyer of any construction faults in the building before the actual transaction; *L.E. Beheer/Stijnman*, DSC 16 June 2000 (NJ2001/559) concerning the situation in which the buyer had not conducted a due diligence investigation; even so, the seller should have informed the buyer about hidden liabilities related to the company.
21. *VDL Shipyards*, DSC 21 February 2003 (JOL 2003/111; LJN AF1891) concerning the size of a fuel tank of a new ship and the intention to use the ship as a seagoing vessel; the buyer should have indicated clearly which expectations he had concerning the new ship and the size of the fuel tank.
22. According to *VBI/Interchem*, DSC 10 October 2003 (LJN AI0306), it can be expected from professional parties that they perform an adequate due diligence investigation and demand sufficient guarantees when buying a business. If the buyer does not do so, he cannot demand a rescission of the contract.
23. See for scholarly analyses: H. Kersten, 'Het due diligence onderzoek' [the due diligence investigation], *Dossier Ondernemingszaken* [journal on corporate law subjects], 2001-47, pp. 28-33; M.M. Van Rossem, *Garanties in de praktijk* [representations and warranties in practice] (Kluwer: Deventer 2002), p. 210; H.J. de Kluiver, '*Overnamecontracten, letters of intent en guaranties*' [acquisition agreements, letters of intent and representations and warranties], *Dossier Ondernemingszaken* [journal on corporate law subjects], 2001-47, pp. 34-43. W. de Nijs Bik, 'Mededelings- en onderzoeksplichten bij (bedrijfs)overname' [disclosure and enquiry duties in relation to a business acquisition], in *Ondernemingsrecht*, 16, 2003, pp. 627-631; W. de Nijs Bik, '*Het due diligence-onderzoek*' [the due diligence investigation], in *Bedrijfsovername* [acquisition of a business], 2nd ed. (Kluwer: Deventer →

matters appear not to be to his liking. He could have found that out before, and is expected to have done so.[24] On the other hand, if a seller remains silent about some crucial fact, *e.g.* an invisible construction fault in a building, or a liability that is not revealed by the annual accounts, he will be considered to have violated his duty to inform the buyer. As a consequence, the buyer is entitled to rescind the agreement or claim compensation.[25]

The scope of a commercial due diligence process is not prescribed. The parties to the transaction can agree on any type of information that will be exchanged between them. Sometimes, a buyer of a company is only interested in learning about really material issues. Since these mostly come up with regard to pensions, environmental or tax matters, parties can decide to limit the due diligence to these subject matters. Only specialists in these areas will then be hired to perform the investigation. In other situations, a buyer is mainly interested in acquiring a company because of the human capital. In that case, he will primarily focus on the employment agreements to ascertain that the key-employees will stay on after the take-over. Parties also need to agree on the scope of the investigation: will the buyer be given access to information concerning all companies in a corporate pyramid or just one or more of the top-holding companies?

7.3.2.4 Private transactions due diligence – integrating human rights?

Generally, as in capital markets transactions, a due diligence process in private transactions will cover the whole spectrum of subjects which are pertinent to the business that is the object of the transaction. Human rights issues are typically not issues that are listed in a due diligence questionnaire exchanged between the parties before the investigation commences (see Annex 7.1, *in fine*).[26] However, since many companies operate globally, human rights violations become a business risk relevant for consideration. Being accused of human rights abuse, or complicity thereto, is bad news for a company. It can severely damage its

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2005), pp. 51-73. For an analysis of European tort law and the duty of care, see: C. Van Dam, *European Tort Law* (Oxford: Oxford University Press, 2006). He states that the tort of negligence in both common law and civil law jurisdictions generally "consists of three elements: a duty of care, a breach of that duty and consequential damage" (p. 502).

24. Articles 6:228 DCC *re dwaling* [mistake] and 6:265 *re* rescission. See *e.g.*: *ABP/Hoog Catherijne*, DSC 22 December 1995 (NJ1996/300) concerning damages under a representations and warranties claim that were not awarded because the buyer could have performed a more adequate due diligence investigation; *VBI/Interchem* (*supra* note 22).

25. *Mol/Meyer (Provamo)*, DSC 4 February 2000 (NJ2000/562) concerning sellers which had not informed the buyer of a potato processing factory about the illegal ways in which the factory obtained water and discharged its polluted water, hence the discovery of the hidden liabilities (tax claims) led to the rescission of the purchase agreement.

26. Pickard, *supra* note 12.

reputation.[27] It therefore seems rational to include this subject in a private transaction due diligence process. If the due diligence investigation of the target business or future project reveals any human rights related problems, the entrepreneur or financier can deal with such issue in good time, accept the inherent risk or alternatively, back out of the intended transaction.

7.3.3 Other reasons for executing due diligence

Besides legal reasons, companies also mention other reasons, of a more practical nature, why they perform a due diligence investigation. For example, the motivation of a bank to carry out a due diligence inspection before granting a loan is to ascertain, firstly, whether the company can repay the loan and generate sufficient cash flow to pay for the periodical interest and, secondly, to identify collateral and to determine its value. A risk analysis of the company, its business, the industry and the geographical region usually forms part of a finance due diligence.

The reason for initiating a due diligence analysis before concluding an operational agreement is that the company needs to know about the operational and business opportunities, the value of the proposed contract, and which obstacles and risks can be expected. Other drivers for a due diligence investigation are:[28]

- evaluating possible synergies for a merger, *e.g.* in the type of business activities or geographical markets, new opportunities or innovative approaches;
- verification of assumptions regarding the business or the price offered;
- avoidance of 'skeletons in the cupboard' (unexpected liabilities);
- finding arguments for renegotiating the price;
- examining whether permission from third parties is required for the transaction, *e.g.* pursuant to legislation or contractual 'change of control' clauses.[29] Certain transactions require government consent, *e.g.* in the

27. R. Van Tulder, A. Van der Zwart, *International Business-Society Management. Linking corporate responsibility and globalisation* (Routledge: London and New York, 2006). See also: chapter 9 (Shell in Nigeria). Information on business and human rights can also be found, at: http://www.business-humanrights.org/Home, accessed on 12 August 2010.
28. This list is based on the author's experience as a corporate lawyer and on the *Loyens & Loeff Handbook: Due Diligence Law and Practice* (1997, 2nd edition 2003), *i.e.* an in-house handbook of which she was the author. See also Brink (*supra* note 15), pp. 67-73.
29. 'Change of Control' clauses allow one or both parties to terminate the agreement on a change in ownership of a controlling interest in the other party. The rationale is that upon a change of a controlling interest by one party, the other party does not have to deal with an undesirable new party – the new owner. They are quite common in debt and lease agreements as well as in substantial supplier contracts. See further: D. Rankine, M. Bomer, G. Stedman, *Due diligence: definitive steps to successful business combination* (Pearson Education Limited: Harlow, Essex, 2003), at p. 94.

Netherlands, for the sale of a bank, permission has to be obtained from the Minister of Finance; for transactions with a EU dimension, the approval of the EU Commission is required pursuant to EU competition law;
- to optimise the transaction structure (*e.g.* to consider legal and tax variations: a share or asset purchase? Should a new company be incorporated to acquire the new business? If so, under which jurisdiction?);
- identification of 'conditions precedent'[30] which are applicable to concluding the transaction (*e.g.* supervisory board or shareholders' approval, consultation with unions or works councils, third-party consent);
- preparation of the 'representations and warranties' that will become part of the transaction documentation;[31]
- to substantiate taking a decision on concluding the transaction: YES or NO?
- to avoid mismanagement and directors' liability (due to unfunded investment decisions);[32] and
- to prepare a to-do-list concerning improvements which need to be made after the transaction has been concluded.

In sum, there are various reasons for companies to commence a commercial due diligence investigation. Some reasons are aimed at gaining a better understanding of the target business. Other reasons are more transaction-related, such as the preparation of the best tax structure for the acquisition or joint venture, or the analysis of which steps need to be taken before the transaction can take place. There are also reasons of a more practical nature: to find assets over which to demand a security right. To date, companies did not consider human rights concerns as a typical subject to be included in a due diligence assessment.

30. 'Conditions precedent' refers to the conditions, which if not fulfilled, could impede the execution of the contractual obligations. The completion of a due diligence investigation can be a condition precedent to the obligation to complete the purchase.
31. *ABP/Hoog Catherijne supra* note 24.
32. Compare *OGEM*, Amsterdam Enterprise Chamber 3 December 1987 and DSC 10 January 1990 (NJ1990/466) concerning mismanagement due to an inadequate preparation of acquisitions; *Verto*, Amsterdam Enterprise Chamber 7 March 1996 (NJ1997/674) – the fact that the directors had not performed a due diligence investigation in view of a business acquisition was judged not to be diligent; however, special circumstances in this case (*i.e.* prior knowledge concerning the target company) led to the judgement that there had been no mismanagement; *Verto*, The Hague CoA 6 April 1999 (NJ1999/142) concerning the personal liability of the directors (rejected); *De Vries Robbé*, DSC 13 September 2002 (LJN AE7940) concerning mismanagement by directors and supervisory directors; one of the questions concerned the quality of the due diligence process.

7.3.4 How is the due diligence process executed?

How does one carry out a due diligence process? As may have become clear, a corporate due diligence concerns a factual investigation into the affairs of a business and into factors that may impact its results. A legal due diligence consists of an examination of the legal, tax and financial structure of a company or a project. It is very important to make any obstacles or hidden liabilities transparent to the counterparty before concluding the transaction. These could also concern human rights issues.

A due diligence assessment typically consists of a factual investigation and desk research. The factual part takes place by for example interviewing company representatives, inspecting operations and machinery, taking soil samples to examine pollution levels, valuating real estate and exploring the IT systems. The steps to be taken depend on the type of business that needs to be investigated and on the type of transaction. A finance transaction requires other information than a management buy-out transaction. The desk study part of a due diligence process will focus on examining documents, *e.g.* annual accounts and other financial documents such as management reporting systems, accountants' letters. Other relevant documents include: operational licences, intellectual property rights registrations, court documents, consultant reports, commercial contracts, distribution contracts, supply contracts, rental contracts, service level agreements, key employee agreements, collective labour agreements and social plans. Reference is made to Annex 7.1 *in fine*.

Besides investigating facts and risks pertinent to the company, the examination also focuses on more general business risks. Questions to be answered are, for example: are there any country risks such as currency risks or corruption risks that need to be avoided? The NGO Transparency International provides useful indices on corruption risks on its website. Human rights issues could well be included in this part of the investigation. In order to deal with this subject – as with any subject which forms part of a due diligence investigation – the researcher should truly understand the way in which the company works and produces its products. It is also necessary to understand where the resources and other ingredients needed for the production process come from, where the company buys its products, and in which way the products are manufactured. Based on this overall knowledge, sensitive issues from a human rights perspective can be distilled and more fully investigated. Furthermore, the due diligence research could include an internet search to see if the company concerned has been identified in connection with any human rights issues. Local news sources could also be included in the search to analyse whether there are any issues in which the company is mentioned. If the parties agree, stakeholder interviews can also be made part of the due diligence assessment.

7.3.5 When do parties execute a due diligence process?

Figure 7.1 depicts a typical transaction timeline. A due diligence inspection typically starts quite early on in the process and generally ends just before completing the transaction. It is important that the experts who perform the due diligence process communicate their findings promptly to their client so that he can use the information in the negotiation process. Quite often, even in the final phases of a transaction, parties are still exchanging information (partly due to practical reasons because transactions involve complex matters, *i.e.* it takes time to collect everything, partly due to strategical reasons, *i.e.* late disclosure of important information sometimes affects the negotiation results less than information provided in an earlier phase of the negotiations).

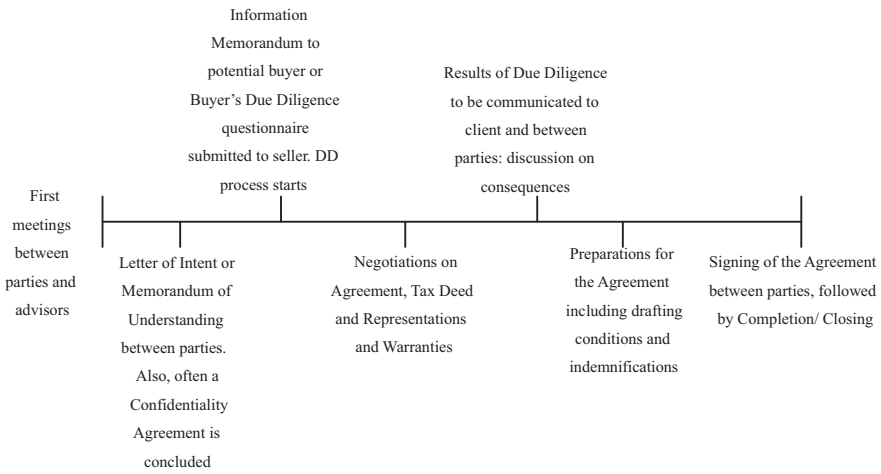

Figure 7.1 Timing of a due diligence process in corporate practice

7.3.6 Conclusion on corporate due diligence processes

This section has demonstrated in which way human rights impact research could fit into current corporate due diligence practice. The logic of including the subject of human rights in standard corporate due diligence processes is that any future problems could have a material adverse effect on the business and reputation of the company. Since a corporate lawyer generally has no training in human rights law, it is recommendable to cooperate with human rights experts, which is in line with the fact that these investigations are often performed by multi-disciplinary teams. Human rights experts in turn can make use of existing HRIA tools (section 7.6). Consequently, from these perspectives, and in view of

Ruggie's recommendations – which now represent the 'state of the art', and are therefore relevant in determining best practices in due diligence – it can be concluded that such cooperation can be of great assistance to any issuer and lead manager performing a due diligence in order to prepare a prospectus, as well as in any private transaction due diligence investigation.

The following section will explain how the concept of due diligence emerged in international human rights law. This also provided a background for Ruggie when he developed his policy framework.

7.4 Due diligence in human rights law

International human rights treaties require of the parties to such treaties, *i.e.* the State Parties, to ensure that their citizens can enjoy human rights. The obligations on State Parties are often categorised in three levels: the obligations to respect, to protect and to fulfil human rights. These obligations entail that States should withhold from violating these rights, but also that they should take measures to assure that the rights will not be violated and will be fulfilled.

The duty to protect is commonly referred to as a 'positive obligation' (or 'responsibility from omission' or 'duty of due diligence').[33] Referring to this positive State obligation, an individual whose rights have been violated by another private actor, can call upon his rights towards the State.[34] If the police or a court as state agents do not protect the human rights of such individual when called upon, the State can be considered to have violated its international responsibilities under the relevant human rights treaty.[35] As States obviously cannot control the behaviour of private actors, the fulfilment of their positive obligation cannot be measured by the achieved result: it therefore qualifies as a 'due diligence' obligation, *i.e.* the State is expected to employ all possible means and measures to prevent violations.

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33. A. Nollkaemper, *Kern van het international publiekrecht* [Basics of International Law], 2nd ed. (Boom Juridische Uitgevers: Den Haag, 2005), p. 255. A. Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2006), pp. 318 and 334, and see: pp. 317-436 for a systematic analysis of positive obligations under selected human rights treaties.
34. Nollkaemper, *supra* note 33, p. 256; Clapham, *supra* note 33, pp. 521-523.
35. ECHR, *X and Y v. The Netherlands*, A. 8978/80, 26 March 1985, Series A., No. 91, p. 23, §22. Regarding article 8 ECHR 'Right to Family Life', the Court judged that this right creates obligations for States which involve 'the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals themselves'. Clapham suggests that these types of statements have had important implications beyond the state duty, *e.g.* the extension of human rights into the private sphere. According to him, it has meant that national courts may consider that a private actor has human rights obligations which stem from the ECHR. He refers to it as 'the horizontal, third party, or *Drittwirkung* effect of the relevant Convention article'.

The term 'due diligence' is often used in international law as an indicator of the level of effort that a State Party to a treaty should employ to discharge its obligations under such a treaty: has the State applied due diligence?[36] According to Professor Malcolm Shaw, the test of due diligence is in fact the standard that is accepted generally as the most appropriate one, at least in the context of preventing harm to another State by environmental pollution.[37] He points out that the due diligence test undoubtedly imports an element of flexibility into the equation and must be applied in the light of the circumstances of the case in question. Case law has catered for new norms and instruments applicable to the State duty to employ due diligence. For instance, the elements of remoteness and foreseeability have become part of the framework of the liability of States: a State must base its actions on an assessment of possible risks and harm. Furthermore, due diligence refers to those measures which are generally considered to be appropriate and proportionate to the degree of risk of harm in the particular instance. The measures can include legislative, administrative and other actions, including the establishment of suitable monitoring mechanisms to implement the measures.[38]

The duty of States to take any necessary measures to protect individual rights is developed in case law pertaining to human rights. In order to understand this concept, one should look closely at the context in which positive obligations are recorded, and specifically the rights at issue, and what extent of effort – the due diligence – is required.

7.4.1 Treaties and commentaries

Most human rights conventions oblige States Parties to take certain measures, whether by domestic legislation or otherwise, in order to protect the rights of individuals in their jurisdiction. Various examples will be provided below. Some treaty provisions clearly indicate that the measures need to include remedies for victims and penalties for perpetrators in order to make the rights effective. Additionally, the States Parties' obligations are sometimes formulated

36. Nollkaemper, *supra* note 33, p. 180. A classic international law case on due diligence is: ICJ, *Corfu Channel* (United Kingdom vs Albania), ICJ Reports 1949, p. 22. The Court states that States have the duty 'not to allow knowingly its territory to be used for acts contrary to the rights of other states'. A State should ensure that acts of private parties committed on its territory or are subject to its jurisdiction, do not harm other States or their citizens.
37. M.N. Shaw, *International Law*, 5th ed. (Cambridge University Press: Cambridge, 2003), pp. 764, 770.
38. *Supra* note 37, p. 760. See also: the UN Committee on the Rights of the Child (CRC), General comment no. 5 (2003) §1, 'General measures of implementation of the Convention on the Rights of the Child, which emphasised the element of monitoring: 'the Committee… has identified a wide range of measures that are needed for effective implementation, including the development of special structures and monitoring, training and other activities in Government, parliament and the judiciary at all levels'.

in such a manner that they explicitly extend to third party acts, *i.e.* parties other than state agents. International law might therefore demand of States that they regulate private behaviour in order to protect human rights. For example, article 3 of the Slavery Convention (1926) clearly includes third parties:

> The High Contracting Parties undertake to adopt all appropriate measures with a view to preventing and suppressing the embarkation, disembarkation and transport of slaves in their territorial waters and upon *all vessels* flying their respective flags. [Emphasis added]

Or, article V of the Genocide Convention (1948) which refers to penalties:

> The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide *effective penalties* for persons guilty of genocide or any of the other acts enumerated in Article III. [Emphasis added]

Article 1 of the European Convention on Human Rights (ECHR, 1948) requires more generally: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."

There is little doubt that the State has a duty to ensure that non-state actors in the private sector do not engage in direct or indirect discrimination. In that respect, the International Convention on the Elimination of All Forms of Racial Discrimination (1965) reads in article 2(d): "Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination *by any persons, group or organisation*." [Emphasis added][39]

Article 2 of the International Covenant on Civil and Political Rights (ICCPR, 1966) stipulates in respect of the States Parties' obligations:

> 2. …each State Party … undertakes to … adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant. 3…undertakes: (a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have *an effective remedy*… (c) To ensure that the competent authorities *shall enforce such remedies* when granted. [Emphasis added]

Articles 1 and 2 of the American Convention on Human Rights (Pact of San Jose, Costa Rica, ACHR, 1969) and article 1 of the African [Banjul] Charter on

39. In a situation in which a Danish bank refused to provide a loan to a Moroccan person, Mr. Ziad Ben Ahmed Habassi, the Danish authorities were found to have failed to investigate properly the alleged discrimination by the non-state actor in order to protect him effectively from racial discrimination. See: *ZIAD Ben Ahmed Habassi v. Denmark,* Communication no. 10/1997, UN Doc. CERD/C/54/D/10/1997, 6 April 1999, pp. 10-11.

Human and Peoples' Rights (ACHPR, 1981) placed similar duties on State Parties.

By article IV.2 of the International Convention on the Suppression and Punishment of the Crime of Apartheid (1973), the State Parties to this Convention also pledged to act in respect of third parties:

> To adopt legislative, judicial and administrative measures to *prosecute, bring to trial and punish* in accordance with their jurisdiction *persons* responsible for, or accused of, the acts defined in article II of the present Convention, whether or not such persons reside in the territory of the State in which the acts are committed or are nationals of that State or of some other State or are stateless persons. [Emphasis added]

The Convention on the Elimination of All Forms of Discrimination Against Women **(**CEDAW, 1979) has been in the forefront of efforts to make it clear that States have positive duties to protect individuals from violent acts of other individuals and groups. Respectively, Articles 2 (e),(f) and 5(a) cite that the State Parties commit:

> 2(e) To take all appropriate measures to eliminate discrimination against women *by any person, organisation or enterprise*; (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, *customs and practices* which constitute discrimination against women […].
> 5(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of *prejudices and customary and all other practices* which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women. [Emphasis added]

The UN Committee on the Elimination of Discrimination against Women (CEDAW Committee)[40] builds on the concept of due diligence under general international law to protect individuals from infringements of their rights committed by non-state actors. See its General Recommendation 19 (1992), paragraph 9, which focused on how to prevent violations:

> Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with *due diligence* to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation. [Emphasis added][41]

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40. This is an expert body with the mandate to watch over the progress for women made in those countries that are the States Parties to the CEDAW. The Committee monitors the implementation of national measures to fulfil this obligation and makes recommendations on any issue affecting women to which it believes the States Parties should devote more attention.
41. General Recommendation, No. 19, [§ 9], UN Doc. A/47/38 (1992), p. 5.

This was followed by similar wording in the UN Declaration on the Elimination of Violence Against Women (1993). Article 4(c) was adopted by consensus and avows:

> States should exercise *due diligence* to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the state or by private persons. [Emphasis added][42]

The references to due diligence in these last two texts have been used to develop a set of positive obligations for States with regard to violence by non-state actors.[43] An example can be found in the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará, 1994), *i.e.* the first human rights convention which explicitly mentions the term due diligence (article 7(b)):

> The States Parties condemn all forms of violence against women and agree to pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate such violence and undertake to (…) apply *due diligence* to prevent, investigate and impose penalties for violence against women. [Emphasis added]

A similar view was employed in 2004 by the Human Rights Committee in its General Comment regarding the 'Nature of the general legal obligation imposed on States Parties to the Covenant' (*i.e.* the treaty body to the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966)). This Committee recommended:

> (…) the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by *private persons or entities* (…). There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise *due diligence* to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.[44] [Emphasis added]

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42. UN Doc. A/RES/48/104, Resolution of 20 December 1993.
43. Amnesty International, 'Respect, protect, fulfil – Women's human rights. State responsibility for abuses by 'non-state actors'', AI Index IOR 50/01/00, §4.
44. General Comment No. 31 [§ 8], 2004, UN Doc. HRI/GEN/1/Rev.8, 2006: 'Compilation of general comments and general recommendations adopted by human rights treaty bodies'. Concerning due diligence, see also: General Comment No. 16 [§ 27], 2005.

The Inter-American Commission on Human Rights (2008),[45] and the political bodies of the Council of Europe (2002)[46], and the UN General Assembly (2004)[47] have also recognised due diligence standards as requiring swift and effective action against perpetrators of human rights. Furthermore, the due diligence standard as a tool for the elimination of violence against women was the main subject of the 2006 Report of Yakin Ertürk, the UN Special Rapporteur on Violence against Women.[48] Ertürk has consistently noted that where the State fails to act with due diligence to prevent violence, including by private actors operating in the private sphere, or to investigate and punish such violence or provide compensation, the State can be held internationally responsible for the infringement upon a human right by private acts.

The above quotations provided some examples of the use of the term 'due diligence' in human rights law. Yet, when 'due diligence' is used in a treaty text or in commentaries by treaty bodies, the concept remains broad. It is therefore valuable to study how international human rights courts have interpreted its meaning in specific cases.

7.4.2 Jurisprudence

'Due diligence' was first used in *Velásquez Rodriguez v. Honduras* (1988). The Inter-American Court of Human Rights introduced this term as the standard against which the State's behaviour could be tested. The test resulted in a judgement that Honduras had violated international human rights obligations. The case concerned the question whether Articles 4 (Right to Life), 5 (Right to Humane Treatment) and 7 (Right to Personal Liberty) of the ACHR had been violated, because of the involuntary disappearance of Mr. Velásquez. The Court argued that Honduras could be held liable: "not because of the act itself, but

45. 'Observations of the Inter-American Commission on Human Rights upon the conclusion of its April 2007 visit to Haiti', OEA/Ser.L/V/II.131 Doc. 36, 2 March 2008, [§§ 39 and 65]; 'The situation of the Rights of women in Ciudad Juárez, Mexico. The right to be free from violence and discrimination', OEA/Ser.L/V/II.117, Doc. 44, 7 March 2003 [§§ I 7, 9, 10 and IV 103, 104, 131-137, 154-158, 165].
46. 'Committee of Ministers Recommendation No. Rec., 2002, p. 5 to Member States on the Protection of Women against Violence', §II; Appendix [§§ 34-41, 45] and Explanatory Memorandum [§§ 90-92].
47. UNGA Res. 58/147 (19 February 2004) 'Elimination of Domestic Violence Against Women'.
48. 'Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk'. The due diligence standard as a tool for the elimination of violence against women, 20 January 2006, E/CN.4/2006/61, §§ 61-64, 101-103.

because of the lack of *due diligence* to prevent the violation or to respond to it as required by the Convention."[49] [Emphasis added]. The Court rationalised:

> What is decisive is whether a violation of the rights recognized by the Convention has occurred *with the support or the acquiescence of the government*, or whether the *State has allowed* the act to take place without taking measures to prevent it or to punish those responsible.[50] [Emphasis added]

The Court explained that the State has a legal duty to take reasonable steps to prevent human rights violations. It was stressed that every situation involving a human rights violation committed within its jurisdiction must be seriously investigated by the State. The Court considered it a failure if "the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible."[51] Even when the violations have been caused by private persons or groups, the State is expected to take action to avoid impunity: it should identify those responsible and impose the appropriate punishment. Also, it is the State's duty to ensure that the victim receives adequate compensation.[52] The Court reasoned that the State's "duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result." The concept of due diligence was further elaborated by the Court in its statement that the investigation "must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the State as its own legal duty." Compliance therewith does not suffice "without an effective search for the truth."[53] Elements that were important in this case were (i) the failure of the judicial system to act upon the writs brought before various tribunals; (ii) no judge had access to the places where Velásquez might have been detained; (iii) the executive branch failed to carry out a serious investigation to establish the fate of Velásquez; and (iv) public allegations of a practice of disappearances had not been investigated.

On the other side of the Atlantic, the European Court of Human Rights (European Court) deducted from a number of substantive provisions of the ECHR that circumstances may arise in which a State would have a positive obligation to protect individuals' rights. *E.g.*, according to this Court, the Right to Life of article 2 entails the obligation to take appropriate steps for the

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49. *Velasquez Rodriguez v. Honduras*, Inter-Am. Ct. H.R. (Ser. C) No. 4, 29 July 1988 [§§ 172-175]. The Inter-American Commission on Human Rights had submitted this case to the Inter-American Court of Human Rights.
50. *Supra* note 49 [§§ 173-174].
51. *Supra* note 49 [§ 176].
52. *Supra* note 49 [§ 177].
53. *Supra* note 49 [§ 177].

safeguarding of life within its jurisdiction.[54] A similar due diligence standard as applied in *Velásquez* was used by the European Court in *Osman v. United Kingdom* (1998).[55] Mrs. Osman's husband had been killed by her son's former teacher. Her son was seriously injured in the same incident. The case concerned the alleged failure of the authorities to protect the right to life of Mr. Osman and his son from the threat posed by the teacher. The Court noted that it was not disputed that the right to life may in well-defined circumstances imply "a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual." As to the scope of that obligation the Court considered that:

> bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, any such obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities.

This consideration clearly brings in the proportionality factor which, according to Shaw, forms part of the concept of due diligence as applied under environmental law (the introductory paragraph of section 7.4). Furthermore, the Court expressed that it was important to assess what the authorities knew or ought to have known about the imminent risk that a violation of a human right was to take place:

> it was sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which *they have or ought to have knowledge*. This is a question which can only be answered in the light of all the circumstances of any particular case. [Emphasis added].[56]

However, based on the factual evidence presented in this case, the Court considered that the police did not have nor ought to have such knowledge. The results from the investigation conducted by the police – which included exchanging information with a psychiatrist – did not suggest that the son was at risk from the teacher, less so that his life was in danger. The Court's conclusion recorded no violation of article 2 by the United Kingdom authorities.

After the *Osman* case, the case law of the European Court and the European Commission of Human Rights developed further on positive state duties in relation to violations by non-State actors. A useful overview of the Court's position on the due diligence standard in various cases was presented in the

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54. Shaw, *supra* note 37, p. 332, referring to *LCB v. United Kingdom*, 9 June 1998.
55. *Osman v. the United Kingdom* (Appl. 23452/94) ECHR 28 October 1998, Reports 1998-VIII [§§115-122].
56. *Supra* note 55 [§116].

brief submitted by Interights in the domestic violence case of *Nahide Opuz v. Turkey* (2001).[57] Interights, the 'international centre for the legal protection of human rights', was a third party intervener on the case. In this case, Opuz had alleged that the Turkish authorities had failed to protect the right to life of her mother and that they were negligent in the face of repeated violence, death threats and injury to which she and her mother were subjected. The Court concluded:

> Despite the withdrawal of the victims' complaints, the [Turkish] legislative framework should have enabled the prosecuting authorities to pursue the criminal investigations against H.O. [the murderer] on the basis that his violent behaviour had been sufficiently serious to warrant prosecution and that there had been a constant threat to the applicant's physical integrity. Turkey had therefore failed to establish and apply effectively a system by which all forms of domestic violence could be punished and sufficient safeguards for the victims be provided. Indeed, the local authorities could have ordered protective measures under Law no. 4320 or issued an injunction banning H.O. from contacting, communicating with or approaching the applicant's mother or entering defined areas. On the contrary, in response to the applicant's mother's repeated requests for protection, notably at the end of February 2002, the authorities, apart from taking down H.O.'s statements and then releasing him, had remained passive; two weeks later H.O. shot dead the applicant's mother.

The Court concluded that the Turkish authorities had not shown due diligence in preventing the violence and had therefore failed to protect the right to life of the applicant's mother.

Examining the depth of a State's due diligence obligation, it appears that the European Court applies a 'knew or ought to have known' standard.[58] Beyond the obligation to take action when an official complaint is lodged, or – under special circumstances – when the victims' complaints have been withdrawn

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57. *Nahide Opuz v. Turkey*, 9 June 2009*,* (Appl. 33401/02), at: http://www.kahdem.org.tr/?p=232, accessed on 12 August 2010. See: legal brief Interights of 21 July 2007 [§§ 8-22], at: http://www.interights.org/view-document/index.htm?id=237, accessed on 12 August 2010. Interights referred to: *Z and Others v. the United Kingdom* (Appl.29392/95) ECHR, 10 May 2001-V33 [§ 73]; *E and Others v. the United Kingdom* (Appl. 33218/96) ECHR 590, 26 November 2002. See: E/CN.4/2006/61, 20 January 2006 [§§ 20-23]*; A. v. the United Kingdom*, judgement of 23 September 1998 [§ 22], *Reports of Judgments and Decisions* 1998-VI [§22]; *Okkalı v. Turkey* (Appl. 52067/99) ECHR 2006 [§ 70,73-75]; *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* (Appl. 13178/03) ECHR 12 October 2006 [§ 53]*; Akkoc v. Turkey* (Appl. 22947/93) and (Appl. 22948/93) ECHR 10 October 2000 [§ 77]; *Isayeva and Others v. Russia*, (Appl.57947/00,57948/00 and 57949/00) ECHR 24 February 2005 [§§ 208-213]; *Menesheva v. Russia* (Appl. 59261/00) ECHR 2006 [§ 64]; 13 *M.C. v. Bulgaria* (Appl. 39272/98) ECHR 2003-XII [§ 151].

58. *Osman vs the United Kingdom*, *supra* note 55 [§ 116]. Interights' legal brief, *supra* note 57 [§ 14], referring to ECHR, *Z and Others v. the United Kingdom* (Appl. 29392/95), 10 May 2001-V33 [§ 73]; *E. and Others v. the United Kingdom* (Appl. 33218/96), 15 January 2003, ECHR 763 [§ 88]. See: UN Doc. E/CN.4/2006/61, 20 January 2006, pp. 20-23 [§§ 20-23, 88].

(*Nahide Opuz*), the Court has held that "even in the absence of an express complaint, an investigation should be undertaken if there are other sufficiently clear indications that [serious violations] might have occurred."[59] This should be understood in a context which is particularly opaque and where victims are often reluctant to report violence. Certainly in the event that prior cases of violence have been reported, there can be little doubt that the State has sufficient 'knowledge' to trigger the requirement of close scrutiny and adequate measures of protection. This is all the more apparent in situations of a general pattern of abuse, such as was the case in *Kaya v. Turkey.*[60] A particularly high degree of vigilance is then required of the State.

Along the same lines was *Maria da Penha v. Brazil* (2001), in which case the Inter-American Commission on Human Rights stressed that the State's obligation is not limited to eliminating and punishing violence, but also includes the duty of prevention.[61] Referring, amongst others, to the State duty defined in article 7(b) of the Convention of Belém do Pará to exercise due diligence to prevent human rights violations (section 7.4.1 *supra*), the Commission argued:

> This means that, even where conduct may not initially be directly imputable to a state (for example, because the actor is unidentified or not a state agent), a violative act may lead to state responsibility 'not because of the act itself, but because of the lack of due diligence to prevent the violation or respond to it as the Convention requires'.[62]

The Commission concluded that Brazil had violated Ms. Fernandes' rights by delaying for more than 15 years the prosecution of her abusive husband for the attempted murder, despite the clear evidence against the accused and the seriousness of the charges. The Commission found that the case could be viewed as "part of a general pattern of negligence and lack of effective action by the State in prosecuting and convicting aggressors." Subsequently, the specific obligation which the Convention of Belém do Pará imposes on States to take additional measures to affirmatively protect the rights of women – in particular, vulnerable groups of women such as migrant women and young women and girls – has been confirmed in *Ximenes-Lopes v. Brazil; Pueblo Bello Massacre v. Colombia*; and *Mapiripán Massacre v. Colombia.*[63]

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59. ECHR, *97 Members of the Gldani Congregation of Jehovah's Witnesses and 4 other v. Georgia,* 3 May 2007, Application. No. 71156/01 [§ 97].
60. *Mahmut Kaya v. Turkey,* 28 March 2000*,* (Appl. 22535/93), *ECHR 2000-III* [§ 127].
61. Inter-American Commission on Human Rights, *Maria da Penha v. Brazil,* Case 12.051, Report No. 54/01, OEA/Ser./L/V/II.111, doc. 20 rev. At 704 (2000), 16 April 2001 [§§ 5, 20, 54, 56, 58].
62. *Supra* note 61 [§ 20].
63. IACtHR, *Ximenes-Lopes v. Brazil,* Inter-Am. Ct. H.R. (ser. C) No.149, p. 85 (4 July 2006); *Pueblo Bello Massacre v. Colombia*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 140, p. 113 (31 January 2006); *Mapiripán Massacre v. Colombia*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 132, p. 111, (15 September 2005).

In *A.T. v. Hungary,* the CEDAW Committee expressed the view that Hungary had failed to fulfil its obligations and had thereby violated the rights of the individual under the CEDAW, including the Articles 2(e) and 5(a) (mentioned in section 7.4.1 *supra*).[64] The Committee recommends to Hungary to undertake the following remedies:

> [to] take immediate and effective measures to guarantee the physical and mental integrity of A.T. and her family; and [to] ensure that A.T. is given a safe home in which to live with her children, receives appropriate child support and legal assistance and that she receives reparation proportionate to the physical and mental harm undergone and to the gravity of the violations of her rights….[to] assure victims of domestic violence the maximum protection of the law by acting with due diligence to prevent and respond to such violence against women.

Despite the growing popularity of the standard of due diligence as a tool for promoting greater State accountability, this standard has also been criticised. Carin Benninger-Budel contends that the content and scope of due diligence obligations remain vague. Against the backdrop of contemporary issues that pose threats to women's rights, she has examined how the due diligence standard and other strategies can be applied as useful mechanisms to combat violence against women in various cultures worldwide.[65] With the same focus, a critical analysis was made in 2006 by Professor Ineke Boerefijn.[66] She opined that State efforts based on due diligence do not suffice. She argued that if violence against women is still daily practice in many countries, exercising due diligence is apparently not enough. She argues that a State must guarantee a satisfactory situation, *i.e.* without violence. In other words: the fulfilment of a human right obligation should not be measured by employing efforts, but – instead – by realising results.[67]

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64. CEDAW Commission*, A.T. v. Hungary*, Communication No. 2/2003, UN Doc. CEDAW/C/32/D/2/2003 (2005) [§§ 9.2, 9.6].
65. Benninger-Budel, C. (Ed.), *Due Diligence and Its Application to Protect Women from Violence* (Martinus Nijhoff Publishers, Nijhoff Law Specials, 2008), vol. 73.
66. I. Boerefijn, *De blinddoek opzij. Een mensenrechtenbenadering van geweld tegen vrouwen* [the blindfold put aside. A human right approach of violence against women], inaugural lecture of 8 December 2006, Maastricht University, the Netherlands, pp. 14-15.
67. Boerefijn, *supra* note 66, pp. 16-17. The same question has been raised in respect of the Ruggie proposal that companies should employ due diligence to avoid human rights abuses. Critical remarks were published after the release of the Ruggie Report (see section 7.5 *infra*) contending that corporate best efforts are not enough to avoid human rights abuses; it was argued that legal liability is needed to solve this problem.

7.4.3 Universal human rights norms for companies?

The preceding sections have described the development of the concept of due diligence obligations for States in international human rights law. The term has also surfaced in the debate on the responsibilities of corporations for human rights. Over the last two decades, a growing concern about human rights abuses or complicity thereto by corporate actors has emerged. Without intending to discuss this subject in depth, a few examples will be given in this section.[68] In 1995, people all over the world were concerned about the possible involvement of the Dutch-UK oil company Shell in the execution of Ken Saro Wiwa and other human rights abuses by the military regime in Nigeria.[69] In response to a communication alleging human rights abuses by the Nigerian government, the African Human Rights Commission (AHRC) stated in 2002, amongst others, that the Nigerian government should have protected its citizens from non-state actors with regard to the right to housing. The Commission also stressed that the government "should not allow private parties to destroy or contaminate food sources". Additionally, it referred to violations by private actors in the context of its finding of a violation of the right to life and integrity of the person.[70] Like other human right treaties, the regional human rights system of Africa does not provide for a mechanism where private parties can be held directly accountable for human rights violations under the ACHPR.[71] Nonetheless, the decision shows that this Commission explicitly acknowledged that the fulfilment of

68. For an overview hereof, see generally Clapham, *supra* note 33; Muchlinsky, P., *Human Rights and Multinational Enterprises* (Oxford: Oxford University Press, 2007); N. Jägers, *Corporate Human Rights Obligations: in Search of Accountability* (Intersentia: Antwerpen, 2002); and S. Joseph, *Corporations and transnational human rights litigation* (Hart Publishing: Oxford and Portland Oregon, 2004). See also: L. Enneking, 'Crossing the Atlantic? The political and legal feasibility of European Foreign Direct Liability Cases', in *The George Washington International Law Review*, Vol. 40, No. 4, 2009, pp. 903-938; and N.M.C.P. Jägers, M.J.C. Van der Heijden, 'Corporate human rights violations: The feasibility of civil recourse in The Netherlands,' in *Brooklyn Journal of International Law,* 33(3), 2008, pp. 833-870.
69. Chapter 9 (Shell in Nigeria).
70. African Human Rights Commission, *Social and Economic Rights Action Center/Center for Economic and Social Rights v. Nigeria*, ACHPR/COMM/A044/1 (27 May 2002) [§§ 2, 59-67]. The Communication and the decision of the Commission are available on: CESR, Nigeria, at: http://cesr.org/nigeria, accessed on 12 August 2010. See also: F. Coomans, 'The Ogoni Case Before the African Commission on Human and Peoples' Rights', in *International and Comparative Law Quarterly*, Volume 52, 2003, pp. 749-760. He draws attention to a *Note verbale* 127/2000 submitted in October 2000 to the Commission by the Nigerian Government. Then new President Obasanjo admitted that "there is no denying that a lot of atrocities were and are still being committed by the oil companies in Ogoniland and indeed in the Niger Delta area". The Commission concluded that ACHPR had been violated.
71. Jägers 2002, *supra* note 68, p. 219.

economic, social and cultural rights can be threatened by the behaviour of multinational corporations.[72]

Companies' behaviour can however also be tested under national law. In 1996, Wiwa's son and others commenced civil law proceedings against Shell in the US.[73] The cases were brought under the Alien Tort Claims Act (ATCA), a 1789 statute granting non-US citizens the right to file suits in US courts for international human rights violations, and the Torture Victim Protection Act (TVPA), which allows individuals to seek damages in the US for torture or homicide, regardless of where the violations take place. The original meaning and purpose of the ATCA are uncertain. However, scholars have surmised that the Act was intended to assure foreign governments that the US would act to prevent and provide remedies for breaches of customary international law, especially breaches concerning diplomats and merchants. The complainants against Shell also alleged that the company had violated the Racketeer Influenced and Corrupt Organisations Act (RICO) and New York state law.[74] These cases were settled in 2009.[75]

Other cases, often cited in the literature regarding human rights and business, concern the role of the oil companies Unocal Corporation (California) and Total S.A. (France) in Myanmar (formerly Burma). In 1997, villagers filed suits in the US against Unocal and Total under the ATCA, domestic US law, for alleged human rights violations connected with the construction of the Yadana gas pipeline.[76] In 1992, Total contracted with the Myanmar government to obtain rights to produce, transport, and sell natural gas from an offshore

72. Clapham, *supra* note 33, p. 434.

73. As Ken Saro Wiwa's family members did not feel safe in Nigeria anymore, they had moved to the US.

74. US District Court, New York, *Wiwa v. Royal Dutch Petroleum* (Shell), 28 February 2002, LEXIS 3293, Docket Nos. 99-7223[L]; US Appellate Ct, 2nd Circuit, 15 September 2000, LEXIS 23274; US Supreme Ct, *certiorari* denied (*certiorari* [cert.] is a type of writ seeking judicial review), 26 March 2001; US Appellate Ct, 2nd Circuit, *Royal Dutch Petroleum Co.* vs *Wiwa*, 14 September 2000, 226 F.3d 88; US Supreme Ct, *cert. denied*, 26 March 2001, 532 US 941. Selected legal documents can be found on: http://wiwavshell.org/resources/legal documents/, accessed on 12 August 2010.

75. Shell paid 15 million dollars to the plaintiffs. The plaintiffs set up a trust for the benefit of the Ogoni people. The Settlement Agreement and Mutual Release and the Kiisi Trust Deed, all dated on 8 June 2009, can be accessed at: http://wiwavshell.org/documents/Wiwa_v_Shell_agreements_and_orders.pdf, accessed on 10 May 2010.

76. US Appellate Ct, 9th Circuit, *Doe* vs *Unocal*, 18 September 2002, LEXIS 19263. The legal documents can be accessed Earth Rights, at: www.earthrights.org/legal/doe-v-unocal, accessed on 12 August 2010. The 9th Circuit rejected the district court's ruling that plaintiffs had to show Unocal's "active participation". Unocal also confronted the question whether forced labour was a violation of the law of nations for purposes of ATCA jurisdiction. The court had no difficulty concluding that it was, observing that "forced labor is so widely condemned that it has achieved the status of a jus cogens violation [of international law]" [at 29]. *Ius cogens* norms are norms of international law that are binding on nations even if →

location in Myanmar. The project involved construction and operation of a gas pipeline running through the interior of Myanmar to Thailand. Unocal obtained a 28 per cent interest in this project from Total. According to plaintiffs, the terms of the project called for the Myanmar Military to protect the gas pipeline. Plaintiffs alleged that the Myanmar Military forced them to work on and serve as porters for the pipeline project. Plaintiffs further alleged that in connection with security for the project, the Myanmar Military subjected them to murder, rape, and torture. Plaintiffs did not allege that Unocal employees physically carried out any human rights violations. Rather, plaintiffs claimed that Unocal was aware of the Myanmar Military's abuses, and that Unocal's involvement in the project and its dealings with the Myanmar Military rendered it liable for these abuses. In 2005, a settlement was reached. The parties released the following joint statement:

> The parties to several lawsuits related to Unocal's energy investment in the Yadana gas pipeline project in Myanmar/Burma announced today that they have settled their suits. (…) the settlement will compensate plaintiffs and provide funds enabling plaintiffs and their representatives to develop programs to improve living conditions, health care and education and protect the rights of people from the pipeline region. These initiatives will provide substantial assistance to people who may have suffered hardships in the region. Unocal reaffirms its principle that the company respects human rights in all of its activities and commits to enhance its educational programs to further this principle.[77]

In 2000, the Sub-Commission on Promotion and Protection of Human Rights (wound up in August, 2006), *i.e.* the main subsidiary body of the former UN Commission on Human Rights (UNCHR, which was replaced in 2006 by the UNHRC, the UN Human Rights Council[78]), had begun to analyse the possibilities for developing 'Universal Human Rights Norms for Companies'. The Sub-Commission was composed of twenty-six experts whose responsibility were to undertake studies, particularly in light of the Universal Declaration of Human Rights, and make recommendations to the UNCHR. These experts operated through seven thematic working groups. The Sub-Commission

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they do not agree with them. Crucially, the Ninth Circuit did not require that plaintiffs put forward evidence that Unocal knew "the precise crime that the principal intend[ed] to commit" or the manner in which its actions would lead to crimes by the Myanmar Military. Rather, it was enough that Unocal "knew that acts of violence would probably be committed [by the host government] as a result of Unocal's conduct, which included "payments" to the Myanmar Military and "instructions where to provide security and build infrastructure" [at 36, 62-63]. See also Clapham *supra* note 33, pp. 255-261.

77. Earth Rights, *supra* note 76, at http://www.earthrights.org/print/1362, accessed on 12 August 2010.

78. The UN Human Rights Council is a subsidiary body of the UN General Assembly. It was established by the UN General Assembly Resolution A/RES/60/251 on 15 March 2006 in order to replace the UNCHR.

had asked the Working Group on the Working Methods and Activities of Transnational Corporations to "contribute to the drafting of relevant norms concerning human rights and transnational corporations and other economic units whose activities have an impact on human rights."[79] The Working Group prepared a set of draft norms and disseminated this as widely as possible, so as to encourage governments, intergovernmental organisations, NGOs, transnational corporations, other business enterprises, unions, and other interested parties to provide any suggestions, observations, or recommendations. The comments received were evaluated and used for the final version of the norms. In 2003, the Sub-Commission unanimously adopted the 'Norms on the Responsibility of Transnational Companies and Other Business Enterprises with Regard to Human Rights' (the UN Draft Norms), and the Commentary thereto.[80] The Commentary on the Norms pointed to global trends which had increased the influence of multinationals on the economies of most countries and in international economic relations. It noted that these companies "have the capacity to foster economic well-being, development, technological improvement and wealth", but can also "cause harmful impacts on the human rights and lives of individuals through their core business practices and operations, including employment practices, environmental policies, relationships with suppliers and consumers, interactions with Governments and other activities." Furthermore, the Commentary drew attention to the fact that "new international human rights issues and concerns are continually emerging and that [companies] […] often are involved in these issues and concerns, such that further standard-setting and implementation are required at this time and in the future."[81] The UN Draft Norms recognise that "States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognised in international as well as national law, including assuring that transnational corporations […] respect […] human rights" (Norm A.1.). In addition, regarding business, the same norm requires: "Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law […]." The Commentary explains this norms as follows (under A.1.b.):

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79. UN Doc. E/CN.4/Sub.2/RES/2001/3, Resolution of 15 August 2001.
80. 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (2003) UN Doc. E/CN.4/Sub.2/2003/12Rev.; 'Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', UN Doc. E/CN.4/Sub.2/2003/38/Rev.2 (2003); Sub-Commission Res. 2003/16, UN Doc. E/CN.4/Sub.2/2003/L.11 at p. 52, 2003.
81. The Commentary also pointed at the OECD MNE Guidelines and the Global Compact Principles.

> Transnational corporations and other business enterprises shall have the responsibility to use *due diligence* in ensuring that their activities do not contribute directly or indirectly to human rights abuses, and that they do not directly or indirectly benefit from the abuses of which they are aware or ought to have been aware […]. Transnational corporations and other business enterprises *shall inform themselves of the human rights impact* of their principal activities and major proposed activities so that they can further avoid complicity in human rights abuses. [Emphasis added][82]

However, when the UN Draft Norms and the Commentary were presented to the then still existing UNCHR for approval, it turned out that there was not enough support among States for their adoption. In particular, the business community had widely advocated that it found the wording on the one hand to be very broad, causing ambiguity regarding their related legal duties, and on the other hand 'coming too close'. The latter argument related to the fact that self-regulation (see chapter 6) should do.[83]

Two years later, there was still complete uncertainty as to whether the Norms would form the basis for a legally binding instrument, and which monitoring mechanisms would be set up in order to ensure that they will be complied with. Due to the continuing lack of certainty on the application of human rights to companies, the UNCHR decided in 2005 to request the UN Secretary-General to appoint a Special Representative on the issue of human rights and transnational corporations and other business enterprises. Later on, this mandate was confirmed by the UNHRC, In 2008, the mandate was renewed and expanded. The post has been fulfilled from the beginning by Ruggie as was indicated in section 7.1. In particular, the Special Representative

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82. Commentary, *supra* note 80.

83. See *e.g.* S.S. Thorsen, A. Meisling, Perspectives on the UN Draft Norms, pp. 1-13; paper discussed at the IBA/AIJA conference on Corporate Social Responsibility held in Amsterdam in 2004, in which conference the author participated. The paper is available at: http://www2.ohchr.org/english/issues/globalisation/business/docs/lawhouse2.doc, accessed on 12 August 2010. The paper states: "The Norms are comprehensive seen in relation to core human rights conventions. Paragraph 12 serves as a "catch-all" paragraph; however, the paragraph does not offer much advise to business. From a preliminary analysis a few shortcomings to the remarkable work could be identified: (i) The Norms decided to include corporate environmental responsibility though this area is traditionally dealt with outside the human rights framework; (ii) The Norms have mixed a 'rights-based' approach with an 'issues-based' approach. The Norms emphasize in particular consumer protection and security personnel, though one could argue that there is no such need since human rights have to be protected within companies' total sphere of influence and in relation to all stakeholders; (iii) Some of the paragraphs are too far-reaching in scope when reading the wording of such paragraphs. However, the Commentary in most instances loosens the tough conditions prompted by first appearance. Other paragraphs are expanded in reach through the Commentary; (iv) Challenging concepts like the precautionary principle are adopted without clear descriptions. It is suggested to approach the formulation of Norms for business on a more straightforward rights-based formula taking the outset in the only universally agreed standards *i.e.* the International Bill of Human Rights", pp. 1-2.

was commissioned to develop a framework for providing more effective protection against corporate-related human rights abuses. This resulted in the report released in April 2008, *i.e.* the Ruggie Report, which attributes a prominent role to corporate due diligence, and in which Report many of the elements of the UN Draft Norms can be retraced, as will become apparent in the next section.

7.4.4 Conclusion on due diligence in human rights law

In sum, since the beginning of the 1990s, various international instruments have utilised the term 'due diligence' to qualify a State's legal duty to prevent human rights abuses. Various international human rights bodies have consistently followed the line that where a State does not undertake adequate action, it may be held internationally responsible for violations, also when they were committed by private parties. Furthermore, international courts have developed jurisprudence on positive obligations, which demonstrates that although the State obligation is not absolute, a State has to exercise 'due diligence' in preventing violations, protecting against them, and investigating, prosecuting and providing redress in the event of a breach. The term 'due diligence' also surfaced in the Commentary to the UN Draft Norms on the responsibility of companies regarding human rights, which was prepared by a working group of the former UN Sub-Commission on Promotion and Protection of Human Rights. Although the Draft Norms were not approved by the UNCHR, they can be considered the groundwork on which Ruggie proceeded with his framework.

7.5 Corporate due diligence as referred to by Ruggie

Against the background of corporate and human rights law standards as set out in the sections 7.2-7.4, it will be interesting to examine in which way the Ruggie Report describes *corporate* due diligence in relation to human rights abuses will be examined in this section. But firstly, a short exposé will be provided of Ruggie's point of view on business and human rights and complementary governance.

Research carried out at Ruggie's request showed that over the period 2005-2007 more than 320 corporate-related human rights violations were reported. Approximately 59 per cent of those violations were conducted by the companies themselves, the remainder concerned indirect corporate-related human rights abuses, through subcontractors, local governments or suppliers.[84] Many of the abuses occurred in the extractive industry and timber logging, but abuses in the consumer products supply chain were also noted. Corporate-related

84. UNHRC GA, 'A Survey of the Scope and Pattern of Alleged Corporate-Related Human Rights Abuse', UN Doc A/HRC/8/5, 23 May 2008 [§ 58 and Add.2].

human rights abuses often have environmental concerns too. Ruggie states that: "(…) environmental concerns were raised in relation to all sectors and translated into impacts on a number of rights, including the right to health, right to life, rights to adequate food and housing, minority rights to culture, and the right to benefit from scientific progress."[85] He mentioned that access to clean water "was raised in 20 per cent of cases, where firms had allegedly impeded access to clean water or polluted a clean water supply." Ruggie considers these abuses a consequence of economic globalisation.

7.5.1 Governance gaps versus accountability gaps

According to Ruggie, globalisation whereby the scope and impact of economic activity are global, as opposed to still mainly state-based law systems, has resulted in 'governance gaps' concerning business and human rights. The background of these 'governance gaps' can be found in the practice that international human rights treaties and the bodies established by them are apparently not sufficiently focussed on the role of companies in relation to human rights. These gaps "create the permissive environment within which blameworthy acts by corporations may occur without adequate sanctioning or reparation."[86] How to narrow and ultimately bridge the governance gaps in relation to human rights is what Ruggie sees as our fundamental challenge. From a human rights law perspective, however, these gaps have been referred to as 'accountability gaps', *i.e.* that corporate conglomerates need not account for their worldwide activities against the same standards everywhere.[87] Ruggie, though, chooses to refer to them as 'governance gaps' in order to emphasise

85. *Supra* note 84, p. 3.

86. Ruggie 2008, *supra* note 3, §3; UN HRC (22 April 2009) UN Doc A/HRC/11/13, 22 April 2009, §7.

87. *E.g.* presentation by Kamminga, M., 'Leidt de benadering van John Ruggie tot het sluiten van de 'accountability gap'?' [Does the Ruggie approach result in closing the accountability gap?], Symposium 'Mensenrechten en Bedrijfsleven' [Human rights and business], organised by Nederlands Juristen Comité voor de Mensenrechten [Dutch Committee for Human Rights] and the NGO Stand Up For Your Rights on 23 June 2009 in Amsterdam, the Netherlands, in which the author participated <http://media.leidenuniv.nl/legacy/Voorlopig_Programma_23juni09.pdf> accessed on 2 September 2009. See also: E. Duruigbo, 'Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges,' in *Northwestern Journal of International Human Rights*, Vol. 6, Issue 2, Spring 2008, pp. 222-261, at: http://www.law.northwestern.edu/journals/jihr/v6/n2/2/, accessed on 12 August 2010; C. Broecker, '*Better the Devil You Know' – Home State Approaches to Promoting Transnational Corporate Accountability*', Paper New York University School of Law, 2009, at: http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=christen_broecker, accessed on 12 August 2010; European Parliament, News, 'European Parliament Report Proposes Human Rights Global Governance of Businesses', 18 May 2009, at: http://www.globalgovernancewatch.org/on_the_issues/european-parliament-report-proposes-human-rights-global-governance-of-businesses, accessed on 12 August 2010.

that the current systemic problems can only be solved when governments, companies and civil society accept their common responsibilities in realising global governance.[88] His approach aspires to find pragmatic solutions supported by those actors who have to implement them in daily practice rather than to initiate a new legal path that can theoretically close the legal gaps (*e.g.* by proposing an international human rights treaty imposing duties directly on companies). The latter approach may take many years to become effective and enforceable; if the required international political support can be acquired at all. Criticasters of Ruggie's approach do not agree with him, and allege that his report only encourages 'good' companies to use due diligence but that it will not bring any change in respect of 'bad' companies' practices.[89]

In sum, the reality that compliance with human rights standards by business actors has not been effectively incorporated in human rights instruments can be considered a gap. Ruggie's framework intends to fill this gap by guiding

88. Presentation by Ruggie, Conference 'Business and Human Rights' (1 December 2008), Wassenaar, the Netherlands, at: http://www.oesorichtlijnen.nl/wp-content/uploads/Uitnodiging%20bedrijfslevendag.pdf and http://www.minbuza.nl/dsresource?objectid=buzabeheer:59586&type=pdf, accessed on 19 May 2010; Dutch Department for Foreign Affairs, '*2008 Rapportage over de uitvoering van de mensenrechtenstrategie*: *Naar een menswaardig bestaan*' [2008 Report on the Implementation of human rights strategies 'To a decent existence'], 27 March 2009, at: http://www.tweedekamer.nl/images/31263-27bijlage_tcm118-185145.pdf, accessed on 12 August 2010. This approach aligns with the idea that governments, business and civil society should operate as a partnership, an idea elaborated upon in the Earth Charter, which reads under 'Universal Responsibilities' [Preamble]: "to realize these aspirations, we must decide to live with a sense of universal responsibility, identifying ourselves with the whole Earth community as well as our local communities." *Supra* note 2 [§ 80].

89. *E.g.* Misereor/The Global Policy Forum Europe, *'Problematic Pragmatism – The Ruggie Report 2008: Background, Analysis and Perspectives*', June 2008, at: http://www.cidse.org/uploadedFiles/Publications/Publication_repository/policy_paper_Misereor_background_Ruggie_report_june08_EN.pdf, accessed on 12 August 2010. Their general reaction to the Ruggie Report is: 'Thus Ruggie's reports falls way short of the expectations of civil society organisations. With his "principled pragmatism" approach, Ruggie formulates what he feels is politically feasible given the forces that be in society but does not state what would be desirable and necessary to protect human rights. Although John Ruggie repeatedly stressed that he rejects any legally binding instruments to regulate companies at global level, because (i) treaty-making can be "painfully slow"; (ii) a treaty-making process "risks undermining effective shorter-term measures to raise business standards (…)", and (iii) serious questions remain "about how treaty obligations would be enforced"'. See also: C. Ochoa, American Society of International Law, ASIL Insights – Vol 12, No. 12, 18 June 2008, at: http://www.asil.org/insights080618.cfm, accessed on 12 August 2010; Amnesty International, Submission to the Special *Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and other Business enterprises,* July 2008, at: http://www.amnesty.org/en/library/asset/IOR40/018/2008/en/fa1e737c-6ad9-11dd 8e5e43ea85d15a69/ior400182008en.html, accessed on 12 August 2010.

companies on how to respect human rights. He relies on CSR as a tool to achieve this.

7.5.2 Ruggie's model for "complementary governance"

The Ruggie Report proposes to use a principle-based policy framework which rests on the concept of 'common but differentiated responsibilities' for the social actors, *i.e.* States, companies and civil society.[90] The framework mainly focuses on three founding principles: Protect, Respect and Remedy. These concepts are also used in human rights law and the UN Draft Norms, as has become apparent in section 7.4. These three principles or pillars are said to form a complementary whole in that each actor supports the others in achieving progress. The second pillar will be portrayed in this section.

Although the human rights regime "rests upon the bedrock role of States", the Ruggie Report stresses that companies have the responsibility to respect human rights, independently of States' duties. Whereas the State has a 'duty' to protect, Ruggie indicates that companies have a 'responsibility' to respect. The difference between a duty, *i.e.* a legal obligation derived from being party to international human rights conventions, and responsibility, which can only be considered a semi-legal or moral obligation, is remarkable.[91] It underlines that

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90. Although not very explicit, the same view can be found in the UN Draft Norms and the Commentary, which limit the corporate obligation to protect human rights to 'their respective spheres of activity and influence' (see section: 7.4.3 *supra*). The concept of 'common but differentiated responsibilities is well known in the fields of international environmental law and sustainable development. See *e.g.* A. Hildering, *International Law, Sustainable Development and Water Management* (Eburon-Delft, 2004), pp. 35-40, 149-150.

91. Prominent law firms have issued differing legal advices on how to interprete the legal impact of the Ruggie Report: Watchell, Lipton, Rosen & Katz LLP advises their clients that the Ruggie framework would "impose on corporations the obligation to compensate for the various deficiencies of the countries in which they perform their business". Martin Lipton & Kevin S. Schwartz of Wachtell, Lipton, Rosen & Katz, "*A United Nations Proposal Defining Corporate Social Responsibility For Human Rights"*, 1 May 2008, p. 1; available at: http://amlawdaily.typepad.com/amlawdaily/files/wachtell_lipton_memo_on_global_business_human_rights.pdf, accessed on 12 August 2010. On the other hand, Weil, Gotshal & Manges LLP explains to its clients that "the Special Representative's mandate does not include the ability to impose new binding legal obligations on corporations." Weil, Gotshal & Manges LLP – "*Corporate Social Responsibility for Human Rights: Comments on the UN Special Representative Report Entitled 'Protect, Respect and Remedy: a Framework for Business and Human Rights*", 22 May 2008, at: http://amlawdaily.typepad.com/amlawdaily/files/weil_gotshal_response_to_un_report_on_human_rights_and_business_final.pdf, accessed on 19 May 2010. In their view, a due diligence process can only bring issues to the attention of a company, having the effect that a company can avoid liability in the tort of negligence which uses the stricter threshold of reasonable foresight of harm. Due diligence prevents litigation rather than act as a trigger for it. Van Dam, C., 'Launch of the Report of the International Commission of Jurists 'Corporate Complicity & Legal Accountability" →

Ruggie did not wish to take a stance in the ongoing discussion regarding the question whether international human rights treaties apply to companies. Human rights lawyers typically argue that the norms captured in those treaties do apply.[92] Companies on the other hand, predictably take the stance that since companies are not parties to human rights treaties, the obligations set out therein have no direct application to them and are a concern of governments.[93]

Lack of jurisdiction under international treaties to try a company does not mean that a company is under no (international) legal obligation regarding human rights compliance. Beyond dispute is the fact that national laws can impose obligations of a human rights nature on companies (*e.g.* the examples mentioned in section 7.4.3 *supra*). Introducing national laws can be part of the State duty to protect. A failure to respect such laws can subject a company to domestic jurisdiction. In case of corporate-related human rights abuse, the question emerges which national law system is applicable: the host country's system or the multinational's home country? Another question is whether the applicable legal system offers adequate access to justice and remedies to victims of the violations?[94] These questions relate to the remedy pillar. They are difficult to answer, and are part of current studies and of discussion between

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(Lecture, London, 28 October, 2008) rightly points out that although John Ruggie's work does not focus on legally binding rules, his work will inevitably have impact on these rules, particularly in the area of due care: "In this respect, there is no clear line to draw between binding rules of care and voluntary rules of care. The concepts are mutually influencing each other […]. Moreover, this is a dynamic area of the law in which the standard of due care will evolve with the opinions in society. What was accepted as proper behaviour yesterday can be considered to be negligent behaviour today."

92. See *e.g.* Clapham, *supra* note 33, pp. 266-270, 317-334 tries to establish direct applicability on the basis of customary international law and human rights treaties' bodies' recommendations; Clapham, *Human Rights in the Private Sphere* (Oxford: Clarendon Press, 1993), pp. 137-138; Jägers 2002, *supra* note 68, pp 36-38, 47 grounds this view on the doctrine of *ius cogens* and/or through the horizontal application of human rights obligations, also known as *Drittwirkung*; Muchlinsky, *supra* note 68, pp. 514-518, 536 bases his on ethical business practice. See furthermore: Anna Triponel, 'Business & Human Rights Law: Diverging Trends in the United States and France', in *AM. U. INT'L L. REV.*, 2008, pp. 856-912.

93. Outlined by *e.g.* J. Abrisketa, 'Blackwater: mercenaries and international law', in *Fride Comment,* October 2007, at: http://www.fride.org/descarga/blackwater.english.pdf, accessed on 12 August 2010; P.W. Singer "War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law," in *Columbia Journal of Transnational Law*, Vol. 44, No. 2, 2004, pp. 521-549.

94. *Doe v. Unocal, supra* note 76: Unocal argued that the laws of Myanmar were applicable. Also, Shell argued that the Dutch court was incompetent in The Hague District Ct., *Oguru, Efanga, Vereniging Milieudefensie v. Shell*, The Hague District Ct, the Netherlands, (Doc. No. 2009/0579), 'Incidentele conclusie houdende exceptie van onbevoegdheid, tevens voorwaardelijke conclusie van antwoord in de hoofdzaak' [writ arguing *forum non conveniens* and defence by Shell] of 13 May 2009 (defence by Shell) under IV.7, available at: http://www.milieudefensie.nl/globalisering/activiteiten/shell/the-people-of-nigeria-versus-shell, accessed on 12 August 2010. With regard to enforcement, see also the →

policy makers and legislators.[95] But, as noted, Ruggie is not looking to become an arbiter in legal-theory disputes.

Interestingly, although the Report states that companies have a responsibility to respect human rights rather than a duty, it specifically explains that besides doing 'no harm', respecting human rights also entails to take 'positive steps'. The same approach was noted in section 7.4 *supra* in respect of the state duty to protect against human rights violations. States are also expected to employ proactive behaviour when it comes to protecting citizens against human rights violations by third parties, and, as recent case law shows, to preventing violations. Positive steps can, for example, imply that a company adopts a specific recruitment and training programme to implement anti-discrimination policy in a workplace.[96] In general, performing a due diligence exercise is depicted as a pre-condition and therefore a pivotal instrument for companies to realise their respect for human rights. The next sections will go into more detail on this corporate due diligence aspect.

7.5.3 The corporate duty to apply due diligence

Under the "corporate duty to respect human rights," the Report introduces the concept of due diligence.[97] It states:

> Yet, how do companies know that they respect human rights? Do they have systems in place enabling them to support the claim with any degree of confidence? Most do not. What is required is *due diligence* – a *process* whereby companies not only ensure compliance with national laws but also manage the risk of human rights harm with a view to avoiding it.[98] [Emphasis added]

The concept of corporate due diligence "describes the steps a company must take to become aware of, prevent and address adverse human rights impacts,"

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report of the Dutch Social Economic Council, 'Duurzame globalisering: een wereld te winnen' [on sustainable globalisation: a world to be won], SER Advisory Report, 2008-06E, p. 41, available at: http://www.ser.nl/~/media/Files/Internet/Talen/Engels/2008/2008_06/2008_06.ashx, which records about the difficult access to labour law lawyers in China.

95. Castermans, A.G., Van der Weide, J.A., 'De juridische verantwoordelijkheid van Nederlandse moederbedrijven voor de betrokkenheid van dochters bij schendingen van mensenrechten, arbeids-, of milieunormen in het buitenland' [the legal responsibility of Dutch holding companies for complicity of subsidiaries in regard of human right abuses, violations of labour and environmental norms], 15 December 2009, available at <http://www.p-plus.nl/beelden/castermans.pdf. An English translation is available at: https://openaccess.leidenuniv.nl/bitstream/1887/15699/2/ENG+NL+report+on+legal+liabilityof+parent+companies+(transl+31+May+2010).pdf, accessed on 12 August 2010; and Enneking, *supra,* note 68, pp. 910-913; Enneking, *supra* note 68, pp. 910-913.
96. Ruggie 2008, *supra* note 3 [§ 55].
97. Ruggie 2008*, supra* note 3 [§ 25].
98. Ruggie 2008*, supra* note 3 [§ 25].

which according to the Report includes considering the international Bill of Human Rights and the core ILO Conventions.[99] In a footnote, Ruggie referred to the definition of due diligence provided by Black's US Law Dictionary: "the diligence, [*i.e.* such a measure of prudence, activity, or assiduity, as is] reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or discharge an obligation."[100]

Ruggie has indicated that he will develop practical guiding principles on due diligence in his mandate extension. Nonetheless, already in a number of reports produced by him, or by experts at his request, we find clear suggestions as to how to conduct a due diligence process. As an overall comment, the Ruggie Report asserted that the process must be "inductive and fact-based".[101] When searching for the standard of knowledge that companies should aspire towards, Ruggie proposes to use the 'should have known' standard:

> Legal interpretations of "having knowledge" vary. When applied to companies, it might require that there be actual knowledge, or that the company "should have known", that its actions or omissions would contribute to a human rights abuse. Knowledge may be inferred from both direct and circumstantial facts. The "should have known" standard is what a company could reasonably be expected to know under the circumstances.[102]

The same standard – have or ought to have knowledge – is used in international law (section 7.4.2 *supra*). Also in corporate law, due diligence implies a duty to investigate and to acquire knowledge. Certainly when professional parties are involved, a similar standard is often used: could the party have known the facts if he had conducted adequate due diligence (section 7.3.2 *supra*)?

As regards the scope of the due diligence investigation, the Report contended: "The scope of human rights-related due diligence is determined by the context in which a company is operating, its activities, and the relationships associated with those activities."[103] Evidently, three sets of factors

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99. Ruggie 2008, *supra* note 3 [§ 58]. The Bill of Rights consists of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights with its two Optional Protocols and the International Covenant on Economic, Social and Cultural Rights. The 1998 ILO Declaration on Fundamental Principles and Rights at Work declares four core principles as laid down in several separate conventions to be applicable to all Member States regardless of ratification, as these principles are considered to lie at the heart of the ILO's *raison d'être* (Article 2). The Conventions relating to the following rights must be respected, promoted and realised: (1) freedom of association and the effective recognition of the right to collective bargaining; (2) the elimination of all forms of forced or compulsory labour; (3) the effective abolition of child labour; and (4) the elimination of discrimination in respect of employment and occupation.
100. *Black's Law Dictionary*, 8th edition, West Group, United States, 2006. Ruggie 2008, *supra* note 3 [§ 25].
101. Ruggie 2008, *supra* note 3 [§ 57].
102. Ruggie 2008, *supra* note 3 [§ 79].
103. Ruggie 2008, *supra* note 3 [§ 25].

need to be considered when undertaking a due diligence investigation: (i) the country context in which the corporate activities take place; (ii) the human rights impacts that the activities may have within such a context; (iii) whether the company might contribute to abuse through the relationships connected to its activities.[104] These factors will be further addressed in the following subsections.

7.5.4 The country context

Pertaining to the country context, it has been indicated that: "A company should be aware of the human rights issues in the places in which it does business in order to assess what particular challenges such context may pose for them."[105] That means that a company is to take the time and effort to study the particularities of the country and its political context before taking the final decision to go there and to become involved. This may sound obvious to a human rights lawyer, but the reader should bear in mind that companies are primarily focussed on business opportunities. It is more probable that attention will be paid to the cost of labour rather than to any local labour-related human rights issues. Even so, it is more likely that a company will invest time in searching for the best quality of a certain material or product than in investigating whether there are any human rights issues concerning the supply chain. Actually, the information is easy to find, as Ruggie points out: "Such information is readily available from reports by workers, NGOs, Governments and international agencies."[106]

It is useful to illustrate the 'country-context issues'. As regards safety issues, a company feels a responsibility to its employees, especially its expat employees. It hires cars for them with security guards, or it arranges expat housing in special guarded compounds including the provision of schooling facilities for their children.[107] Companies usually try to protect their employees from harm whilst living abroad and working for the company. If a company didn't do that and an accident were to occur, it would prove difficult in the future to find employees who would be willing to take on such a challenge. At the same time,

104. Ruggie 2008*, supra* note 3 [§ 57].
105. UN HRC (General-Assembly), 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (John Ruggie) – Implications of "complicity" and "sphere of influence"', 15 May 2008, UN Doc. A/HRC/8/16 [§ 20].
106. Ruggie 2008-2, *supra* note 105 [§ 20].
107. Shell 'Security in Nigeria', at: http://www.shell.com/home/content/nigeria/about_shell/issues/security/security.html, accessed on 12 August 2010. Also see: Pepsi – Cola website, at: http://www.pepsico.com/, accessed on 12 August 2010. Since 2002, safety of employees is a core value 'The New Pepsi Challenge: World Class Safety', at: http://ehstoday.com/safety/ehs_imp_78693, accessed on 12 August 2010.

companies – in general – are less apprehensive when problems tend to occur concerning local employees or subcontractors. Even less so when human rights abuses occur against local people beyond their visual field.

Imagine the situation in which a company acquires a licence to start a soya or palm oil production on a large area of land, or buys a piece of land for mining or for constructing a factory. At the moment the company obtains the ownership documents or the exploitation rights from the 'competent authorities', the area will supposedly have been 'cleared', and the company will not see any reason to ask 'difficult questions about human rights compliance'. Companies usually consider human rights a public matter. The company will regard its project and the jobs it will generate as a positive contribution to the local economic development. However, the reality in many emerging and developing countries is that former inhabitants of such land have commonly not been asked for their consent to relocate; nor have they been compensated. Also, people of neighbouring areas have typically not been consulted about the new plan to allow factory operations. An assessment of potential risks for neighbours in connection with the future pollution of the soil, water or air, has often not been conducted. The behaviour of the local authorities might even be in violation of existing domestic laws.[108] In any case, a possible result for the local people is that they have lost their home and also the possibility to live in a traditional agricultural setting. For them, there is no other choice left than – when lucky – taking up a job in the new factory.[109]

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108. UN HRC (General Assembly), 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises: Further steps toward the operationalization of the "protect, respect and remedy" business & human rights' (9 April 2010), UN Doc. A/HRC/14/27 [§§ 66-67]. And see: UN Secretary General 'Introduction to human rights due diligence', 5 April 2010, at: http://www.srsgconsultation.org/index.php/main/discussion?discussion_id=7, accessed on 12 August 2010.

109. Examples: The operations of Vedanta Resources Plc, a mining corporation in India resulting in the ecological degradation that threatens the livehoods of many Indian tribal people; see: Report of the Joint Committee on Human Rights of the UK House of Lords, House of Commons, First Report of Session 2009-10, Vol. II, 16 December 2009, pp. 137-139, 161-164, 182, at: http://www.publications.parliament.uk/pa/jt200910/jtselect/jtrights/5/5ii.pdf, accessed on 12 August 2010; the British mining company, Monterrico Metals, started an exploitation project without the proper consent of local communities in Peru that led to violence and torture, see: *The Indigenous World 2006,* p. 175; the operations of Shell Nigeria resulted in misery in the Ogoni Delta; see Chapter 9 (Shell in Nigeria); Indigenous people from Talsa village in Northern Jharkhand in India face displacement as a result of nearby open-cast uranium mine – the Uranium Corporation of India Ltd, 25 May 2009; *The Indigenous World 2006,* p. 397; the Canadian-based Barrick Gold Corporation was involved in the displacement of more than 1000 people in Papua New Guinea who were forcibly evicted, by police officials, who burnt their homes; see: J. Catalinotto, *Papua New Guinea's Indigenous people v. Barrick Gold*, 6 June 2009, at: http://www.workers.org/2009/world/papua_new_guinea_0611/, accessed on 12 August 2010.

Consequently, companies can contribute substantially to the reduction of human rights offences by doing their homework and considering local human rights issues to be a part thereof. Getting a better grip on these challenges will pave the way for finding solutions. Dealing in a responsible way with the rights of local communities will help a company in the long run to be appreciated and to maintain its 'licence to operate'.[110]

The Ruggie Report takes the position that when companies do business in failed states and conflict zones, they need to implement an even more proactive corporate human rights policy. This is required in order to prevent human rights abuses by the company itself or complicity through the involvement of or cooperation with third parties.[111] Failed states are characterised by: (i) an absence of the Rule of Law; (ii) generally a governance breakdown; and/or (iii) a pattern of sustained violence.[112]

Illustrative of the importance to perform a study of the country risks is the case *Presbyterian Church of Sudan v. Talisman Energy, Inc*. In 1998, the Canadian oil company, Talisman Energy, Inc. ('Talisman') acquired a 25 per cent stake in the Greater Nile Petroleum Operating Company Limited, a joint oil and pipeline development in Sudan, when it purchased the Canadian company Arakis Energy Corporation. Later-on, Talisman was accused of committing gross human rights violations, *e.g.* complicity with the Sudanese government in forced displacement of non-Muslim Sudanese living in the area of Talisman's oil concession. In 2001, the Presbyterian Church of Sudan and thirteen Sudanese individuals, filed suit in a US court under the Alien Tort Claims Act against Talisman. After a campaign by NGOs targeting institutional investors, Talisman decided to leave Sudan. It sold its stake.[113]

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110. Coca Cola lost its licence to operate in the Indian State of Kerala for at least a year in 2004/2005 due to the fact that the local communities were suffering droughts and did not allow Coca Cola to use groundwater. See: about this conflict: '*The Right to Water under the Right to Life: India*', at: http://www.righttowater.org.uk/code/legal_7.asp, accessed on 12 August 2010; Indian Resource Center, '*Coca-Cola spins out of control in India*', 15 November 2004, at: http://www.indiaresource.org/campaigns/coke/2004/cokespins.html, accessed on 12 August 2010; '*Compensation claims against Coca-Cola to move forward*', 14 October 2008, at: http://www.indiaresource.org/news/2008/1056.html, accessed on 12 August 2010; '*Coca-Cola Liable for US$ 48 Million for Damages – Government Committee*', 22 March 2010, at: http://www.indiaresource.org/news/2010/1003.html, accessed on 12 August 2010; Coca Cola Company, *Sustainability Review* (2006; 2007/2008; 2008/2009), p. 31, at: http://www.thecoca-colacompany.com/citizenship/pdf/2008-2009_sustainability_review.pdf, accessed on 12 August 2010. P. Senge, 'Unconventional Allies: Coke and WWF Partner for Sustainable Water', in: *The Necessary Revolution. How Individuals and Organisations are Working Together to Create a Sustainable World* (Doubleday: NY, 2008), pp. 77-95.

111. Ruggie 2008*, supra* note 3 [§ 48].

112. Ruggie 2008*, supra* note 3 [§ 47].

113. Second District, New York, *Presbyterian Church of Sudan v. Talisman Energy, Inc*, 12 September 2006, 453 F. Supp. 2d 633, pp. 641-661 and US AppelateCt 2d Circuit, 2 October 2009, US Doc. No. 07-0016-cv. The US District Court held that to establish →

As Ruggie pointed out in a meeting in the Netherlands where he presented his framework, we are not talking 'rocket science'.[114] With a common sense approach it will soon be clear whether an investment or transaction takes place in a failed state and whether the company's activities will contribute to human rights abuses. He mentioned as an example that if a company furnishes gas to a local military vehicle, it has to question itself if that vehicle could cause any harm to local people. If so, he commented, abstain, cancel the transaction or withdraw your business.

7.5.5 The human rights impact

Regarding the second factor which forms part of the due diligence process proposed by Ruggie, *i.e.* the human rights impacts, the Report explains that: "A company should analyse potential and actual impacts arising from its own activities on groups such as employees, communities, and consumers."[115] It is recommended that a basic human rights due diligence process should include the following elements:[116]

- *Policies*. Companies need to adopt a human rights policy.
- *Impact assessments*. Companies must take proactive steps to understand how existing and proposed activities may affect human rights. The scale of a human rights impact assessment will depend on the industry involved and the national and local context. Assessments should take place on an ongoing basis. Special attention should be paid to assessing impacts before major internal decisions or changes that could have human rights implications, such as new market entry, a merger or joint venture, a new product launch, or an internal policy change. Generally, broader periodic assessments are necessary to ensure that no significant issue is overlooked. Any assessment

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accessorial liability for violations of the international norms prohibiting genocide, war crimes, and crimes against humanity, plaintiffs were required to prove, *inter alia*, that Talisman provided substantial assistance to the Government of the Sudan with the purpose of aiding its unlawful conduct. The Appelate Court agreed, and affirmed dismissal on the ground that plaintiffs had not established Talisman's purposeful complicity in human rights abuses. See on this case: S. J. Kobrin, Oil and Politics: Talisman Energy and Sudan, in *International Law and Politics*, Vol. 36, No. 2/3, 2004, pp 425-456, at p. 426. S. J. Kobrin, 'Who Has the Obligation to Protect and Respect Human Rights: The Problem of Responsibility in a Networked World Economy', Paper summary presented in Workshop III, HiiL Conference, pp. 21-24, at: http://www.lawofthefuture.org/assets/693/AC2009_outlines.pdf, accessed on 12 August 2010.

114. Presentation Ruggie, *supra* note 88.
115. Ruggie 2008-2, *supra* note 105 [§ 21].
116. Ruggie 2008-2, *supra* note 105 [§§ 60-63]; Ruggie 2010, note 108 [§§ 85, 59]; and Sherman, note 6.

should include explicit references to internationally recognised human rights.
- *Integration.* Leadership from the top is essential to embed respect for human rights throughout a company, including in key processes such as resource allocation, recruitment, procurement and the evaluation of employees and divisions. Also, training is essential to ensure consistency, as well as capacity to respond appropriately when unforeseen situations arise. Employees should be trained, empowered, and incentivised to fulfil their company's responsibility to respect human rights.
- *Tracking and reporting performance.* Regular updates of human rights impact and performance are crucial Adequate oversight should be instituted to ensure that the responsibility to respect is being met, for example by incorporating it into the control systems and assigning managerial or Board accountability. Confidential means to report non-compliance, such as hotlines, can also provide useful feedback on how the company's human rights programme functions.

The Ruggie framework insists that each of these components is essential, and that without them, a company cannot know and show that it is meeting its responsibility to respect rights. Where 'due diligence' in human rights law mainly is used as a standard to test whether a State Party has applied adequate measures to protect individuals and to prevent human rights abuses, the Ruggie framework bases itself on the concept of due diligence as a process as it is known in the corporate due diligence practice. But the corporate due diligence investigations set out in the sections 7.2 and 7.3 were mostly event-driven, *i.e.* necessary in the event of an intended IPO, merger, acquisition or finance agreement. The Ruggie framework however, aims for an on-going process. It recommends that conduct 'broader periodic assessments' be conducted in addition to the *ad hoc* assessments. Pondering on the four elements presented above leads to the supposition that they follow the same lines as corporate in-house programmes to avoid corruption.[117] They also resemble the elements that form part of a corporate internal control & management information process such as the COSO framework, introduced in the US, and referred to by various corporate governance codes and acts.[118] Using an internal control & management information process is essential for governing a large company. It is also necessary to generate reliable and complete information for the preparation of annual accounts, annual reports and sustainability reports. To include questions on corporate human rights performance in these types of corporate risk management programmes would

117. See section 5.5 of this book (Corporate anti-corruption programmes).
118. See section 5.2 of this book (Internal control). *E.g.* the Dutch Corporate Governance Code (Frijns Code); the UK Corporate Governance Code (Combined Code); the US Sarbanes-Oxley Act, sections 302 and 404.

not be a big step. In that respect, companies could use the guidance offered by frameworks developed for the HRIAs. They contain the relevant questions and provide assistance in measuring and understanding corporate human rights impacts. It would be practical to integrate an HRIA, because all risks and issues material to the company, would then become apparent in one oversight system, which makes it easier for management to deal with them. It could serve dual purpose: to manage the risks to the company and the risks to society.[119]

7.5.6 Third party relationships

The third factor concerns third-party relationships. The issue here is to examine whether the company might contribute to human rights abuse through any external relationships connected with its activities. The Ruggie Report recommends analysing the track records of third parties – with which the company intends to do business – in respect of the use of violence and corruption. The question is whether the company might be associated with harm caused by such entities.[120] Third parties include new joint venture partners, subcontractors, agents, suppliers and local authorities. Most business transactions involve cooperation with local partners. The fact that Ruggie mentions third-party conduct as part of the corporate due diligence investigation reflects a wide view of the scope of the responsibility of the business actor. Based on this view, a company cannot discharge its responsibility to respect human rights by hiring agents to perform, or by subcontracting to local parties, any 'painful or difficult' parts of the operations, *i.e.* those activities that may be at risk of human rights abuses. For example, standard business practice is to hire external (local) security forces to protect company assets such as installations or buildings. If an investigation would reveal that such a security firm has a violent track record, the company should reconsider if this is the right firm to hire. There might be others with a better track record.

Another situation in which a company deals with third parties is the supply chain. Following Ruggie's line of reasoning, a buyer of raw materials or products is supposed to ascertain that these have been produced without violating human rights. This can be done by executing a due diligence assessment into critical stages of the product chain.[121] In addition, what can be done is to make these concerns part of the contractual agreements. Interesting

119. Ruggie 2010, *supra* note 108 [§ 69], noted that there are situations in which the company harms human rights and, in doing so, it may also be non-compliant with existing securities and corporate governance regulations by failing to disclose and address stakeholder-related risks.

120. Ruggie 2008-2, *supra* note 105 [§ 22].

121. Ruggie 2008-2, *supra* note 105 [§ 59]. An example thereof has been demonstrated in the G-Star case, where assessments were carried out by professional audit companies. See: Chapter 10.1 (The International CSR Conflict and Mediation).

corporate best practices are those introduced by Philips, G-Star, Nike and Wal-Mart.[122] These companies have included explicit People and Planet considerations in their suppliers' contracts. Human rights violations will then qualify as an 'event of default' which, if not solved, can lead to the termination of the business relationship. Mainstream banks such as the Dutch RABO and British Barclays Bank impose on borrowers the obligation that they guarantee a non-violation of human rights by their business activities. In case of default, ultimately, the loan can be withdrawn.[123] An interesting decision on supply-chain issues has been rendered by the UK NCP in the *Afrimex case*. An English-Congolese raw material trader was questioned about allegations that child labour was used by its suppliers. The trader, or its supplier, was also said to have paid monies ('taxes') to rebel groups that controlled the area of the mines. The NCP came to the conclusion that the trader had not applied "sufficient due diligence to the supply chain and failed to take adequate steps to contribute to the abolition of child and forced labour in the mines or to take steps to influence the conditions of the mines". Applying the due diligence recommendations of Ruggie, the NCP stated that the trader had not investigated the complaints in depth.[124]

A third category of 'third-party relationships' concerns a company's ties with the local authorities. In section 7.5.4, examples were given of human rights violations by local authorities in connection with (future) corporate activities. *E.g.* 'cleaning up' the land often implies forced relocation and violating local people's rights to shelter and food. Even so, if a State does not effectively impose on companies measures to avoid pollution, this can violate people's right to health.[125] This category appears the most difficult one to put into practice. The reason is that it is difficult to determine how far back in time a company should go in investigating the acts conducted by local authorities, or how many links of a supply chain should be investigated. The answer to these questions depends on the type of product and industry. Best practices will develop and change over time as opinions on these issues sharpen. Ruggie has explored whether concepts such as

122. See section 6.7 of this study.
123. Knowledge from corporate law practice. See further: the 'Rabo Annual Sustainability Report 2008' at: www.rabobank.com/content/news/news_archive/053-Annualsustainabilityreport2008.jsp; Rabobank 'Group's Statement on Human Rights', 2002, updated 2006, at: www.rabobank.com/content/images/Human_Rights_Statement_tcm43-37344.pdf; and Barclays Bank's 'Managing environmental and social risks in lending', at: http://group.barclays.com/Sustainability/Responsible finance/Environmental-and-social-risk-in-lending. All sites accessed on 12 August 2010.
124. Final statement by the UK NCP: *Afrimex (UK) Ltd*, 28 August 2008, at: http://www.berr.gov.uk/files/file47555.doc, accessed on 12 August 2010. NCPs are established in most of the OECD Member States and OECD Adhering States. Complaints about corporate conduct allegedly violating the OECD MNE Guidelines can be filed with the NCP of the Member State that is the home state of the company involved. NCPs offer good services to mediate such complaints and – if unsuccessful – they publish a decision on the case.
125. Chapter 9 (Shell in Nigeria) and the examples provided in note 109.

'sphere of influence' and 'complicity' can assist in answering these questions. He issued a detailed report thereon.[126] As regards 'complicity,' he indicated that this "remains an important concept because it describes a subset of the indirect ways in which companies can have an adverse effect on rights through their relationships. A proper process of due diligence helps companies to manage risks of complicity in human rights abuses." Ruggie thus linked 'complicity' to the third factor of a due diligence process. In respect of 'sphere of influence,' Ruggie declared that this "is too broad and ambiguous a concept to define the scope of due diligence with any rigour."[127] He pointed at the fact that there are two very different meanings of 'influence': "One is 'impact', where the company's activities or relationships are causing human rights harm. The other is whatever 'leverage' a company may have over actors that are causing harm or could prevent harm." According to Ruggie "impact falls squarely within the responsibility to respect; leverage may only do so in particular circumstances."[128]

7.5.7 Due diligence: when?

As has become apparent from the various reports of the Special Representative, a company is typically expected to perform a human rights due diligence investigation in a situation where it intends to engage in new operational contracts with a local government or with a local third party. In comparison, in precisely such situations, companies obtain the services of forensic accounting firms that have in-depth knowledge of the country and the business to perform due diligence operations to uncover possible corrupt practices or accounting fraud.[129] The motivation for a company to do so can be varied: trying to be a responsible corporate citizen, or a fear of falling within the jurisdictional ambit of the US Foreign Corrupt Practices Act.[130] It would not be too big a hurdle to add to the investigation team one or more HRIA specialists in order to find out about the local human rights situation.

The same remark is valid for a situation in which a company plans to acquire a local company or to purchase operational assets or land to expand its business operations. As has been demonstrated in section 7.3 *supra*, in such a situation,

126. Ruggie 2008-2, *supra* note 105 [§ 4]. Also: International Commission of Jurists 'Corporate Complicity and Legal Accountability', in *Criminal Law and International Crimes*, Vol. 2, 2008, p. 24. In Ruggie 2010, *supra* note 108, [§§ 74-76], Ruggie hinted at various companies that have been implicated in human rights-related international crimes and argues that proper due diligence might prevent such situations.
127. Ruggie 2008-2, *supra* note 105 [§ 4].
128. Ruggie 2008-2, *supra* note 105 [§ 12].
129. For example: KPMG International – Forensic Services, at: http://www.kpmg.com/SG/en/WhatWeDo/Advisory/Transactions_Restructuring/Forensic/Pages/default.aspx and Daylight Accounting, at: www.daylightforensic.com/, accessed on 12 August 2010.
130. See section 5.2 (Corruption and corporate governance).

any well organised company will perform a commercial, legal and tax due diligence investigation.

Furthermore, regarding all existing operations, the Ruggie Report advises carrying out human rights due diligence assessments on an on-going basis. This could for instance be included in the annual process that a company has to go through to collect the relevant information to have its tax return, annual accounts and report, and – as the case may be – its sustainability report prepared.

7.6 HRIA tools and sector approaches

The myriad of human rights conventions and other instruments are very important but sometimes not very practical to work with – implying thousands of pages and often in a difficult 'legal language'. Over the years international human rights law has been 'translated' into practical frameworks for business actors, *i.e.* the HRIA instruments. Some even offer an industry-specific approach. Scientific institutions, NGOs and human rights consultants have developed these HRIAs and it is they that conduct them.[131] Business can profit from their knowledge and skills. An HRIA is basically an assessment of the affairs of a company which reveals (potential) human rights impacts of the company's activities, leading to recommendations on how to improve performance. In addition, the process will help a company to gather information for its public reporting, and hence improve internal information streams, which will ultimately contribute to a better corporate performance as risks can be better dealt with. HRIAs seem perfectly adapted to be used in the due diligence suggested by Ruggie. The most familiar ones are:

- Human Rights Compliance Assessment (Danish Institute for Human Rights);[132]
- Human rights indicators for sustainability reporting – GRI G3 guidelines (GRI);[133]
- Global Compact: Human Rights Translated – A Business Reference Guide (Monash University, Australia); and
- Guide for Integrating Human Rights into Business Management (online tool; 2nd edition 2009) (Business Leaders Initiative on Human Rights).[134]

Since every company is organised differently, due diligence processes come in various forms. The Ruggie Report anticipates that a company's approach depends on "the country context, the nature of the activity and industry, and

131. See *supra* note 13.
132. For example: Shell cooperated with the Danish Institute for Human Rights concerning the development of this instrument. See Human rights training, tools and guidelines, http://www.shell.com/home/content/environment_society/society/human_rights/training_tools_-guidelines/, accessed on 12 August 2010.
133. It is noted that the G3 connects to the Global Compact Principles and the Earth Charter. For a company that adheres to one or both of these codes, the G3 makes it easy to report on human rights compliance. See two reports of GRI, 'A Resource Guide to Corporate Human Rights Reporting' and 'Corporate Human Rights Reporting: An Analysis of Current Trends', 2009, http://www.globalreporting.org/CurrentPriorities/HumanRights/, accessed on 12 August 2010.
134. All HRIAs listed have websites explaining their tool. For BLIHR, see: http://www.human-rights-matrix.net/assets/ES%20final.pdf, accessed on 12 August 2010. See also: *supra* note 13.

the size of investment."[135] It is expected of a company that it performs a more detailed due diligence assessment concerning its own operations and subsidiaries abroad, than in regard to suppliers that are several links away from the company's activities.[136]

An interesting example of how to differentiate human rights issues per industry can be found in the report by the UN Special Representative on the Right to Health. In cooperation with the UK-based pharmaceutical multinational company GlaxoSmithKline (GSK), he has prepared a report containing many practical recommendations.[137] In order to address any potential negative impacts, the report proposes that pharmaceutical companies adhere to clear ethical guidelines when testing on people, especially when it concerns people in developing countries, as poor people tend to be more susceptible to participating in unhealthy experiments that generate some income. Other recommendations emphasise that a pharmaceutical company can contribute to fulfilling the Right to Health.[138] Examples are:

- providing access to medicine by extending the company's supply channels in order to bring the medicines closer to the people, also those living in rural areas;
- to provide good quality, up-to-date and clear instructions on how to use the medicine, the safety aspects and side-effects; in relevant languages, if useful illustrated by drawings for illiterate people;
- developing medicines that can resist variations in temperature as electricity for cooling is not always reliable in developing countries;
- cooperating with local companies in the production of generic medicines and controlling quality;
- prices should be differentiated in line with local living standards;

135. Ruggie 2008-2, *supra* note 105 [§ 23].
136. Ruggie 2008-2, *supra* note 105 [§ 24].
137. Report 18 May 2009; UN Doc. A/HRC/11/12/Add.2. Various scandals have been reported over the years. See, for example, 'Pfizer to Pay $75 Million to Settle Trovan-Testing Suit', *Washington Post*, 31 July 2009, at: www.washingtonpost.com/wp-dyn/content/article/2009/07/30/AR2009073001847.html ('Pfizer signed a USD 75 million agreement with Nigerian authorities to settle criminal and civil charges that the pharmaceutical company illegally tested an experimental drug on children during a 1996 meningitis epidemic'), website accessed on 12 August 2010.
138. GSK and other pharmaceutical companies are also active in establishing public-private partnerships (PPPs) aimed at contributing to the Millennium Development Goals. See GSK '*Corporate Social Responsibility Report 2008*', at: http://www.gsk.com/responsibility/downloads/GSK-CR-2009-full.pdf, pp. 37, 59-61, 72, 73, accessed on 12 August 2010.

- invest in research and development in treatment for neglected tropical diseases, *i.e.* diseases that only occur in the Third World and for which treatment is not very profitable;[139]
- providing licences to developing States, including non-exclusive commercial voluntary licences and non-commercial voluntary licences, in order to ensure an adequate access to medicines;[140]
- use impact assessments to help pharmaceutical companies to ensure that their human rights policy is consistently integrated across all of the company's activities;
- disclosure and transparency activities of pharmaceutical companies and their subsidiaries (disclosure of all advocacy and lobbying positions and the impact of companies' activities); and
- appropriate accountability and monitoring mechanisms for pharmaceutical companies (including external monitoring mechanisms, such as an Ombudsman with oversight of a company's human rights responsibilities, including those relating to access to medicines).

Other industries have also developed codes of conduct including human rights standards specific to the industry. These standards are useful when determining the scope and extent of a due diligence process. For example, the garment industry can follow the Social Accounting 8000 standards and audit regime aimed at managing ethical workplace conditions throughout the global supply chain (SA 8000). This approach has found satisfactory solutions to respect human rights in countries that do not recognise the freedom of association and collective bargaining.[141] The extractive industry has developed various codes of conduct. Some pertain to security issues, including instructions on how to deal with private security forces (*e.g.* VPSHR); others pertain to avoid corruption and complicity with governmental abuses (*e.g.* PWYP and

139. *E.g.* tuberculosis, malaria, blinding trachoma, buruli ulcers, cholera, dengue/dengue haemorrhagic fever, racunculiasis, fascioliasis, human African trypanosomiasis.
140. Non-exclusive voluntary licences are meant to increase access, in low-income and middle-income countries, to all medicines. Exclusive licences, on the other hand, based on the Western intellectual property regime, hinder access to medicines because the treatment becomes unaffordable for the local population in developing and least developed countries. *E.g.*, GSK grants voluntary licences on a case-by-case basis. It granted its first voluntary licence in 2001 for producing and selling ARVs to Pharmacare, sub-Saharan Africa's largest generics company. The licence now covers both the public and private sectors across sub-Saharan Africa; *Supra* note 137 [§ 75].
141. *E.g.* Article 4.2 of the SA 8000 guidelines suggest to implement human rights grievance committees and employees' representative bodies. See: www.sa-intl.org, accessed on 12 August 2010.

EITI).[142] Large infra-structural projects are frequently (partly) financed by multilateral financial institutions such as the World Bank or the International Finance Cooperation (IFC). These organisations impose their own human rights standards on lenders, such as that people will be duly compensated when they have to move from their land because of new public works.[143] For timber, one can buy certified timber such as FSC.[144] The certification process includes environmental and human rights due diligence assessments. In other words, by buying certified timber, a company 'outsources' its due diligence review.[145] Soy and palm oil production have organised 'round tables' with stakeholders. The round-table mechanism intends to institutionalise a shareholder dialogue,

142. Voluntary Principles on Security and Human Rights, at: http://www.voluntaryprinciples.org/; Publish What you Pay, at: http://www.publishwhatyoupay.org/; Extracting Industries Transparency Initiative, at: http://eitransparency.org/; all websites accessed on 12 August 2010. A number of gold companies have signed up to the Responsible Jewellery Council (RJC), which has a code of conduct for mining companies as well as up the gold supply chain. The International Council on Mining and Metals – ICMM – was formed in 2001 to represent the world's leading companies in the mining and metals industry and to advance their commitment to sustainable development, at: http://www.icmm.com/about-us/icmm-history, accessed on 12 August 2010. ICMM's Sustainable Development Framework outlines principles supported by reporting guidelines (GRI Mining and Metals Supplement) as well as third party assurance. However this is at a corporate level for the time being (rather than a site level). For site performance, the most well known system is the Mining Association of Canada's Towards Sustainable Mining. It also includes third party review via a multi-stakeholder panel, but the topics that are covered do not go across all corporate social responsibility topics. See also: J. Spinelli (Daylight Forensic & Advisory), 'Foreign Corrupt Practices Act Due Diligence in Mergers & Acquisitions', *Ethishere ™ Institute* (online news service), 13 May 2009, at: http://ethisphere.com/foreign-corrupt-practices-act-due-diligence-in-mergers-acquisitions/, visited on 12 August 2010, illustrating that extensive FCPA due diligence is needed when operating in a high-risk industry (*e.g.* oil), in high-risk countries and in deals with government owned organisations.

143. World Bank, Development Policy Lending 2006 http://siteresources.worldbank.org/PROJECTS/Resources/DPLretro06f.pdf. IFC, *IFC Environmental and Social Standards*, 30 April 2006 http://www.ifc.org/ifcext/sustainability.nsf/Content/EnvSocStandards; *The International Finance Corporation's new environmental and social requirements*, at: http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pr_BackgroundNoteES/$FILE/Background+Note+-+New+ES+Standards.pdf. Also see: L. Baker, Bretton Woods Project, May 2007, *The World Bank and human rights. Caution on World Bank developments*, at: http://www.ifiwatchnet.org/sites/ifiwatchnet.org/files/The_World_Bank_and_human_rights-%20at%20issue.pdf. All sites accessed on 12 August 2010.

144. Forest Stewardship Council (FSC) is an NGO which has developed a certification system for sustainably produced timber. Certification requires compliance with the FCS Principles and Criteria for responsible forest management. See further: http://www.fsc.org/pc.html, accessed on 12 August 2010.

145. There are also other certification labels; however, one should evaluate their legitimacy. A programme supported by all stakeholders (rather than one set up by the industry itself) scores highly on legitimacy. See Chapter 6.

partly to assure that no human rights will be violated by the production. Other reasons concern ecological matters and the loss of biodiversity.[146]

These examples demonstrate that various sectors have identified industry-specific human rights issues recognised by all involved, *i.e.* companies, civil society and governments. To take notice hereof can help in designing a human rights due diligence process. There are also industries that generally lack effective codes of conduct on human rights issues *e.g.* real estate development (in particular hotels and golf courses), tourism, fisheries, meat, tobacco and weapons. For companies in those sectors, it would be particularly useful to undertake a full human rights due diligence assessment.

7.7 Dilemmas

In the previous section it has been argued that performing an HRIA can be fitted into the existing corporate due diligence practice in a relatively easy way. It will all depend on the corporate decision to embark upon this path. Having said this, there are certainly unanswered questions. One of these is the question in which way the Ruggie framework works out for victims of corporate-related human rights abuses. Does it improve their position? The third pillar of the framework, *i.e.* 'Remedy' aims to address this question, but that pillar was not the subject of this chapter. Related thereto, the question has been raised whether a *third party* – for instance an NGO concerned with human rights issues, or a victim of a corporate-related human rights abuse – should have access to corporate due diligence reports.

As regards an NGO request, the following could be considered. If the company concerned already cooperates with NGOs in performing the due diligence assessment, providing access to the due diligence report could be seen as part of an effective stakeholder dialogue. It could help to define further recommendations to improve company policies. However, if a company only commissions a due diligence report with a view to silencing critics, the answer will probably be different. NGOs and campaigning organisations will sense the 'cosmetic' approach by the company management, and will critically review the due diligence report if handed to them.

Regarding a victim of a concrete abuse who wants access to a due diligence report, the situation is as follows. Certain jurisdictions, such as the UK and the US, recognise the concept of 'pre-trial discovery' or 'document disclosure'. In

146. Palm oil is one of the key ingredients for Unilever. See the report "Palm Oil: Sustainable Future, 2002", at: http://www.unilever.com/images/Palm%20Oil%20-%20A%20Sustainable%20Future%202002_tcm13-5315.pdf, accessed on 12 August 2010.

the US, this doctrine forms part of civil procedural law.[147] This concept does not exist under Dutch law.[148] There is only one provision in Dutch Civil Procedure law that deals with a party's right to request documents (*i.e.* article 843a). In practice, it appears difficult and sometimes impossible to obtain documents that are in the possession of opponents who are unwilling to submit them. The requesting party must (i) have a legitimate interest, which will only be the case where an evidential interest exists; (ii) specify the desired documents in sufficient detail so that it is possible to determine which documents are meant and why the requesting party has a legitimate interest in them (this condition is designed to prevent so-called 'fishing expeditions'); and (iii) the documents must 'relate' to a legal relationship (based on contract or tort) to which it is a party. As regards due diligence reports, there are examples of cases in which the claimant was allowed to receive a copy. In *BVR/Ho-Cla,* a report prepared by a financial adviser for the buyer of a company was concerned. The court considered this document to 'relate to' the legal relationship between the buyer and the seller as laid down in their Share Purchase Agreement (*i.e.* the third condition mentioned above had been fulfilled).[149]

A lesson to be learned from this is that under certain jurisdictions, a documents disclosure request can also pertain to a due diligence report. Hence, there is a risk that such a report will end up in the public domain. Consequently, it will be important for companies based in such a jurisdiction to carefully document any internal decisions that relate to the report. When a due diligence report shows a considerable risk of becoming engaged in human rights abuses in a certain area, management need to have good arguments if they nevertheless decide to invest. Good corporate governance supposes a rational and good business-informed decision.[150]

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147. Federal Rules of Civil Procedure (2007), Rule 26 (incorporating the revisions that took effect on 1 December 2007).
148. M. van Hooijdonk and P. Eijsvoogel, *Litigation in the Netherlands. Civil Procedure, Arbitration and Administrative Litigation* (Kluwer Law International: The Hague, 2009), pp. 25-26. H. Uittien, Gedwongen verstrekking van due diligence-rapportages [Forced provision of due diligence reports], in *Tijdschrift voor de Rechtspraktijk* [Journal for the law practice], 1 January 2007, pp. 19-23.
149. *BVR/Ho-Cla*, Den Bosch CoA 28 September 2004 (JOR 2005/23); similarly: *Verder Holding/Hagemeijer,* Amsterdam District Court 13 April 2005 (JOR 2005/142); *Aegon/ Dexia*, Amsterdam District Court, 3 November 2004 (JOR 2004/326) concerning a request for due-diligence documentation, which was rejected because it was not sufficiently specified and, firstly, the Court had to decide on the scope of the information duty.
150. OGEM, *supra* note 32; Ruggie 2009, *supra* note 4 [§ 82]. Ruggie suggests that there are two scenarios where due diligence could bring additional liability. Either when "the company gains knowledge of possible human rights violations", and then "violations occur" and "the company's prior knowledge gets out," or when "the company publicly misrepresents what it finds in due diligence and that fact becomes known." It is important to note that this →

Another pressing question for companies is where to draw the line? How deep into the international supply chain and how broad should the due diligence investigation extend? Responding to a question about supply chain management, Ruggie indicated that all links in any supply chain represent companies owing a duty to respect human rights. In other words, a chain consisting of many links does not constitute an excuse for the companies involved to not act diligently.[151] In the opinion of the author the answer will depend on: (i) the available possibilities; (ii) the type of human rights issues; (iii) best practices in the industry; and (iv) the availability of certified operations in the particular industry (FSC, SA 8000, round tables). But it will remain difficult to demarcate the exact scope of a due diligence. This needs to be determined on a case-by-case basis. As commercial due diligence has expanded and formalised over time, it can be anticipated that societal expectations of corporate human rights due diligence will also increase over time.

Another dilemma frequently posed is what to do when human rights abuses are likely to occur in a certain type of industry or region. Some companies assert that their activities help to diminish such abuses. For instance, because they hired black employees in a country where black people did not enjoy the same civil rights as white people. Shell asserted that it did so in South Africa during the Apartheid regime.[152] Other companies claim that they improved labour-related human rights in China because they created employee-representative bodies.[153] These companies point to the likelihood that, if they leave, other parties will come in that probably care less about human rights. The argument of these companies is valid, their predictions usually materialise. However, following the Ruggie line: if due diligence research shows that there is a risk that a company's activities contribute to human right abuses, directly or indirectly, it is better to leave. However, the outcome will vary from case to case.

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liability is not because of performing due diligence *per se*. In fact, the decisive factor in both is how the company responds to new information: "The point of human rights due diligence is to learn about risks and then to take action to mitigate, and not to ignore or misrepresent the findings."

151. Presentation by Ruggie, *supra* note 88.

152. Shell, 'Embracing the Process of Black Economic Empowerment in Shell', at http://www.shell.com/home/content/zaf/aboutshell/who_we_are/our_values_and_principles/bee/, accessed on 12 August 2010.

153. Regarding the operations of Timberland in China, see: M. Ma, 'The Story of Ying Xie – Democratic Workers' Representation in China as a Tool for Better Business', in: A. Nadgrodkiewicz (ed.), *From Words to Action: A Business Case for Implementing Workplace Standards – Experiences from Key Emerging Markets* (Center for International Private Enterprise and Social Accountability International: Washington DC/New York 2009, pp. 6-24, at p. 11.

7.8 Summary and concluding remarks

In this chapter, it has been contended that the Ruggie Report offers a valid and interesting contribution to the discussion on the responsibilities and practice concerning the role of business in the field of human rights. Ruggie's approach aligns with the tradition of human rights law and it fits into the current practices of businesses. The recommendations concerning the performance of a due diligence assessment correspond with the standards applicable to the conduct of business partners when they engage in a business transaction. The aim of the chapter was to demonstrate that by using the term 'due diligence', Ruggie established a link between two areas of law, *i.e.* human rights law and corporate law, which were long considered to be unrelated. This seems a valuable step which will ultimately benefit both business actors and human rights promoters.

As an introduction to current corporate practice, the second and third sections of this chapter discussed the legal basis for and the practice of due diligence in a securities and contract law context. Securities law generally obliges a company that intends to issue securities (the issuer) and the bank that assists the issuer in selling the securities (the lead manager) to prepare a prospectus. Since this document needs to contain facts about the securities to be issued, the company's business and risks that could occur, the issuer and the lead manager have to conduct a full investigation to collect the information. In corporate practice this is called a due diligence investigation. Enforcement takes place, partly preventively, *i.e.* authorities have to approve the prospectus before publication, and partly curatively, *i.e.* parties who suffered damages because of false information in the prospectus can claim damages from the issuer and the lead manager on the basis of tort law. Prospectus liability is generally based on the doctrine of misleading advertisements, a species of tort.

In respect of a private transaction, *e.g.* a merger, business acquisition or finance transaction, the law commonly does not explicitly require parties to carry out a full due diligence investigation. Often, however, legal doctrine states that parties to a private transaction have a duty to communicate on the material aspects of the transaction in order to avoid that any of the parties enters into the transaction guided by false presumptions. Under Dutch law, it is explicitly prescribed that the selling party has a duty to inform the buyer of any material issues, and that the buying party has a duty to investigate the object of the transaction to ascertain that it complies with his expectations (*onderzoeksplicht en mededelingsplicht*). In other jurisdictions similar rules can be distilled from the case law. In general, it can be concluded that the parties to a private transaction are free to decide on the scope of their due diligence research. Due diligence benefits the party performing the investigation, hence he has an interest in an analysis with a scope and depth which is suited to the intended transaction. If he does not practice due diligence, his legal options could be limited. For example, under Dutch law it will be more difficult for him to

demand a rescission of the agreement on the basis of the doctrine of mistake (*dwaling*), or to claim damages under contractual guarantees (*ABP v. Hoog Catherijne*).

This chapter has also analysed whether, and in which way, the subject of human rights can be integrated into common corporate due diligence practice. As regards securities transactions, it has been noted that the EU Prospectus Directive of 2003 explicitly states that it observes the fundamental rights and principles recognised in the 2000 EU Charter of Fundamental Rights. Apparently, the EU considers human rights compliance also to be important in the context of capital market regulation on business transactions. Consequently, when human rights issues play a role in a certain business sector, supply chain or geographical area, it is recommendable to incorporate an HRIA in the due diligence process and to include the outcome in the prospectus. Moreover, when any human rights issues would emerge in respect of the issuer, it is certainly at risk of reputational damage, which could also impact share value. From a business perspective, it appears rational to prevent this by conducting an adequate due diligence assessment. Being 'human rights compliant' also facilitates becoming qualified for capital markets sustainability indices.

Concerning private transactions such as mergers and acquisitions, it has been argued that it is in the spirit and goal of performing a due diligence investigation to reveal any and all material issues regarding the target company and its worldwide business activities. Just like any other material subject, such as environmental pollution, difficulties in attracting loans, currency risks, fraud or corruption, so is the subject of human rights. An HRIA could assist. This seems especially important if the company that intends to acquire or finance the target company considers itself a socially responsible company that has underwritten human rights in its policies or codes of conduct. For a responsible company it is important to avoid a situation whereby the newly acquired target company damages the acquirer's good reputation. Besides looking at reputation risks in acquisition situations, for any company that is practicing corporate social responsibility, making use of HRIAs will contribute to materialising intentions.

The practical side of this is not too difficult: for a long time, international organisations, scientific institutions and NGOs have been preparing and testing HRIA tools which can be used to evaluate a company's business activities in the context of human rights compliance. Some companies have even actively cooperated with HRIA developers to test these instruments in practice.

Although the focus of this chapter was on how the corporate community can contribute to reducing human rights abuses by applying due diligence, the fourth section of this chapter elaborated on the meaning of 'due diligence' as used in international law. Various international treaties and declarations impose on States the obligation to apply due diligence to protect their citizens from human rights abuses. Accordingly, the due diligence standard presents a method

for measuring whether a State has fulfilled its obligations to prevent and respond to human rights abuses. Case law, starting with the landmark decision in *Velásquez*, showed that the duty to exercise due diligence directs the owner of that duty to employ all means at his disposal to prevent human rights violations. The Inter-American Court of Human Rights concluded that Honduras had not practised due diligence to prevent that the human right to life of Mr Velásquez was violated. 'All means at his disposal' implies that all strategies, instruments and tools should be utilised, as became clear by the type of actions that the English authorities had employed to avoid abuse against Mr Osman and his son. The authorities investigated the complaints, visited locations and studied a psychiatric report to establish whether they were at risk. In that case the European Court of Human Rights judged that the authorities had employed due diligence. The same Court noted in this and other cases that "measures taken to provide effective protection for vulnerable persons should include reasonable steps to prevent ill treatment of which the authorities *had or ought to have had knowledge*". [Emphasis added]. The *Nahide Opuz* and *Georgia* cases made it clear that "even in the absence of an express complaint, an investigation should be undertaken if there are other sufficiently clear indications that [serious violations] might have occurred." This should be understood in a context which is particularly opaque and where victims are often reluctant to report violence. These cases displayed that a particularly high degree of vigilance is required of the State when human rights are at stake, also when there is a threat that third parties may abuse them.

Although these standards were recorded in cases pertinent to a State's legal duty to respect human rights, they can be regarded as a relevant line of thought when reflecting on the moral duty of companies to practice due diligence as set out in the Ruggie Report.

The Ruggie framework can be regarded as a continuation of the work of the former Sub-Commission on Promotion and Protection of Human Rights. Many viewpoints exposed in the UN Draft Norms, developed by this Commission, have been elaborated on in the Ruggie framework. The manner in which this framework emphasised the need for global governance, thereby attributing an important role to companies (alongside with States and civil society), made the framework acceptable for the corporate community.

Section 7.5 elaborated on situations identified by Ruggie in which companies should be alert to avoiding corporate-related human rights abuses and are expected to employ due diligence. Evidently, three sets of factors need to be considered in performing a due diligence investigation: (i) the country context in which the corporate activities take place; (ii) the human rights impacts that the activities may have within such a context; (iii) whether the company might contribute to abuse through external relationships connected to its activities. As has been concluded before, these three factors are also relevant from a company perspective when preparing for a capital market transaction or a private

transaction. Consequently, Ruggie's model aligns well with current corporate practice. The main issue is to start using HRIAs and making them part of normal business operations, preferably on an on-going basis. As human rights situations are dynamic and pre-existing conditions will change with the entry of a high impact business operation, Ruggie recommends that the assessment of impacts take place regularly throughout the life of a project or activity, whether triggered by project milestones, regular cycles (*e.g.* periodic performance reviews), or changes in any of the issues related to the scope of a company's responsibility to respect human rights: context, activities, and relationships.[154]

In practice, especially when complaints about corporate activities are being made by individuals or civil society organisations, it makes sense for a company to inspect these seriously. Drawing a parallel with the international law duty of States, the company can be expected to invest sufficient effort to find out what really happened, and – if this reveals an abuse – to determine how to respond. Can the situation be remedied? Can the victim or victims be helped or compensated? What does it mean for the future practices of the company? Do internal corrective measures have to be taken, or new policies drafted and implemented? A complicated situation occurs when a civil society organisation does not want to identify specific victims, while putting forward the argument that the victims are afraid of repercussions by the company or the State.[155] Or there might be a situation in which individual victims cannot be identified because the local State's practice is particularly hard on all citizens as is the case in Myanmar. If we follow the line of the human rights case law, also in those situations it can be expected of a company that it commences an investigation into any potential human rights risks related to its business activities in such a State with a view to preventing them from occurring. Another difficult situation develops when a company is interested in doing business in a failed state or conflict zone. Its activities may positively impact citizens, although negative effects are also imaginable. Hence, Ruggie's clear recommendations: in failed states and conflict zones, business should act very proactively or stay away.

Concluding, 'corporate due diligence and human rights' is definitely a developing area. Due diligence can contribute substantially to CSR, and hence to the protection, respect and fulfilment of individual human rights. As Ruud Lubbers, the former prime-minister of the Netherlands, has said this: "From

154. Ruggie 2010, *supra* note 108.

155. Chapter 9 (Shell in Nigeria) and chapter 10 (CSR-conflict and mediation). In a situation like the Shell operations in Nigeria during the dictator Abache period, this could have been the case; in the G-Star case, the Dutch and Indian campaigners did not disclose the names of victims stating that they were afraid of repercussions by the company such as dismissal.

Individual Rights to Common Responsibilities".[156] The responsibility of companies is considered in a moral context, although there are some instances where legal considerations also play a role. Translating this responsibility into tools which can be used in daily practice, a number of HRIA instruments have been identified in section 7.6. These tools can already be applied. Since different concerns per geographical area and industry play a role, best practices developed by frontrunners are worth examining, such as those mentioned regarding pharmaceutical companies.

In the Ruggie approach, the private sector plays a prominent role in contemporary thinking on the UN and the way in which it can achieve its many different tasks, including those in the field of human rights. As Kofi Annan emphasised in his 2005 report entitled "In larger freedom: towards development, security and human rights for all": "States […] cannot do the job alone […] we need an active civil society and a dynamic private sector" and "the [UN] goals […] will not be achieved without their full engagement."[157] The author believes in this 'partnership approach'. Businesses need to engage and can play a better role in respecting human rights when they are prepared. Due diligence investigations can assist in all kinds of situations.

156. Ruud Lubbers, 'Epilogue – From Individual Rights to Common Responsibilities', in: Ruud Lubbers, Willem van Genugten, Tineke Lambooy, *Inspiration for Global Governance – The Universal Declaration of Human Rights and the Earth Charter* (Kluwer: Deventer 2008), pp. 89-96.
157. UN General Assembly A/59/2005 (21 March 2005) [§ 20].

Annex 7.1 Due diligence checklist

(source: http://www.meritusventures.com/template_assets/pdf/diligence.pdf)

I. Financial Information

A. Annual and quarterly financial information for the past three years	B. Financial Projections	C. Capital Structure	D. Other financial information
1. Income statements, balance sheets, cash flows, and footnotes	1. Quarterly financial projections for the next three fiscal years a. Revenue by product type, customers, and channel b. Full income statements, balance sheets, cash	1. Current shares outstanding	1. Summary of current federal, state and foreign tax positions, including net operating loss carryforwards
2. Planned versus actual results	2. Major growth drivers and prospects	2. List of all stockholders with shareholdings, options, warrants, or notes	2. Discuss general accounting policies (revenue recognition, etc.)
3. Management financial reports	3. Predictability of business	3. Schedule of all options, warrants, rights, and any other potentially dilutive securities with exercise prices and vesting provisions	3. Schedule of financing history for equity, warrants, and debt (date, investors, dollar investment, percentage ownership, implied valuation and current basis for each round)
4. Breakdown of sales and gross profits by: a. Product Type b. Channel c. Geography	4. Risks attendant to foreign operations (*e.g.*, exchange rate fluctuation, government instability)	4. Summary of all debt instruments/bank lines with key terms and conditions	
5. Current backlog by customer (if any)	5. Industry and company pricing policies	5. Off balance sheet liabilities	
6. Accounts receivable aging schedule	6. Economic assumptions underlying projections (different scenarios based on price and market fluctuations)		

A. Annual and quarterly financial information for the past three years	B. Financial Projections	C. Capital Structure	D. Other financial information
	7. Explanation of projected capital expenditures, depreciation, and working capital arrangements		
	8. External financing arrangement assumption		

II. Products

A. Description of each product
1. Major customers and applications
2. Historical and projected growth rates
3. Market share
4. Speed and nature of technological change
5. Timing of new products, product enhancements
6. Cost structure and profitability

III. Customer Information

A. List of top 15 customers for the past two fiscal years and current year-to-date by application	B. List of strategic relationships	C. Revenue by customer	D. Brief description of any significant relationships severed within the last two years.	E. List of top 10 suppliers for the past two fiscal years and current year-to-date with contact Information
(name, contact name, address, phone number, product(s) owned, and timing of purchase(s))	(name, contact name, phone number, revenue contribution, marketing agreements)	(name, contact name, phone number for any accounting for 5 per cent or more of revenue)	(name, contact name, phone number)	(name, contact name, phone number, purchase amounts, supplier agreements)

IV. Competition

A. Description of the competitive landscape within each market segment including:
1. Market position and related strengths and weaknesses as perceived in the market place
2. Basis of competition (*e.g.*, price, service, technology, distribution)

V. Marketing, Sales, and Distribution

A. Strategy and implementation	**B. Major Customers**	**C. Principal avenues for generating new business**	**D. Sales force productivity model**	**E. Ability to implement marketing plan with current and projected budgets**
1. Discussion of domestic and international distribution channels	1. Status and trends of relationships		1. Compensation	
2. Positioning of the Company and its products	2. Prospects for future growth and development		2. Quota Average	
3. Marketing opportunities/marketing risks	3. Pipeline analysis		3. Sales Cycle	
4. Description of marketing programs and examples of recent marketing/product/ public relations/media information on the Company			4. Plan for New Hires	

VI. Research and Development

A. Description of R&D organisation	**B. New Product Pipeline**
1. Strategy	1. Status and Timing
2. Key Personnel	2. Cost of Development
3. Major Activities	3. Critical Technology Necessary for Implementation
	4. Risks

VII. Management and Personnel

A. Organisation Chart	B. Historical and projected headcount by function and location	C. Summary biographies of senior management, including employment history, age, service with the Company, years in current position	D. Compensation arrangement	E. Discussion of incentive stock plans	F. Significant employee relations problems, past or present	G. Personnel Turnover
			1. Copies (or summaries) of key employment agreements			1. Data for the last two years
			2. Benefit plans			2. Benefit plans

VIII. Legal and Related Matters

A. Pending lawsuits against the Company	B. Pending lawsuits initiated by Company	C. Description of environmental and employee safety issues and liabilities	D. List of material patents, copyrights, licenses, and trademarks	E. Summary of insurance coverage/any material exposures	F. Summary of material contacts	G. History of SEC or other regulatory agency problem, if any
(detail on claimant, claimed damages, brief history, status, anticipated outcome, and name of the Company's counsel)	(detail on defendant, claimed damages, brief history, status, anticipated outcome, and name of Company's counsel)	1. Safety precautions	(issued and pending)			
		2. New regulations and their consequences				

Chapter 8.* To know or not to know? The consumer's right to information under REACH and other European Union legislation

'Enable consumers to identify products that meet the highest social and environmental standards'
The Earth Charter, provision 7(d)

8.1 Introduction

A consumer who purchases goods within the EU is entitled to a set of basic consumer rights. The Commission developed these rights in the course of two consumer political programmes (1975 and 1981).[1] The five fundamental rights of consumers set out in these programmes are: (1) the right to the protection of health and safety; (2) the right to the protection of economic interests; (3) the right of redress; (4) the right to information and education; and (5) the right to representation.[2] The right to information – one of these rights – is the focus of this paper. The significance of this right was firmly established in 1990 by the decision of the ECJ in the *GB Inno case*.[3] This decision should be understood "as recognition, under Community free movement law, of the consumer right to information at least with regard to measures by Member States restricting the free movement of goods".[4] The consumer's right "to information and education" was also recognised by the Treaty of Amsterdam.[5] This right has since

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1. OJ C92, 25 April 1975 and OJ C133, 3 June 1981.
2. N. Reich, H. Micklitz, Understanding EU Consumer Law, in *Intersentia*, 2009, p. 21.
3. ECJ decision C-362/88 [1990] ECR I-667.
4. Note 2 *supra*, p. 21.
5. The Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, 2 October 1999. Article 129a (1) states that "in order to promote the interests of consumers and to ensure a high level of consumer protection, the Community shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests".

become an integral part of European Community (EC) consumer policy.[6] The consumer's right to information is especially relevant in the framework of product safety.

The safety of products has become a priority for EU policy makers over the past decade.[7] In 2004, the revised General Product Safety Directive (GPSD) came into force.[8] The GPSD introduces safety requirements for most consumer products. The main emphasis of the GPSD is the consumer's right to know about dangerous products. Later, in 2006, the landmark chemical legislation 'REACH'[9] was introduced. As REACH is a Regulation, its provisions have direct effect on companies and consumers and do not have first to be transposed, as is the case with Directives, into national legislation.[10] REACH aimed to increase environmental and consumer protection. One of the key provisions is the right of consumers to information regarding dangerous chemicals. Making risks transparent and providing information on safe use of products that contain dangerous chemicals is considered important to realise the fundamental consumer right pertaining to the protection of health and safety. This article will discuss this focus in particular. The environmental protection goals of REACH will not be elaborated upon.

The emergence of EU measures in the field of consumer protection indicates that this area has become more effective. Traditionally, the legislation was directed at protecting the consumer's economic interest. Since the last decade, health, environmental concerns and CSR aspects have also been addressed by consumer law. Specifically, the consumer's 'right to know' has been recognised and emphasised in various legislation. In order to assess how the consumer's right to information has been implemented in practice and whether it can be regarded as an effective right (*i.e.* how much information can a consumer successfully request from a company?), this chapter will first analyse the REACH Regulation.

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6. 'The Amsterdam Treaty: A Comprehensive Guide', EUROPA-the portal site of the European Union, see: http://europa.eu/legislation_summaries/institutional_affairs/treaties/amsterdam_treaty/a17000_en.htm, accessed on 24 June 2010.
7. Speech by Robert Madelin, Director General for Health and Consumer Protection (European Commission), 24 June 2004. See: http://ec.europa.eu/dgs/health_consumer/library/speeches/speech180_en.pdf, accessed on 24 June 2010.
8. Directive (EC) 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety (GPSD) [2001] OJ L11/4. See further section 8.4.1.
9. Regulation (EC) 1907/2006 concerning the Registration, Evaluation, Authorization and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No. 793/93 and Commission Regulation (EC) No. 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC [2006] OJ L396/1.
10. P. Craig, G. de Burca, *EU Law: Text, Cases and Materials* [Oxford University Press, Oxford, 2008], p. 85.

Section 8.2 will explain what type of information has to be registered under REACH. This will be followed by an analysis of the consumer's right to information in section 8.3. It is interesting to note that workers also have a right to information under REACH. Furthermore, we note that the consumer's right to information cannot be analysed in a European setting alone. Non-EU manufacturers play a major role in supplying chemicals to the European market. Consequently, the impact of REACH on non-EU manufacturers will also be discussed. The question whether non-EU consumers can benefit from REACH will also be addressed. Section 8.4 will offer a comparative analysis of REACH and other EU legislation with respect to consumer protection and product information tracing systems. This analysis will give a broader perspective of the consumer's 'right to know'. Section 8.5 addresses enforcement issues and will present the outcome of an experiment regarding the right to information under REACH. In section 8.6, a new interesting legislative proposal in the field of consumer information will be discussed. A brief summary concludes this chapter.

The perspective of this article is European legislation, the implementation of which is in one case illustrated by describing enforcement possibilities under Dutch law. The research method was theoretical. In addition, two practical experiments have been conducted.

8.2 Overview of REACH

When your child plays with an innocent plastic duck in the bathtub, do you ever consider that it might be dangerous to the health of your child? Probably not. The producer of this 'sweet' and 'innocent' toy probably did not mention that it used a chemical substance called 'phthalates' in order to make these types of plastic products softer. This substance is known to be a widespread contaminator of the global environment: it is a toxic chemical which disturbs the reproductive and hormonal systems of animals.[11] Knowing this, you would probably think twice before buying a plastic duck for your child.

Consumers have a right to know about any hazardous substances that can affect their health and the environment. Companies have a duty to warn them that a growing number of health problems, such as allergies, lower fertility, cancer and children's underdevelopment, are caused or are influenced by chemicals released into the environment. This right to information has been acknowledged by REACH. 'REACH' stands for: "Registration, Evaluation, Authorisation and Restriction of Chemical substances".

11. 'Chemicals Health Monitor, Diseases and Chemicals', project of Health and Environment Alliance (NGO) aimed at improving the understanding of REACH by consumers, at: http://www.chemicalshealthmonitor.org/spip.php?rubrique1, accessed on 24 June 2010.

8.2.1 Background

The REACH Regulation was adopted by the EP and the Council on 18 December 2006.[12] REACH entered into force on 1 June 2007. The long awaited Regulation has replaced approximately 40 pieces of previous EU legislation on chemical substances. The main problem with the former EC legislative framework was the lack of a harmonised approach. Moreover, this system did not produce sufficient information regarding the effects of the majority of existing chemicals on human health and the environment.[13] Prior legislation drew a line between 'existing' and 'new' chemicals, *i.e.* all 'new' chemicals had to be tested for potential harmful effects to human health and the environment. However, similar requirements did not apply to the 'existing' 30,000 chemicals on the market.[14] Moreover, risk management measures of the possible hazards of substances and their impact on human beings and the environment were not properly addressed.

REACH is an attempt to improve the legislative framework for chemicals, including 'existing' chemicals. The Regulation aims 'to ensure a high level of protection for human health and the environment'.[15] Overall, REACH requires the registration, over a period of 11 years, of about 30,000 chemical substances.[16] It covers almost all chemicals, with the exception of chemicals in food and medicines, which are excluded because they are covered by other EU laws.[17] 'Natural substances' are also excluded.[18]

From a consumer protection point of view, REACH has important implications. It requires industries to provide consumers with safety information on

12. Note 9 *supra* [REACH].
13. Commission, 'REACH in Brief', Environment Directorate-General, October 2007. Available at http://ec.europa.eu/environment/chemicals/reach/pdf/2007_02_reach_in_brief.pdf, accessed on 24 June 2010.
14. P. Bormann, D. Kappers, 'What impact will REACH have on consumer protection?', in *Chimia,* vol. 60, No. 10, 2006, pp. 651-655.
15. Note 9 *supra* [REACH] [Art. 1].
16. REACH Compliance B-lands Consulting, The scope of REACH legislation. Available at: http://reach compliance.eu/english/legislation/reach-scope.html, accessed on 24 June 2010.
17. ECHA, REACH: the New Chemical Legislation, 2007. See: http://ec.europa.eu/environment/chemicals/reach/pdf/reach_me_flyer_en.pdf, accessed on 24 June 2010.
18. Exempted from the obligation to register in accordance with article 2(7)(b) REACH are natural substances which are substances that occur in nature and that have not been chemically modified during manufacturing, unless they meet classification as dangerous according to Council Directive 67/548/EEC, of 27 June 1967 on the approximation of laws, regulations and administrative provisions relating to the classification, packaging and labeling of dangerous substances 1976, OJ L196, note 9 *supra* [REACH] [Annex V]. Examples are: ores, minerals, natural gas, crude oil. Note 9 *supra* [REACH] [Annex V].

substances.[19] Consequently, REACH makes industries responsible for assessing, and providing information on potential risks of chemicals. Pursuant to REACH, importers and manufacturers are obliged to collect information on the properties of chemical substances in order to ensure their safe handling.[20] This information must be registered in a central database supervised by the European Chemicals Agency (ECHA)[21] in Helsinki. Permission to continue manufacturing and importing these chemicals in the EU is dependent upon this. Each chemical substance should be registered before expiration of the applicable deadline (*i.e.* the 'full registration date').

8.2.2 Registration deadlines

Registration deadlines will be gradually implemented through a phase-by-phase approach that will extend beyond 2020.[22] The obligation to *pre*-register applied from 1 June 2008.[23] Basic information about the substances has to be submitted to ECHA, *i.e.* the 'pre-registration procedure'.[24] This procedure allows chemicals to be used in the market before they are fully registered, but only until such point in time that registration deadlines will have lapsed. Deadlines vary depending on the type of chemicals and the quantities imported or in use:

– substances *classified* as carcinogenic, mutagenic or toxic to reproduction, or substances that are categorised as very toxic to aquatic organisms and may cause long-term adverse effects in the aquatic environment (as stated in Directive 67/548/EEC), can only be used without full registration until 30 November 2010;

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19. A substance is "a chemical element and its compounds in the natural state or obtained by any manufacturing process, including any additive necessary to preserve its stability and any impurity deriving from the process used, but excluding any solvent which may be separated without affecting the stability of the substance or changing its composition", note 9 *supra* [REACH] [Art. 3].
20. Commission, Environment, Chemicals: REACH, at: http://ec.europa.eu/environment/chemicals/reach/reach_intro.htm, accessed on 24 June 2010.
21. ECHA was created by the Regulation in order to manage the database necessary to operate the system, to co-ordinate an in-depth evaluation of suspicious chemicals and to run a public database in which information can be found.
22. Strategies for enforcement of Regulation (EC) no. 1907/2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), 2009, Forum for Exchange of Information on Enforcement, 2-4 December 2008, at: http://echa.europa.eu/doc/about/organisation/forum/strategies_enforcement_reach.pdf, accessed on 24 June 2010.
23. ECHA, Pre-register to Benefit from Extended Deadlines, at: http://echa.europa.eu/sief/pre-registration_en.asp, accessed on 24 June 2010.
24. Note 9 *supra* [REACH] [Art. 28].

– other substances, *i.e.* not classified, manufactured or imported in quantities starting from *100 tonnes* or more per year, can only be used without full registration until 31 May 2013;
– finally, unclassified substances manufactured or imported in quantities of *1 tonne* or more per year are allowed to be used, if pre-registered, until 31 May 2018.[25]

The full registration procedure requires that the manufacturers and importers of substances submit a registration to ECHA for each substance manufactured or imported in quantities of 1 tonne or more per year.[26] The failure to do so before the applicable deadline will result in a prohibition on manufacturing or importing such substance. The main rule of is "no data, no market".[27]

8.2.3 Registration contents

Registration requires the submission of a 'registration dossier' to the ECHA. A specified set of data must be collected or generated for each substance including a technical dossier ('Technical Dossier'), which contains information such as study summaries, the identity of the manufacturer(s) or the importer(s), and the identity of substances.[28] The Technical Dossier has to be provided for any substances manufactured or imported in quantities of 1 tonne or more. For larger quantities (10 tonnes or more), a more detailed 'Chemical Safety Report' has to be prepared.[29] This includes providing exposure scenarios for specific uses of dangerous substances, *i.e.* including a description of how those substances are manufactured or used during their life-cycle.[30] All 'identified uses', including use by a consumer, have to be recorded. Also, any risks regarding human health and the environment related to the manufacture or import, and the use of a substance, have to be addressed in 'risk characterisation measures'.

8.2.4 Communication in the supply chain

A duty to communicate information regarding safety, health and environmental properties related to chemical substances in products, and risk management

25. ECHA, Guidance on Data Sharing, September 2007, at: http://guidance.echa.europa.eu/docs/guidance_document/data_sharing_en.htm, accessed on 24 June 2010.
26. Note 9 *supra* [REACH] [Art. 28].
27. Note 9 *supra* [REACH] [Art. 5].
28. Note 9 *supra* [REACH] [Art. 10].
29. Note 9 *supra* [REACH] [Art. 14].
30. Note 9 *supra* [REACH] [Annex 1].

measures,[31] *down* the supply chain is an essential part of REACH. Manufacturers and importers are required to exchange information on how the chemicals can be used in a safe way, both for humans and the environment. They have to prepare a 'Safety Data Sheet' (SDS), to which the exposure scenarios have been annexed.[32] In the opposite direction, new information on hazardous properties and information that may challenge the quality of the risk management measures contained in the relevant SDS have to be passed *up* the supply chain by downstream-users.[33] It is intended that information be passed as follows: manufacturer/importer ←→ downstream user ←→ distributer ←→ consumer. It is believed that in the longer term "intensive communication in the supply chain in two directions will provide better understanding of the needs of other parties in the supply chain."[34] Consumers are not entitled to receive SDSs, but they can request information about certain dangerous substances from the producers and retailers. This will be discussed in section 8.3. For a general overview of obligations under REACH, see Annex 8.1, *in fine*.

8.3 The right to information

The focus of this chapter is not to elaborate on the technical provisions regarding how and when to register what type of chemicals, but to address the following question: which rights have consumers gained under the Regulation?

The common principle of REACH is the "duty of care", which is "based on the principle that the production, import and marketing of substances should be carried out with such responsibility and care as may be required to ensure that neither human health nor the environment is adversely affected".[35] In this framework, the business actors have acquired a responsibility to assess the risk profile of chemicals and a duty to communicate that information onwards. The following section will discuss the precise scope of this responsibility.

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31. Note 9 *supra* [REACH] [Art. 33].
32. Note 9 *supra* [REACH] [Art. 31].
33. A 'downstream user' is any natural or legal person established within the Community, other than the manufacturer or the importer, who uses a substance, either on its own or in a preparation, in the course of his industrial or professional activities, note 9 *supra* [REACH] [Art. 13(3)].
34. Z. Pavlinic, D. Licko, J. Grubic-Dodo, 'REACH Regulation and its Influence on Business Activities', in *The Journal of Fuels and Lubricants*, 2009, p. 54.
35. EP, Socialist Group, REACH Regulation on Chemical Products, 2008. See: http://www.socialistgroup.org/gpes/media3/documents/2293_EN_reach_en_070828.pdf, accessed on 24 June 2010.

8.3.1 Right to information for consumers

One of the novelties of REACH is the introduction of a consumer right to information about dangerous chemicals, or as they are called in the Regulation 'Substances of Very High Concern' (SVHCs). According to article 57 of REACH, a chemical substance (or part of a group of chemical substances) qualifies as an SVHC when it has one of the following characteristics: (1) it is carcinogenic; (2) it is mutagenic; (3) it is toxic for reproduction; (4) it is persistent, bio-accumulative and toxic according to the criteria set out in Annex XIII ('PBT' substances); and/or (5) it is very persistent and very bio-accumulative according to the criteria set out in Annex XIII ('vPvB' substance). Generally, SVHCs are substances that can have serious consequences for human health (like cancer) or a detrimental impact on the environment.

SVHCs are subject to authorisation by the ECHA. Without authorisation, SVHCs included on the so-called 'candidate list' cannot be used on the market.[36] In the framework of the authorisation procedure, the Commission has required the authorised national 'REACH Competent Authorities' or the ECHA to prepare dossiers for the identification of SVHCs. Proposals to nominate a chemical substance as an SVHC are published on the ECHA website. Interested parties can submit comments within 45 days, *e.g.* scientific evaluation. If there are no comments, the substance will automatically be included in the 'candidate list'.[37] However, if comments are received, ECHA will return the dossier to the Member State Committee that initially proposed this chemical substance. The Member State Committee consists of members appointed by each Member State. The Member State Committee needs to reach consensus as to whether the substance meets the requirements of article 57. If such consensus cannot be reached, the Commission will prepare a draft proposal on the substance and a final decision will be taken in accordance with the 'comitology procedure'[38] set out in article 133 of REACH.[39]

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36. Chemsec, International Chemical Secretariat, 'REACH step by step'. See: http://www.chemsec.org/chemsec/eu-chemicals-policy/reach/reach-step-by-step, accessed on 28 June 2010.
37. Publication of the ECHA candidate list of SVHCs is only the first phase of the authorisation procedure. The second phase will include a far-reaching evaluation of these substances before any decision by the Commission will be taken (note 9 *supra* [REACH] [Art. 133]) and the substances are included in Annex XIV's 'List of Substances Subject to Authorisation'.
38. Under the 'comitology procedure', the Commission adopts decisions for the implementation of its legislation. The proposals for these decisions must be approved by Member States by a qualified majority vote. In accordance with article 202 of the Treaty establishing the European Community (ECT), the Commission is assisted by a committee during the implementation process of EU legislation, in line with the procedure that is referred to as comitology. The committee consists of representatives of Member States and is chaired by the Commission.
39. United Kingdom Government Leaflet, 'REACH – Substances of Very High Concern', 2009, at: http://www.hse.gov.uk/reach/svhc.pdf, accessed on 24 June 2010.

If an SVHC has been processed in an 'article'[40] (this refers to a product), additional obligations arise for the producer, importer and supplier of the article.[41] Firstly, the supplier has to provide the recipient of the article (industrial or professional users and distributors) with sufficient information to allow for the safe use of the article.[42] If no specific information is necessary for safe handling, the supplier still has to communicate, at a minimum, the name of the chemical substance.[43] Secondly, any other information regarding the substance available to the article supplier, has to be communicated to consumers. *Vide* article 33(2):

> on request by a consumer, any supplier of an article containing a substance meeting the criteria in Article 57 and identified in accordance with Article 59(1) in a concentration above 0.1 % weight by weight (w/w) shall provide the consumer with sufficient information, available to the supplier, to allow safe use of the article including, as a minimum, the name of that substance. The relevant information shall be provided, free of charge, within 45 days of receipt of the request.[44]

In October 2008, the first candidate list of SVHC with titles of hazardous substances was published. The last update of the list was on 18 June 2010. It will continue to be regularly updated with new SVHCs. At present, it contains 38 substances.[45] Today, a European consumer can request information regarding items such as an electronic toothbrush or shampoo. He can submit his request to the retailer or the brand manufacturer, and ask whether the product contains any of the chemical substances on the candidate list. A template letter is contained in Annex 8.2 *in fine*.[46]

8.3.2 The workers' 'right to know'

REACH also targets workers. According to article 35, "workers and their representatives shall be granted access by their employer to the information

40. *I.e.* "An object which during production is given a special shape, surface or design which determines its function to a greater degree than its chemical composition", see note 9 *supra* [REACH] [Art. 3(3)].
41. European Chemical Agency, Guidance in a Nutshell: Requirements for Substances in Articles, 2009. Available at: http://guidance.echa.europa.eu/guidance2_en.htm, accessed on 24 June 2010.
42. Note 9 *supra* [REACH] [Art. 33(1)].
43. Note 9 *supra* [REACH] [Art. 33(1)].
44. Note 9 *supra* [REACH] [Art. 33(2)].
45. ECHA, Candidate List of Substances of Very High Concern for authorisation, updated on 18 June 2010, at: http://echa.europa.eu/chem_data/authorisation_process/candidate_list_table_en.asp?sortby=Date_inclusion&order=descending, accessed on 29 June 2010.
46. Note 11 *supra* [Chemicals Health Monitor].

provided in accordance with articles 31 and 32 in relation to substances or preparations that they use or may be exposed to in the course of their work". This means that workers will have access to SDSs (art. 31 REACH) and general information about substances (art. 35 REACH). Article 35 aims to reduce the number of chemical-related occupational diseases. Millions of workers across Europe are exposed to dangerous chemicals in their workplace. In the EU, more than 26,000 deaths of workers were registered in 2001, because of their exposure to hazardous chemicals.[47] Dangerous substances are not only found in chemical industry workplaces, but also employees who are engaged in farming, nursing, construction, health-care services and the automobile and airspace industry, can be directly exposed to chemicals.[48] The current system of dealing with chemicals poses serious occupational health risks for workers, and unless it changes, an additional 3,000-4,000 cancer deaths per year over the next 30-40 years can be expected.[49] The European Trade Union Confederation is convinced that REACH can help reduce the number of chemical-related occupational diseases and associated costs for both industry and society,[50] provided it is properly implemented throughout the supply chain. Making information available to workers will significantly improve their situation and reduce health risks. Yet, it has been argued that for real progress to be made, dangerous chemical substances have to be substituted by safer options. Another issue is the dilemma of nanomaterials. A report by the European Agency for Safety and Health at Work (EU-OSHA) states that nanomaterials top the list of substances that workers need protecting from.[51]

8.3.3 Nanotechnology

Nanotechnology is used in a wide range of products such as IT products and cosmetics, and is expected to grow rapidly into a global, multi-billion euro

47. T. Musu, 'New Responsibilities for Trade Unions to Ensure Workers Health within the Framework of REACH', 2007, p. 4, at: http://www.baua.de/cae/servlet/contentblob/676694/publicationFile/48239/Vortrag-11.pdf, accessed on 24 June 2010. This source did not disclose whether the number mentioned pertained to the year 2001 or to another period.
48. L. Walter, 'European Workers Face Increasing Health Risks from Hazardous Substances', March 2009, at: http://ehstoday.com/health/news/euro-workers-health-risks-1273/, accessed on 24 June 2010.
49. Risk & Policy Analysts for the Commission, Environment Directorate-General, 'Final Report: Assessment of Impact of the New Chemicals Policy on Occupational Health', 2003, p. 64. See: http://ec.europa.eu/environment/chemicals/reach/background/docs/finrep_occ_health.pdf, accessed on 24 June 2010.
50. Note 47*, supra* [Musu, 2007], p. 1.
51. EU-OSHA, 'Workplace Exposure to Nanoparticles', 2009, p. 48, at: http://osha.europa.eu/en/publications/literature_reviews/workplace_exposure_to_nanoparticles, accessed on 24 June 2010.

market.[52] Preliminary observations suggest that exposure to certain types of nanoparticles could be detrimental to human health, for example being a cause of numerous skin diseases.[53] Another study suggests that there is a serious "concern that long-term exposure to some nanoparticles without protective measures may be related to serious damage to the lungs".[54] Nonetheless, there are no provisions in REACH referring specifically to nanomaterials.[55] Generally, REACH deals with substances, in whatever size, shape and physical state, including substances at nanoscale.[56] Consequently, importers, manufactures and downstream users have to ensure that their nanomaterials do not adversely affect human health or the environment. Nevertheless, in April 2009, the EP explicitly called for a more serious approach towards nanomaterials. The EP asked for the insertion of provisions in the REACH Regulation that will provide information to consumers on the use of nanomaterials in finished products. Concerns were expressed that nanomaterials need not be registered if manufactured or imported below 1 tonne.[57] This is a valid concern, because, according to the newly-established REACH Competent Authorities Subgroup on Nanomaterials, "several nanomaterials are only produced at low tonnage level", which leads to a "lack of information on nanomaterials due to the present tonnage triggers for data requirement under REACH".[58]

In May 2009, during the Helsinki Chemicals Forum organised by the Commission and ECHA, the participants agreed that the handling of nanoscale

52. Note 51, *supra* [EU-OSHA, 2009], p. 8.
53. Note 51, *supra* [EU-OSHA, 2009], p. 40.
54. Y. Song, X. Li, X. Du, Exposure to nanoparticles is related to pleural effusion, pulmonary fibrosis and granuloma, in *European Respiratory Journal*, vol. 34, 2009, pp. 559-567.
55. Commission, Environment Directorate-General, Follow-up to the 6th Meeting of the REACH Competent Authorities for the implementation of Regulation (EC) 1907/2006 (REACH), December 2008, pp. 5, and 15-16. See: http://ec.europa.eu/environment/chemicals/reach/pdf/nanomaterials.pdf, accessed on 24 June.
56. There is a difference between 'nanomaterial' and 'nanoscale'. 'Nanomaterial' is manufactured or engineered nanosised and nanostructered materials, without specification as to whether these materials are substances or forms of substances. Nanomaterials include metals or metal oxides, carbon black, carbon nanotubes, fullerenes, silicate, organic nanoparticles or nanocomposites. 'Substance at nanoscale' refers to substances with properties specific to nanomaterials. See: Commission, Follow-up to the 6th Meeting of the REACH Competent. Authorities for the implementation of Regulation (EC) 1907/2006, 2008.
57. European Parliament, Press Release: Nanomaterials: MEPs Calls for More Prudence, 24 April 2009. Available at: http://www.europarl.europa.eu/sides/getDoc.do?language=EN&type=IM-PRESS&reference=20090422IPR54260, accessed on 24 June 2010; WWF, 'First Improvements on nanoparticles under REACH chemical law', 2008, at: http://www.panda.org/about_our_earth/teacher_resources/webfieldtrips/toxics/news/?136301/First-improvements-on-nanoparticles-under-REACH-chemicals-law, accessed on 24 June 2010.
58. Note 55 *supra* [Commission, 2008], p. 14.

substances should be reconsidered under REACH. Governmental spokespersons came to the conclusion that a specific regulation on nanomaterials might be adopted after the revision of REACH, which the EC is required to do by June 1, 2012.[59] However, why wait? Protection at the national level can be instituted today. On 8 July 2009, the Norwegian Board[60] of Technology announced that the Norwegian Pollution Control Authority had established a scheme to report their use of nanomaterials in chemical products.[61]

8.3.4 Non-EU manufacturers

Most consumer products are imported from abroad. Hence, this section will discuss how REACH protects EU consumers from hazardous substances of imported goods. Non-EU manufacturers do not have direct obligations under REACH. Article 8 of REACH states that manufacturers established outside the Community cannot directly pre-register or register substances. However, a foreign manufacturer may "by mutual agreement appoint a natural or legal person established in the Community to fulfil, as his 'only representative', the obligations on importers".[62] The said representative becomes directly responsible under REACH for registration, in the same manner as an EU importer. Upon the agreement of a representative, the non-EU manufacturer must inform his EU importer(s) thereof.[63] The importer then becomes a 'downstream user'.[64] The representative should possess the latest information on quantities imported and customers sold to (including their uses).[65] He should also prepare the information required for the communication down the supply chain.

There are significant REACH implications for non-EU manufacturers. For example, clothing exports to the EU from India account for nearly 47 per cent

59. L. Bergeson, 'EU Examining how REACH Applies to Nanomaterials', in *Nanotechnology Law Blog*, 2009, at: http://nanotech.lawbc.com/2009/06/articles/international/eu-examining-how-reach-applies-to-nanomaterials/, accessed on 24 June 2010.
60. After adoption the REACH Regulation entered into force in Norway on 30 May 2008. Norwegian Ministry of Environment, REACH adopted in Norway, news and story 25.08.2005. Available at: http://www.regjeringen.no/en/dep/md/Whats-new/News/2008/reach-adopted-in-norway-2.html?id=515102, accessed on 28 June 2010.
61. Norwegian Board of Technology, 'Businesses Asked to Declare Use of Nanomaterials', Teknologiradet, 2009, at: http://www.teknologiradet.no/FullStory.aspx?m=3&amid=7830, accessed on 24 June 2010.
62. Note 9 *supra* [REACH] [Art. 8(1)].
63. Note 9 *supra* [REACH] [Art. 8(3)].
64. For EU importers it means that they will be relieved from their registration obligations within the supply chain as they will be regarded as downstream users of the only representative.
65. European Chemical Agency, Guidance on Data Sharing, September 2007, p. 22, at: http://guidance.echa.europa.eu/docs/guidance_document/data_sharing_en.htm, accessed on 24 June 2010.

of all Indian clothing exports.[66] It has been indicated that the implementation of REACH will become a great challenge for the Indian textile industry. Indian processors and manufacturers of clothing use a number of chemical substances, such as solvents, pigments and dyestuffs. In view of the export to the EU, these chemicals have to undergo the process of registration, evaluation and authorisation under REACH.[67] The Indian government has to create adequate infrastructure, so that exporters can comply with REACH.[68]

8.3.5 Non-EU consumers

The question arises whether Indian, Chinese and other non-EU consumers can benefit from consumer protection under REACH. The answer is no. Although the 'Rotterdam Convention on the Prior Informed Consent Procedure for certain hazardous chemicals and pesticides' entered into force in 2004[69] and is aimed at the protection of human health and the environment, there are still serious problems for non-EU consumers and employees. The main reason is that the majority of electronic items used in the EU (which typically contain chemical substances) find their way to developing countries for a 'second life' or as waste products. For example, countries such as China, India, Ghana and Nigeria experience problems because of electronic waste (E-Waste) from the EU.[70] The increased EU consumption of electronics has also led to an increase in E-waste. Developing countries generally lack the capacity and legislative framework needed to deal with E-waste in a responsible manner. Local workers are often exposed to hazardous chemicals when products such as refrigerators and

66. 'New REACH Regulation can impact apparel exports', Fibre2fashion News Desk – India, 4 August 2009, at: http://www.fibre2fashion.com/news/apparel-clothing-policy-news/news-details.aspx?news_id=75752, accessed on 24 June 2010.
67. Pointed out in a workshop of the Apparel Export Promotion Council of the Federation of Indian Chambers of Commerce and Industry. See: 'Textiles Industry Needs to Prepare for Compliance with REACH Regulation', 31 July 2009, at: http://www.fibre2fashion.com/news/textiles-association-organisation-news/newsdetails.aspx?news_id=75586, accessed on 24 June 2010. For more information, see the website of FICCI-AEPC at: http://www.ficci.com/, accessed on 24 June 2010.
68. At the present time, only a few laboratories in India are presently capable of certifying REACH compliance. See 'REACH is coming. Are you prepared?' in *The Indian Star News Service,* 4 March 2009, at: http://www.theindianstar.com/index.php?uan=3805, accessed on 24 June 2010.
69. Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (known as the Rotterdam Convention and also commonly known as PIC) The text of the Rotterdam Convention, which sets out the provisions and obligations that apply to all parties can be accessed via the PIC site, at: www.pic.int, accessed on 28 June 2010.
70. Report from SwedWatch as a part of the European makeITfair campaign, Out of Control: E-Waste Trade Flows from the EU to Developing Countries, April 2009, p. 9, at: http://makeitfair.org/the-facts/reports, accessed on 24 June 2010.

computers are taken apart in order to extract valuable components and metals. A study published in 2007 indicates that children in the 'recycling town' of Guiyu in China had much higher lead levels in their blood than children living in a settlement where the recycling of electronics did not take place.[71] Other health problems reported included diseases and problems related to skin, the stomach, the respiratory tract and other organs. The EU directive on the Waste Electrical and Electronic Equipment (WEEE) aims to deal with this problem by stipulating that the costs of disposing electronic products must be borne by the producers of the waste.[72] Another European Directive prescribes that producers must phase out some of the most hazardous substances (*i.e.* the RoHS Directive).[73] Despite these measures, the export of EU waste to the developing world continues. The financial incentives for EU companies to export waste is high. For example, it costs approximately EUR 10 to recycle a computer in Sweden; in India, the same computer can be recycled for EUR 1.50 within the informal sector.[74] EU legislation provides a framework; however, only companies themselves can bring about a real change in the handling of chemicals.

8.3.6 Preliminary observations on REACH

Although REACH is a significant step forward in closing the safety gaps and increasing transparency in respect of information relating to chemicals in products, there are still points of concern for consumers:

– The main criterion of substances' registration is the massive quantity of those substances. Only substances manufactured or imported in volumes starting at 1 tonne need to be registered. The same substances in low quantities do not fall within the REACH application except when they are identified as an SVHC. Consequently, if a particular substance has never been registered in the EU because of its low production volume, and has never been tested in any other way, "its hazardous properties may not be

71. X. Huo, L. Peng, X. Xu, L. Zheng, B. Qiu, Z. Qi, B. Zhang, D. Han, Z. Piao, 'Elevated Blood Lead Levels of Children in Guiyu, an Electronic Waste Recycling Town in China', in *Environmental Health Perspectives*, Volume 115, Number 7, July 2007, at: http://ehp03.niehs.nih.gov/article/fetchArticle.action?articleURI=info:doi/10.1289/ehp.9697, accessed on 24 June 2010.
72. Directive 2002/96/EC of the European Parliament and of the Council of 27 January 2003 on waste electrical and electronic equipment (WEEE) [2002] OJ L0096.
73. Directive 2002/95/EC of the European Parliament and of the Council of 27 January 2003 on the restriction of the use of certain hazardous substances in electric and electronic equipment (RoHS) [2002], OJ L0095.
74. Note 70, *supra* [makeItfair], p. 33.

known".[75] The dilemma concerning nanomaterials illustrates that one should not be too optimistic about REACH.

– Only facts related to substances have to be assessed and dispersed. This excludes information concerning products, especially regarding their full composition. Moreover, the assessment does not have to address the production process.[76] CSR concerns, *e.g.* possible human rights abuses and environmental impacts in relation to the production of substances or products, are not covered by REACH.
– The fact that the burden of carrying out risk assessments in respect of chemicals has been placed on the producer is positive. However, it has also been noted that a great deal of responsibility is entrusted to the industry.[77] Therefore, the success of REACH directly depends on how the private sector manages the safety system, and how companies discharge their responsibilities to inform consumers about any dangers and safety aspects related to chemicals in products.
– The information that consumers may request relates only to SVHCs. Presently, only 30 substances are on the SVHC candidate list. NGOs have reacted critically to this list: "the first-ever list is a welcome start, but it is a drop in the ocean when compared to the hundreds of well-known dangerous substances presently used in products every day across Europe."[78] Only six States have put forward candidate substances for the SVHC list. The expansion of the list depends on the motivation of the Member States and the Commission. The reason for the brevity of the first list is mainly political. Consumers and industries might see the candidate list as a 'blacklist' of unwanted substances. Hence, the Commission and Member States supported the idea of keeping the list brief 'to test the system'.[79] One can argue that such reasoning is too pragmatic, considering the urgency of the situation.[80] German and other EU experts have already identified 400 chemicals that are mutagenic, teratogenic and generally harmful to health and

75. EC, 'Questions and Answers on REACH', July 2007, at: http://ec.europa.eu/environment/chemicals/pdf/qa.pdf, accessed on 24 June 2010.
76. Note 11, *supra* [Chemicals Health Monitor].
77. Note 11, *supra* [Chemicals Health Monitor].
78. M. Breddy, 'First REACH Hazardous Chemicals List is a Drop in the Ocean', 2008, at: http://www.greenpeace.org/eu-unit/press-centre/press-releases2/First-REACH-hazardous-chemicals-list-is-a-drop-in-the-ocean, accessed on 24 June 2010.
79. T. Musu, 'REACH Authorisation: Will the Mountain Give Birth to a Mouse?', March 2009, at: http://hesa.etui rehs.org/uk/newsletter/files/NWL_35_UK_p23.pdf, accessed on 24 June 2010.
80. German Federal Environmental Agency, Chemicals: Federal Environment Agency proposes inclusion of five anthracene oils as subject to EU authorisation, Press Release 054/2009, p. 1, at: http://www.umweltbundesamt.de/uba-info-presse-e/2009/pe09-054_chemicals_federal_environment_agency_proposes_inclusion_of_five_anthracene_oils_as_subject_ →

to the environment.[81] At this point in time, it is up to the Member States to put forward all hazardous substances and to include these in the SVHC list.

– SVHCs are still allowed to be used, even if safer alternatives or technologies are available. During the REACH negotiations, this issue was debated heatedly. The EP voted in favour of a requirement to substitute an SVHC by a safer option as a part of the authorisation clause.[82] However, in the end, as part of a political compromise, the EU Council decided to continue to allow the use of these hazardous substances, even if they could be replaced by safer alternatives.[83]

To summarise REACH in the framework of the consumer's right to information, the following observations can be made. It took a long time for the EU to succeed in enforcing a powerful chemical Regulation that aims to protect consumers' health and the environment. Many compromises in the final version of REACH had to be made because of the pressure exercised by powerful lobbyists representing industries. Discussing the impact of REACH on consumers, two contrasting opinions exist. The first, usually expressed by members of 'green' (environmentaly engaged) parties and NGOs, is that the Regulation was watered down and would do little to improve human health.[84] The second position is that REACH is a great EU success because it is the first time that adequate protection against hazardous substances has been provided. Both positions contain an element of truth. On the one hand, REACH erased the distinction between 'new' and 'old' chemicals, *i.e.* covering most of the substances used in the market. The Regulation places the responsibility to assess the risks related to the use of chemicals, and to communicate these, on the industry. REACH has also given consumers a voice, by obliging producers and retailers to provide them with information regarding any SVHCs contained

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to_eu_authorisation.htm, accessed on 24 June 2010. As the Vice President of the German Federal Environmental Agency (UBA), Dr Thomas Holzmann has underlined: "Some Member States are hesitant and so far only a few Members have taken advantage of the great opportunities provided by REACH to do more to protect the environment and health".

81. Note 80, *supra* [Press Release 054/2009] p. 1.
82. EP, 'Parliament adopts REACH – new EU chemicals legislation and new chemicals agency', press release, 13 December 2006, at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+IM-PRESS+20061213IPR01493+0+DOC+XML+V0//EN&language=EN, accessed on 24 June 2010.
83. Greenpeace International, 'Cleaning Up our Chemical Homes Changes the Market to Supply Toxic-Free Products', February 2007, pp. 15-16, at: http://www.greenpeace.org/raw/content/international/press/reports/chemical-home-company-progress.pdf, accessed on 28 April 2010.
84. J. Kanter, 'European Union chemical plans are criticized', in *International Herald Tribune, Business,* 1 November 2006.

in a product. On the other hand, REACH mandates the registration of chemicals based on their quantity, except when they qualify as SVHCs. Hence, chemicals in small quantities, which can also pose a risk to human health and the environment, might never become known to the public. The same is true for nanomaterials. Moreover, the information that consumers are entitled to is very limited as it only concerns 38 SVHCs. The right of consumers to information is clearly 'balanced' with the interest of industry. Last but not least, hazardous substances contained in everyday products will continue to be used, even if safer alternatives exist. The lack of knowledge concerning exposure to chemicals in everyday consumer products (such as textiles and computers) remains a serious problem, as well as the consumer information gap in respect of CSR aspects of the production process.

8.4 Comparison with other EU legislation

The consumer's right to information under REACH provides just one approach. Other relevant EU legislation will be discussed in this section 8.4 and compared to REACH from the 'to know or not to know perspective'.

8.4.1 The General Product Safety Directive

The General Product Safety Directive (GPSD)[85] applies when the safety of a product is not covered by specific legislation such as REACH. Although the GPSD does not offer harmonisation in a particular product area, it offers a new approach by working with broad requirements and by laying down a general legislative framework designed to ensure a high level of protection of safety and health for consumers with adequate enforcement procedures.[86] As the GPSD is a directive, it has to be implemented in national law.

Manufacturers are obliged to take necessary measures to avoid the risks to which consumers might be exposed. These measures can entail: (1) providing consumers with relevant information in order to enable them to assess risks inherent to a product throughout its normal or foreseeable use, especially when the risks are not directly obvious;[87] (2) recalling products that have been supplied to consumers[88]; and (3) withdrawing products from the market.[89] Distributors also have an obligation to act with due care to help to ensure

85. Note 8 *supra* [GPSD].
86. P. Nebbia, T. Askham, *EU Consumer Law* [Richmond Law & Tax Ltd, Richmond, 2004] p. 61.
87. Note 8 *supra* [GPSD] [Art. 5].
88. Note 8 *supra* [GPSD] [Art. 3(4)].
89. Note 8 *supra* [GPSD] [Art. 3(4)].

compliance with the applicable safety requirements, in particular by not supplying products which they know or should have presumed on the basis of the information in their possession and as professionals, do not comply with those requirements.[90]

One of the inconsistencies between REACH and the GPSD concerns the definition of a 'product'. REACH uses the term 'article', and defines this as "an object which during production is given a special shape, surface or design which determines its function to a greater degree than does its chemical composition."[91] In contrast, GPSD defines a product as:

> any product – including in the context of providing a service – which is intended for consumers or likely, under reasonably foreseeable conditions, to be used by consumers even if not intended for them, and is supplied or made available, whether for consideration or not, in the course of a commercial activity, and whether new, used or reconditioned. [92]

The REACH definition is confusing and can give rise to implementation problems, *e.g.* there can be an uncertainty as to whether a certain item qualifies as an article (*i.e.* the substance as an integral part) or as a substance in a container. Printer cartridges and pens are examples of 'borderline' cases. A harmonised approach to EU consumer protection would benefit from using a single and clear definition in various EU legislation.

8.4.2 The General Food Law

Regulation 178/2002 (General Food Law) lays down the general principles and procedures in matters of food safety and established the European Food Safety Authority (EFSA).[93] Important elements are the precautionary and traceability principles that aim to ensure the consumer's safety, and to build up product knowledge. Article 7(1) introduces the precautionary principle:

> In specific circumstances where, following an assessment of available information, the possibility of harmful effects on health is identified but scientific uncertainty persists, provisional risk management measures necessary to ensure the high level of health protection chosen in the Community may be adopted, pending further scientific information for a more comprehensive risk assessment.

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90. Note 8 *supra* [GPSD] [Art. 5(2)].
91. Note 9 *supra* [REACH] [Art. 3].
92. Note 8 *supra* [GPSD] [Art. 2(a)].
93. Regulation (EC) No. 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety (GFL) [2002] OJL31/1.

The Commission conducts the process of evaluating the safety of a food product mainly relying on scientific advice. If a particular ingredient or food additive is suspected of not being completely safe, the Commission can act to limit possible risks and does not have to await proof concerning such risk.[94]

In comparison, despite the fact that REACH is based on the precautionary principle,[95] the facts suggest otherwise. For example, chemicals that are under suspicion of having adverse effects to consumers or the environment, but concerning which little research has been carried out, or no political consensus has been reached to ban them, continue to be present in consumer products. Also, REACH fails to oblige producers to substitute SVHCs for safer options.[96] Another example concerns the ongoing debate as to whether nanomaterials pose serious risks to human health. Due to their small volumes they generally fall outside the REACH scope, hence no data concerning their use or effect are being collected and communicated in the supply chain.[97] Although both REACH and the General Food Law aim to protect human health, very different approaches have been chosen to realise this.

The landmark aspect of the General Food Law is the establishment of the traceability of food at all stages of production, processing and distribution.[98] Food business operators shall put systems and procedures in place which allow them to retrace where food ingredients are sourced from and they are held to make this information available, upon demand, to the competent authorities. Each operator should therefore be able to identify its suppliers, and should also be capable of indicating to which business it has supplied its products. This is known as the 'one-step-backward, one-step-forward' approach.[99] This traceability system throughout the supply chain is not only important with a view to ensuring consumer safety. It can also aid a company in complying with CSR standards: "traceability of food products will help isolate industry response to

94. Note 93 *supra* [General Food Law] [Articles 19 and 20].
95. Note 9 *supra* [REACH] [Art. 1(3)].
96. S. Hansen, L. Carlsen, 'Chemicals regulation and precaution: does REACH really incorporate the precautionary principle', in *Environmental Science and Policy*, vol. 10, No. 5, August 2007, pp. 395-404.
97. Friends of the Earth, 'Nanomaterials, sunscreens and cosmetics: Small ingredients, big risks', 2006, available at: http://nano.foe.org.au/nanomaterials-sunscreens-and-cosmetics-small-ingredients-big-risks, accessed on 28 June 2010. Nanoparticles like carbon and graphite are since 2008 no longer exempted from registration under REACH; see also note 57 *supra* [WWF].
98. Note 93 *supra* [General Food Law], Art. 18.
99. Food Standards Agency, Guidance Note for Business Operators on Food Safety, Traceability, Product Withdrawal and Recall. A Guide to Compliance with Articles 14, 16, 18 and 19 of General Food Law Regulation (EC) 178/2002, July 2007. Available at: http://www.food.gov.uk/multimedia/pdfs/fsa1782002guidance.pdf, accessed on 1 July 2010.

problems, thus enabling the industry to more rapidly and cost effectively control disease and reduce impacts from tampering".[100]

The traceability requirement is also present in REACH as REACH maintains a registration system for chemical substances, which system requires the traceability of chemicals and the identification of chemical substances within consumer goods. Although both REACH and the General Food Law enhance traceability in the supply chain, the traceability does not concern CSR aspects related to the production process. One might argue that it could prove too burdensome for industries to provide information on societal aspects to consumers. However, the counter-argument would be to state that when a consumer is willing to pay EUR 2,000 for a new TV set, he should also be entitled to receive full information about the history of the product and its properties.

8.4.3 Draft Consumer Directive

On 8 October 2008, the Commission adopted a proposal for a Directive on Consumer Rights (Consumer Directive).[101] This piece of legislation unifies four existing consumer directives.[102] It modernises and strengthens existing consumer rights.[103] This draft directive covers consumers' rights with regard to different types of purchasing and the methods in which these purchases are effected, *e.g.* distance selling and doorstep sales. This directive will stimulate clear information on price, extra charges and fees. It also aims to provide security against non-delivery and late delivery. Chapter 2 of the draft directive contains provisions on consumer information. Specifically, article 5 includes general information requirements, which a seller is obliged to provide to a consumer. These requirements are: (1) the main characteristics of the product; (2) the address and, if possible, identity of the trader and, if possible, the identity of the trader on whose behalf he is acting; (3) the price and additional price-related information; (4) the arrangements for payment, delivery, performance and the complaint handling policies; (5) the existence of a right of withdrawal; (6) the existence and the conditions of after-sales services and commercial guarantees; (7) the duration of the contract or if the contract is open-ended, the conditions for terminating the contract; (8) the minimum duration of the consumer's obligations under the contract; and (9) the existence and conditions of deposits or other financial guarantees to be paid or provided

100. M.J. Maloni, M.E. Brown, 'Corporate Social Responsibility in the Supply Chain: An Application in the Food Industry', in *Journal of Business Ethics,* No. 68, 2006, p. 42.
101. Proposal for the Directive of the European Parliament and of the Council on Consumer Rights, 8 October 2008, Brussels [Directive 2008/0196/COD].
102. *I.e.*: The Unfair Terms Contract Directive, the Distance Selling Directive, the Consumer Sales and Guarantees Directive and the Doorstep Selling Directive.
103. Note 101 *supra* [Proposal Directive Consumer Rights], context of the proposal, p. 3.

by the consumer at the request of the trader. This long list of information items only refers to the 'traditional' type of consumer information, and does not contain any item regarding the way in which and under which circumstances a certain product has been produced (*e.g.* CSR aspects). That being said, it still concerns a draft directive and many comments and proposals for amendments have been circulated, hence it will probably undergo some amendments. Subsequently, it has to be considered by the Council and the EP.[104]

8.4.4 Tobacco Directive

Directive 2001/37/EC (Tobacco Directive)[105] concerns the sale, manufacture and presentation of tobacco products in the Member States of the EU. In particular, the Tobacco Directive regulates the use of warnings on cigarette packs, the prohibition of descriptions such as 'mild' or 'light,' the maximum tar, carbon monoxide yields and nicotine and the prohibition of tobacco for oral use.[106] This Directive unified Community legislation on this subject,[107] and contributes to a higher level of consumer health protection by stating that companies are to provide more information to consumers. The information has to appear on the cigarette containers, *e.g.* health warnings, product description, ingredients, and a traceability number. Article 6 states that manufacturers and importers of tobacco products have to submit a list of ingredients per product to the authorities. Ultimately Member States will ensure that the list of ingredients for each product, indicating tar, nicotine and carbon monoxide yields, is made public.[108] However, a Commission report on the implementation of the Tobacco Directive reveals that only 13 Member States have provided information about the ingredients of tobacco products.[109] Overall, it was concluded that

104. For an analysis of the draft directive, see: J. Luzak, Information duties in the new proposal for the Directive on consumer rights, in: M. Hesselink, M. Loos, *Het voorstel voor een Europese richtlijn consumentenrechten* (Boom Juridische Uitgevers, The Hague, 2009). Hardy, R., Hesen, G., 'Het voorstel voor een richtlijn betreffende consumentenrechten' [the proposal for a directive on consumers' rights], *WPNR*, Vol.140, No. 6785, 24 January 2009, pp. 69-72.
105. Directive 2001/37/EC of the European Parliament and of the Council of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products [2001] OJ L194.
106. Europa, Manufacture, presentation and sale of tobacco products. Summaries of EU Legislation, 2006, at: http://europa.eu/legislation_summaries/public_health/health_determinants_lifestyle/c11567_en.htm, accessed on 25 June 2010.
107. Note 105 *supra* [The Tobacco Directive], p. 1, repeals Directive 89/622/EEC (amended by Directive 92/41/EEC) and Directive 90/239/EEC,
108. Note 105 *supra* [The Tobacco Directive], Art. 6(3).
109. The Commission of the European Parliament, the Council and The European Economic and Social Committee, 'First Report on the application of the Tobacco Products Directive', 2005, p. 6, at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0339:FIN:EN:PDF, accessed on 25 June 2010.

the available information concerning the ingredients and its effect on consumers' health still remains incomplete and rather limited.

Article 5(9) of the Tobacco Directive also incorporates the traceability principle. It states that "to ensure product identification and traceability, the tobacco product shall be marked in any appropriate manner, by batch numbering or an equivalent hereof, on the unit packet enabling the place and time of manufacture to be determined." This means that each pack of cigarettes should have a traceable number through which the producer can be identified. For consumers, however, this does not have added value, because the codes on the pack are not understandable outside of the tobacco industry.[110] A system which is comprehensible to consumers still has to be developed. Furthermore, similar to REACH and the General Food Law, the Tobacco Directive framework does not allow for CSR aspects relating to production to be traced.

8.4.5 The Unfair Commercial Practices Directive

The Unfair Commercial Practices Directive[111] lays down rules that prohibit certain practices across the EU, *e.g.* misleading and aggressive marketing practices. This legislation also aims to protect vulnerable groups of consumers, such as children, against advertising that directly encourages them to buy. The overall goal of the Unfair Commercial Practices Directive is to clarify consumer rights and to simplify cross-border trade. The Directive's scope is wide. It covers all business-to-consumer transactions. A trader has to provide certain basic, factual information to a consumer prior to a contemplated purchase transaction, including the key characteristics of the product, data about price, delivery costs and the right of withdrawal.[112] The listed items do not include information regarding the conditions under which a product has been produced.

110. A. McNeill, L. Joosens, M. Jarvis, 'Review of the Implementation of the Tobacco Product Regulation Directive 2001/37/EC', ASH March 2004, p. 50, at: http://www.ash.org.uk/files/documents/ASH_164.pdf, accessed on 24 June 2010.
111. Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council
112. Note 111 *supra* [Unfair Commercial Practices Directive], Article 7.

8.4.6 Fish products labelling Regulation

The regulation on the common organisation of the markets in fishery and aquaculture products (Fish Regulation)[113] requires producers to collect information on fish, marketed in the Community, on its origin or catchment area and production method, *i.e.* caught or farmed or cultivated.[114] According to the Fish Regulation a producer shall provide such information together with the scientific name of the species to consumers by means of the labelling or packaging of the product, or by means of a commercial document accompanying the goods. The increasing variety of supply, particularly of fresh and chilled fishery products, makes it essential to provide consumers with a minimum amount of information on the main characteristics of the fish products.[115] Another reason for the disclosure of the information is the potential for consumer influence in creating a sustainable fishery market. The Dutch view on the European fishery policy is formulated in a report published by the Ministry of Agriculture, Nature and Food Quality.[116] In this report it is stated that the government alone is not able to stimulate the necessary sustainability of the fishing industry.[117] Since the market and consumers are powerful allies, it is wise to use their involvement to the advantage of the fishing sector. By providing consumers with information on the characteristics of the fish products, the consumer will have a larger role in the realisation of the goals of the fisheries policy, such as a sustainable fishery market.[118]

8.4.7 Electrical and electronic equipment

As stated in section 8.3.5, there are two EU directives that address the handling of chemical substances in electronic goods: the WEEE Directive[119] and the RoHS Directive.[120] The WEEE Directive aims to both reduce the amount of electrical and electronic waste being produced, and to promote the reuse,

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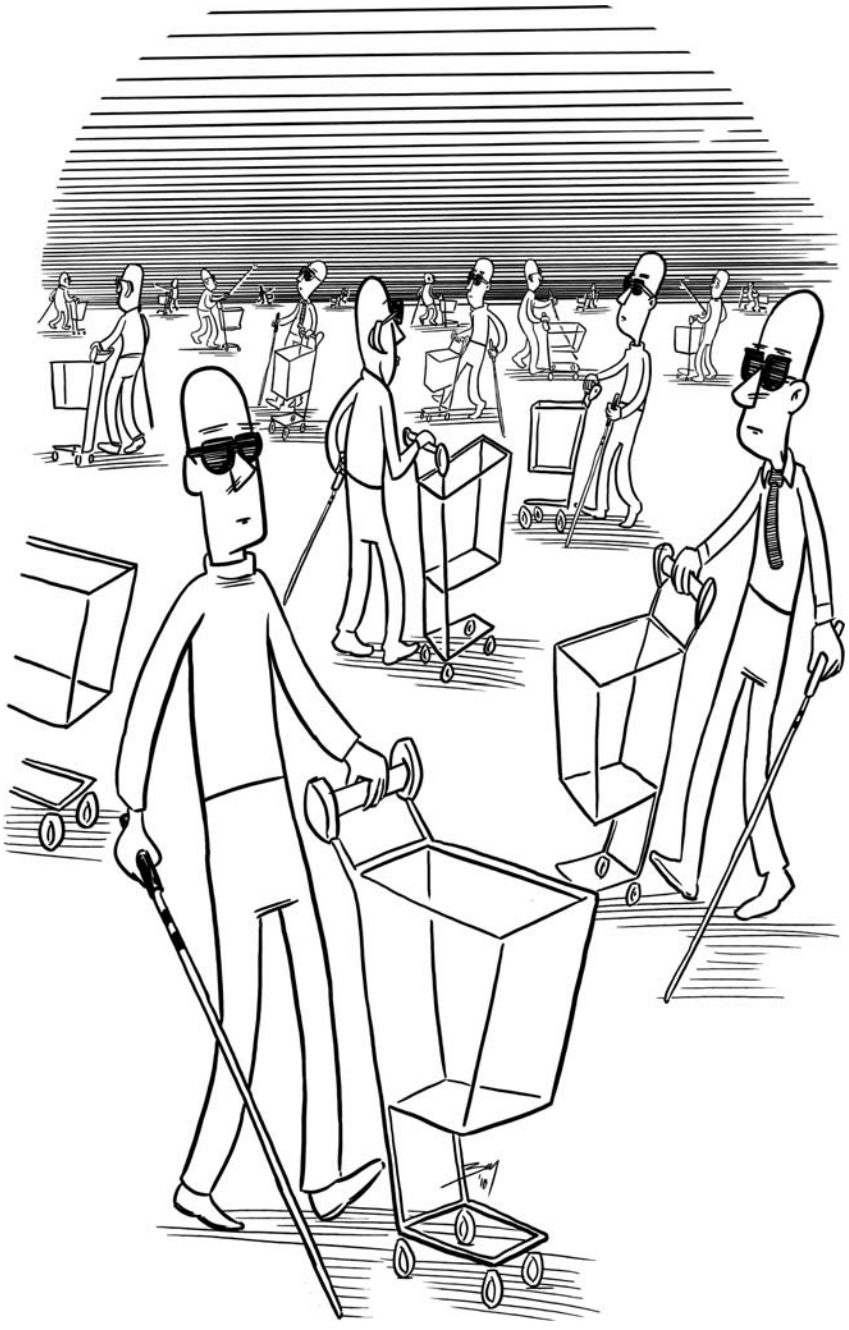
113. Council Regulation (EC) laying down detailed rules for the application of Council Regulation (EC) No 104/2000 as regards informing consumers about fishery and aquaculture products (Fish Regulation) [2001] OJ L278/6.
114. Note 113 *supra* [Fish Regulation], Article 4.
115. Council Regulation (EC) No 104/2000 of 17 December 1999 on the common organisation of the markets in fishery and aquaculture products [2000] OJ L17/22, preamble consideration 8.
116. Report from Dutch Ministry of Agriculture, Nature and Food Quality, Fish as a sustainable capital: the Dutch view on the European Fisheries Policy, 2009-2010, at: http://www.minlnv.nl/portal/page?_pageid=116,1640360&_dad=portal&_schema=PORTAL&p_file_id=49282, accessed on 28 June 2010.
117. Note 116 *supra* [Fish as a sustainable capital], p. 27.
118. Note 116 *supra* [Fish as a sustainable capital], p. 27.
119. Note 72 *supra* [WEEE].
120. Note 73 *supra* [RoHS].

recycling and recovery of these products (*i.e.* to reduce disposal). Importantly, it requires that certain information be divulged to consumer households, including the potential effects on the environment and human health as a result of the presence of hazardous substances in electrical and electronic equipment.[121] Member States may require that some or all of the information shall be provided by manufacturers and/or distributors, *e.g.* in the instructions for use or at the point of sale.[122]

The RoHS Directive requires that new electrical and electronic equipment that is put on the market should not contain any of the six following banned substances: lead, mercury, cadmium, hexavalent chromium, poly-brominated biphenyls or polybrominated diphenyl ethers in quantities exceeding maximum concentration values. The RoHS Directive does not explicitly refer to compliance procedures, specific certificates or testing methods to be used by the Member States for demonstrating compliance; hence the Member States are responsible for setting the relevant compliance rules. Similar to REACH, the RoHS Directive deals with chemical substances. It has been argued that companies could face a situation where a chemical substance is allowed in IT equipment under REACH, but banned under the RoHS regime and vice versa. Apparently, there are inconsistencies between these two legislative products.[123]

121. Note 72 *supra* [WEEE], Article 10.
122. Note 72 *supra* [WEEE], Article 10(4).
123. Speech by Alexandre Affre, Adviser, Environmental Affairs Business People, Confederation of Danish Industry (DI) Conference on the implementation of REACH, 2 September 2009. Available at: http://212.3.246.117/docs/1/JECCCKPBEAFKCJCBAHOIIMLPPDBG9DWWB39LTE4Q/UNICE/docs/DLS/2009-01807-E.pdf, accessed on 18 June 2010. See also: Europe environmental news and information system, 'EU chemicals legislation remains inconsistent', September 2009, at: http://www.endseurope.com/22118?referrer=search, accessed on 18 June 2010.



8.5 Enforcement of the consumer's right to information

8.5.1 Experiment regarding consumer information under REACH

The effectiveness and enforceability of the consumer's right to information provided for in article 33(2) of REACH can be measured in various ways. One of them is by measuring the compliance rate of companies in answering a consumer's request for information regarding the presence of SVHCs in a product, and to evaluate the quality of the responses. In view of this chapter, such an experiment was conducted by sending a request for information to 32 companies in the Netherlands. Each request pertained to a specific product of that company. For the request, they used the format included in Annex 8.2. The results are presented in Figure 8.1 below, and in Table 8.1 *in fine* in more detail. Since the experiment only concerned a small sample and was only undertaken for illustrative purposes, the author will refrain from drawing affirmative conclusions. However, certain observations can be made. Firstly, the response rate of 52 per cent illustrates that not all companies consider their legal obligation to provide information to consumers pursuant to article 33(2) to be as a 'hard' obligation. Secondly, the variety in the level of detail provided in the responses raises questions of uniformity: 24 per cent of the companies included in the sample gave an incomplete answer. Arguably, the lack of a standard reply template can lead to ambiguous and vague answers. Finally, 28 per cent of the companies adequately addressed the question posed. Most of them referred in their e-mails or letters to their websites, where the requested information could be found. From an enforcement perspective, the question emerged whether an incomplete or vague answer qualifies as an insufficient response, and should therefore be regarded as a breach of REACH.

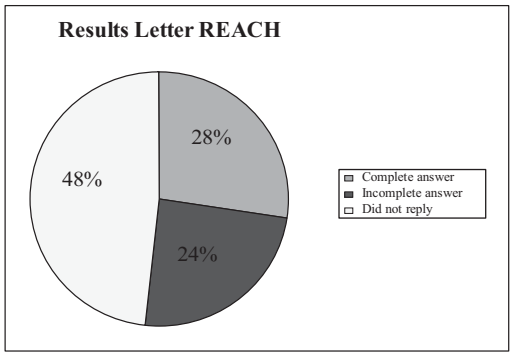


Figure 8.1 Compliance by Dutch companies

8.5.2 Enforcement of REACH

As REACH is a Regulation, it has direct effect in all Member States,[124] *i.e.* it will automatically form part of Member States' national legislation.[125] In accordance with the principle of procedural autonomy,[126] the enforcement of REACH is carried out through Member State legislation. The Member States thus have a significant responsibility for establishing mechanisms that will ensure the smooth implementation of REACH by their industries. Due to the complexity of REACH (849 pages of legislation), a 'Forum for Exchange of Information on Enforcement' (Forum) was created for the purpose of assisting the Member States with the implementation. The Forum is part of ECHA.[127] It has issued non-binding guidelines[128] which allow Member States a certain degree of discretion to adopt enforcement strategies according to their national priorities. Member States' enforcement regimes may therefore vary. For example, the penalty system according to article 126 of REACH stipulates that the Member States shall lay down "the provisions on penalties applicable for infringement of the provisions of the Regulation and shall take all measures necessary to ensure that they are implemented". Many differences can be observed among the States that have already determined the penalty system for infringements of the Regulation.[129]

The consumer's right to information under article 33(2) of REACH can only be guaranteed if sanction mechanisms or other measures are adequately set up and maintained at a national level. The question is how the enforcement of the consumer's right to information can be regulated. To find an answer to this question, the author examined the Dutch legal system.

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124. EC Treaty (Treaty of Rome, as amended), art. 249 (pursuant to the Lissabon Treaty this has become article 288 EC Treaty).
125. Note 10 *supra* [Craig, De Burca], p. 85.
126. The principle of procedural autonomy implies that in the absence of uniform procedural rules, the Member States have authority to lay down the procedural rules and remedies available before national courts as a matter of national law. Also see note 2 *supra* [Reich, Micklitz], p. 35.
127. ECHA, 'The Forum of the European Chemical Agency', at: http://echa.europa.eu/about/organisation/forum_en.asp, accessed on 25 June 2010.
128. Strategies for enforcement of Regulation (EC) no. 1907/2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), 2009, Forum for Exchange of Information on Enforcement, 2-4 December 2008, at http://echa.europa.eu/doc/about/organisation/forum/strategies_enforcement_reach.pdf, accessed on 24 June 2010.
129. Most of the new Member States have chosen more lenient measures to penalise violations of REACH. *E.g.*, in Latvia, the fine is from 300 to 1,000 Lats (1000 Lats is equivalent to EUR 1.426) depending on the seriousness of the infringement; in Romania, the punishment is a fine from 6,500 to 50,000 Lei (50,000 Lei is equivalent to EUR 11.771 euro); and in the Czech Republic, fines range from 50,000 to 500,000 CZK (500,000 CZK is equivalent to EUR 19.772). The majority of the other EU States have imposed more stringent penalties.

8.5.3 Enforcement regime in the Netherlands

The Netherlands has chosen to implement REACH strictly. The maximum punishment for a breach is a fine of EUR 670,000 and/or imprisonment for up to six years. Dutch restrictions on using hazardous substances are more severe than those listed in Annex XVII of REACH.[130] Under Dutch law, the enforcement of REACH has become part of the Environmental Management Act (EMA; *Wet milieubeheer*). Article 9.3.3(1) EMA qualifies the violation of certain provisions of REACH, including article 33(2) concerning the consumer's right to information, as a 'serious infringement' or 'environmental offence' under the Economic Offences Act (*Wet op de economische delicten*). The supervision of company compliance with REACH falls within the sphere of competence of the Ministry of Housing, Spatial Planning and the Environment (*VROM*). The Inspectorate for Housing, Spatial Planning and the Environment (*VI*), the Food and Consumer Product Safety Authority (*VWA*) and the Labour Inspectorate (*AI*) also supervise company compliance with REACH pursuant to administrative law. These governmental authorities are authorised to investigate infringements of REACH provisions and are authorised to issue an official report on their findings. In the event of an infringement, the Minister has discretionary powers to enforce administrative measures under article 18.7 EMA. Additionally, the Minister can impose an order for incremental penalty payments under article 5:32 of the General Administrative Law Act (*Algemene wet bestuursrecht*) on the infringer.

From a consumer perspective, it is essential to understand what he can do if the company does not reply to his request for information. There are no guidelines or relevant provisions on how the consumer can proceed with his complaint if and when this should occur. Pursuant to inquiries by the author, VROM officials informed us that, in principle, the VWA is responsible for the enforcement of article 33(2) of REACH. Hence, the consumer has to contact this agency with a complaint and the VWA might impose sanctions that can be of an administrative as well as of a penal character.

It is doubtful, however, whether a consumer would actually take action against a company. Firstly, most consumers are simply unaware of the fact that

130. *E.g.*, the restrictions affecting coatings containing polyaromatic hydrocarbons and short-chain chlorinated paraffins will be maintained until 1 June 2013. From June 2009 the Marketing and Use Directive (76/769/EEC) became Annex XVII to REACH. Annex XVII imposes restrictions on hazardous substances. See: Chemical Inspection & Regulation Service Limited, 'Netherlands Strictly Implemented REACH', 16 June 2009, at: http://www.cirs-reach.com/index.php?option=com_content&view=article&id=113:netherlands-strictly-implement-the-reach-regulation&catid=42:news&Itemid=78, accessed on 3 May 2010.

they have a right to information concerning dangerous chemicals. This has been poorly communicated to consumers.[131] Secondly, even if a consumer wishes to undertake action against a company, the absence of clear guidelines as well as difficulties which present themselves when trying to access the relevant authorities will most likely bring his enthusiasm to an end. Obviously, it will not be a priority for the authorities to employ their resources to take action against a company that has failed to send a response to a consumer.

If *not* providing a full answer on an 'article 33(2) REACH question' was to be qualified by the Dutch authorities as tortious behaviour, *e.g.* as an 'unfair trade practice', it would certainly assist a consumer, or a consumer organisation on his behalf, in addressing such a company, and if relevant in claiming damages (*e.g.* in line with articles 6:193b or 6:193c DCC on unfair trade practices and misleading information). Alternatively, civil law could stipulate that non-compliance with article 33(2) of REACH provides ground for rescission of the purchase contract for the product concerned.

8.6 The consumer's right to product information on societal aspects

8.6.1 New Dutch legislative proposal

In the Netherlands, the Labour Party (*Partij van de Arbeid*, *i.e.* PvdA) is preparing a legislative proposal to assist consumers in promoting CSR.[132] According to many in the Netherlands, including the Dutch Labour Party, consumers play an important role in promoting CSR, *i.e.* by taking conscious decisions when buying products. As they need information upon which to base their decision to buy, they are expected to request information from companies regarding the societal aspects of a product, thereby helping companies to better manage and control their supply chain.[133]

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131. However, the Chemicals Health Monitor Project, note 11 *supra* [Health and Environment Alliance], provides relevant information.
132. The text has not yet been published (28 June 2010). The Dutch Member of Parliament, Mei Li Vos, has been kind enough to share a working draft of 5 March 2010, as well as the accompanying Explanatory Memorandum, with the author.
133. *E.g.* SER [Social-Economic Council], 'De winst van waarden' (2000-11), pp. 31, 32, 43; SER, 'Duurzame globalisering: een wereld te winnen' (SER 2008-06), pp. 223-227; MVO Nederland (platform to promote CSR in the Netherlands), 'Consumenten: rechten, veiligheid en gezondheid' [consumers: rights, safety and health], at: http://www.mvonederland.nl/dossier/7/152; EU Commission, Greenbook on CSR, COM(2001) 366 def., 18 July 2001 [no. 79-83]; Interview with the director of the Dutch Consumers' Organisation, available at: www.basisboekmvo.nl/files/interviews/Klaske%20de%20Jonge.pdf; websites accessed on 16 June 2010.

The objective of the proposed bill (*Wet Openbaarheid Productieketens* [Act on the transparency of supply chains], WOP) is to grant consumers a 'right to know' concerning the sustainability aspects of products offered on the Dutch market with a view to enhancing sustainable consumption. A right to information could contribute to transparency concerning the manner in which products are produced. Transparency is one of the cornerstones of a well functioning market economy. Therefore, only if a consumer has access to information about the extent to which supply chains comply with societal norms during the production process, will he be able to make an educated decision to either buy or not to buy the certain product. As a consequence, the consumer's decision will be an incentive to companies to sell products that are produced in a sustainable manner. 'Consumer power' is one of the means embraced by the Dutch government and the EU Commission to exert influence on international supply chains. The WOP grants consumers a right to information regarding the CSR aspects of a certain product. These aspects relate to compliance during the production process (in the supply chain) with (see draft article 2):

- the ILO norms on 'decent work' (*i.e.* ILO treaties 138 [minimum age], 182 [worst forms of child labour], 29 [forced labour], 111 [discrimination], and 87 [establishment of unions];
- corruption as defined in article 2 of the Council of Europe Civil Law Convention on Corruption (1999);
- article 2 of the Convention on Biological Diversity; and
- the Convention on International Trade in Endangered Species of Wild Fauna and Flora.

A manufacturer operating on the Dutch market has to provide, upon request, the abovementioned information to a consumer or consumer association. According to the WOP, a 'consumer' is any natural person who is acting for purposes which are not related to trade, business or a profession. 'Manufacturers' are manufacturers of a finished product, producers of raw materials and elementary components, or any persons purporting to be a manufacturer by placing their name, trade mark or other distinctive sign on the consumer goods (the same definition is used as the one in the Product Liability Directive[134]).Whether or not a purchasing agreement has been concluded is not a decisive factor; the consumer's intention to buy the product is sufficient to activate the right to information. The information requested shall be provided within 45 days after having received the request (the same period as under REACH). An information request can be submitted by the consumer, and answered by the manufacturer, on

134. Directive 85/374/EEC [1985], OJ L 210.

paper or by means of another durable medium which is easily accessible to the consumer.[135]

In order to protect the competitive position of manufacturers, the proposed act exempts a manufacturer from providing information if this could cause serious or irreparable damage to its legitimate commercial interests. Furthermore, to alleviate the burden on manufacturers to produce answers, the WOP has built in quantitative limitations. Draft article 4 releaves the manufacturer from the obligation to respond if he is able to demonstrate that he has satisfied a certain maximum number of information requests in the same year. This article contains a table which provides quantitative limitations related to the number of employees. On an annual basis, for every product, information has to be communicated at a pace of (on average) one request for every hundred employees. For example, if a company with 650 FTEs places 15 different products on the market, it has to deal with a maximum of 90 information requests submitted by consumers on annual basis.

A manufacturer acts in accordance with the WOP by providing the requested information within the agreed deadline. However, the data in question might not be available in the supply chain. In that case, a manufacturer can still fulfil his duty under the WOP by simply informing the consumer of this fact. The WOP does not contain a sanction mechanism. In fact, the WOP relies on market forces and consumer empowerment. Notwithstanding, the legislative proposal could seek analogous application of the legal framework of 'unfair trade practices' (Directive 2005/29/EC; see sections 8.4.5 and 8.5.3 *supra*), if it were to define a manufacturer's failure to timely answer a consumer request as an 'unfair commercial practice'. Hence, pursuant to article 5 of this directive, such manufacturer can be considered to have 'distorted the economic behaviour of a consumer with regard to the product in question'. Under articles 6:193b or 6:193c DCC this might qualify as a tort against the consumer because the former impairs the latter's ability to make an informed decision. This could in turn lead to a compensatory damages claim (article 6:162 DCC).

The proposed WOP will probably soon be submitted to Dutch Parliament. Subsequently, the Lower House can either adopt, reject or amend the proposal. The WOP will not be promulgated until the Upper House has adopted the proposal.

From the perspective of a European legal framework, the proposal is consistent with current legislation as discussed in the previous sections. Manufacturers use information mechanisms, such as the information exchange channels which have been developed in the supply chain pursuant to obligations imposed by REACH, the General Food Law, the Fish Directive and the Tobacco Directive. Besides, the WOP is in line with the European trend of consumer empowerment and the emergence of awareness. The Fish Regulation

135. Note 132 *supra* [WOP] [draft art. 3].

(see section 8.4.6 *supra*) is an example thereof. Additionally, in the Consumer Directive, rules about consumer rights on information constitute an important element (see section 8.4.3 *supra*).

8.6.2 Experiment regarding consumer information on CSR

Similar to the REACH experiment described in section 8.5.1, an experiment was conducted in view of this chapter. An information request was submitted to manufacturers concerning CSR aspects of a certain product. A total of 32 companies[136] was requested to provide information concerning such a product with respect to (1) the labour conditions, including in the supply chain of the product; (2) corruption practices, and (3) the environmental impact (see the full text of the letter in Annex 8.3). In comparison to the REACH experiment, the response rate was significantly lower, namely 38 per cent in total. Assumedly, the fact that companies are not obliged to provide CSR information is one of the explanations for this. The quality of the responses was diverse. Only 17 per cent of the companies addressed all of the questions, and gave full and detailed answers. The other 21 per cent responded only to some of the questions or merely referred to their websites. The results are presented in Figure 8.2 below, and in Table 8.2 *in fine* in more detail.

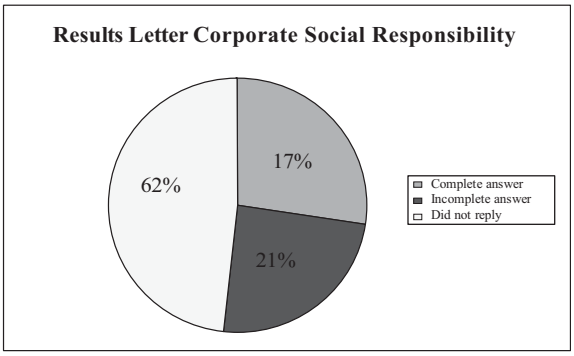

Figure 8.2 Answers by Dutch companies

8.7 Conclusion

The objective of this chapter was to analyse the consumer's right to information. As this right is considered to be one of the most important

136. Most of the products and companies were the same as in the first experiment. Only the questions posed were different.

consumer rights, also under REACH, the REACH Regulation was evaluated in sections 8.2 and 8.3 with a focus on the provisions that deal with consumer protection. On the basis of this research, the author has identified certain problematic elements. Examples are: the registration criterion of chemical substances is based on volumes rather than on health impact and the information that consumers can request is limited to only a few hazardous substances.

In section 8.4, REACH was compared with other EU legislation that directly or indirectly concerns the consumer's 'right to know'. Inconsistencies were discovered between the terminology used in REACH and in the GPSD. This does not improve the effectiveness of the EU legislation. Neither does it strengthen the position of EU consumers. Furthermore, an analysis was conducted regarding obligations on companies to set up systems so that they can trace products and ingredients throughout the supply chain. Product traceability requirements were found under REACH, the General Food Law, the Tobacco Directive, and the Fish Regulation. It is contended that such a system will help companies in providing answers to consumers.

Section 8.5 revealed that the right to information under REACH is not easy to enforce. The outcome of an experiment undertaken as part of the study for this chapter demonstrated that not all companies respond clearly to a question submitted to them concerning possible chemical substances in one of their products. Moreover, an examination of the Dutch procedures set up for enforcement of a consumer's right to information has shown that these procedures are notnecessessarily effective or adequate for these types of rules.

Furthermore, the question was posed whether it is sufficient for a consumer wanting to make an informed purchase decision to only receive information on the presence of chemical substances. An argument was made in favour of consumers who wish to receive full product information that also includes the societal aspects of production. Section 8.6 assessed a new legislative proposal that is being prepared in the Netherlands, the WOP. It intends to provide a consumer with the right to information on societal aspects of a product. The results of a second experiment showed that only a small portion of companies made an effort to answer the questions posed. Apparently, legislative pressure helps companies in dedicating resources to answering consumer questions. As both authorities and the private sector indicate that consumers have to ask for more responsible supply-chain strategies, this presents itself as an interesting field for further research. More in-depth studies are surely needed.

Annex 8.1 Corporate obligations under REACH

Actors	Obligations
(1) Manufacturers of substances	➢ to register chemical substances ≥ 1 tonne/year ➢ to provide information (including the Technical Dossier and the Chemical Safety Report (CSR) for substances manufactured or imported in quantities ≥ 10 tonnes per/year) ➢ to provide information on the safe use of chemicals with particularly hazardous properties (this requirement depends on the concentration level of these chemicals in products) upon a consumer's request
(2) Importers of substances	➢ to pre-register chemical substances with ECHA (applies to companies which started to import the substances before December 2008) to register chemical substances ≥ 1 tonne/year ➢ to inform ECHA electronically about the classification and labelling of chemicals, if imported chemicals are subject to registration or classified as 'dangerous' ➢ to provide information on the safe use of chemicals with particularly hazardous properties (this requirement depends on the concentration level of these chemicals) upon the consumer's request
(3) Downstream Users	➢ to comply with restrictions set for certain dangerous substances listed in Annex XVII ➢ to communicate any potential hazards caused by chemicals up and down the supply chain ➢ to comply with Risk Management Measures stated in suppliers' Safety Data Sheets ➢ to classify and label 'dangerous substances' and those registered under REACH ➢ to assess their own uses and prepare a Chemical Safety Report and to report, where necessary ➢ to submit the required notifications to the ECHA ➢ to obtain authorisation to use substances of very high concern that have not been authorised

Annex 8.2 Template consumer letter [REACH]

To […….]

Dear Sir/Madam

Date, place

Re: [describe product or mention brand or retail store]

In accordance with the new European regulation on Chemicals, REACH, I am writing to ask you to inform me about the presence in the product XX or its packaging of any chemical from the group of "substances of very high concern" as specified by REACH.

Should any of these substances be present in the product XX or its packaging, I wish to be informed about the name of this substance. I would be grateful to receive this information within 45 days as required by REACH.

I would also be grateful if you would inform me about steps you are taking to provide products intended for the same use but which do not contain such potentially hazardous chemicals.

Yours faithfully,

[NAME and (email) address of the consumer]

CC: European Chemicals Agency – Helsinki
Annankatu 18, 00120 Helsinki, Finland
(www.echa.europa.eu)

CC 2: Your national consumer or environmental organisation

Annex 8.3 Template consumer letter [CSR Aspects]

To […….]

Dear Sir/Madam

Date, place

Re: [describe product or mention brand or retail store]

As a concerned consumer, I would be grateful to receive information on the corporate social responsibility aspects of one of your products. It concerns the production of product (name of the product).

Specifically, I would like to know:

1) With regard to labour conditions, can you guarantee that in the supply chain of the Product no form of child labour is employed (below the minimum age, specified in ILO Conventions) or forced labour; and that employees through the entire supply chain of the Product are not discriminated against on the basis of their gender, race, nationality and religion?
2) Can you guarantee that in the supply chain of the Product, employees are not willingly involved in corruption?
3) Can you inform me of the steps that your company undertakes to reduce any negative effects of the production of the Product on the environment? Can you guarantee that the production of the Product does not violate the Convention on Biological Diversity?

I would be very grateful to receive […]

Table 8.1 Company responses to consumer questions on chemicals

no	Company	Product	Type of letter: hard copy or email	Content of response (use of chemical substances)	Type of response
1	Canon	Ink cartridge	No reply		
2	Dell	Laptop	E-mail	No SvHC	Unclear answer or language
3	Esprit	Cotton jacket	Hard copy	No SvHC	Unclear
4	Etos	Shower gel	E-mail	No SvHC	Full answer
5	European Salt Company	Salt	Hard copy	No risk for using product	Unclear
6	H&M	Shoes	E-mail	No SvHC above 0,1	Full answer
7	Head & Shoulders	Shampoo	No reply		
8	Hewlett-Packard	Ink cartridge	Hard copy	It contains SvHC	Full answer
9	HTC	Mobile phone	Letter returned		Did not reach addressee
10	Imation Europe BV	CDs	Letter returned		Did not reach addressee
11	Inkstation International	Ink cartridge	No reply		
12	Jonson Benelux N.V.	Cleaning liquid	Hard copy	No SvHC	Full answer
13	Keune	Shampoo	E-mail	No SvHC	Unclear
14	Kyocera	Ink cartridge	No reply		
15	Lexmark	Ink cartridge	No reply		
16	Lexmark International	Ink cartridge	Hard copy	No SvHC, with the exception of extra parts	Full answer
17	Lidl	Cleaning product	No reply		
18	Logitech	Wireless desktop	Hard copy	No SvHC	Full answer
19	Merison BV	Cleaning product	No reply		
20	Nokia	Mobile phone	No reply		
21	Philips	Headphones	No reply		
22	Philips	Lamp	No reply		
23	Plus	Washing liquid	E-mail	No SvHC	Unclear

no	Company	Product	Type of letter: hard copy or email	Content of response (use of chemical substances)	Type of response
24	Procter & Gamble	Washing liquid	Hard copy	No SvHC	Unclear
25	Sara Lee	Toothpaste	E-mail	No SvHC (they think)	Full answer
26	SCA Hygiene Products B.V.	Hankerchiefs	No reply		
27	Sony	Laptop	No reply		
28	Sony	Playstation	No reply		
29	TEFAL	Tefal Compact frying pan	E-mail	No SvHC (they think)	Unclear
30	Toshiba	Satellite	E-mail (much later after deadline)	It contains SvHC	Full answer
31	Unilever	Bleach	No reply		
32	Unilever	Fabric softener	No reply		

Table 8.2 Company responses to consumer questions on CSR

no	Company	Product	Reply	Content of response (labour/corruption/ environment)	Type of response
1	Akai Sales Pte Ltd	Television	No		
2	Apple	iPhone 3G	No		
3	Canon	Ink	No		
4	Dell	Dell Vostro 1520 laptop	Yes	Vaguely answered	Unclear
5	ESCO, European Salt Company	Salt	Yes	Vaguely answered	Unclear
6	Esprit	Clothing (jacket)	Yes	One issue from three was answered	Unclear
7	Etos	Shower gel	No		
8	Groupe SEB Nederland BV	Cooking Pan	No		
9	H&M	Clothing (jacket)	Yes	All issues answered	Full answer

no	Company	Product	Reply	Content of response (labour/corruption/ environment)	Type of response
10	Hennes En Mauritz Netherlands BV	Shoes	No		
11	Hewlett-Packard BV	Ink	No		
12	HTC Headquarters	HTC Touch HD Mobile Phone	Yes	All issues answered	Full answer
13	Ikea	Wardrobe	Yes	All issues answered	Full answer
14	Ikea Ltd.	Wardrobe	No		
15	Imation Europe BV	CDs	Letter returned		Did not reach addressee
16	Inkstation International BV	Ink cartridge	No		
17	Keune Hair Cosmetics	Shampoo	Yes	Two Issues from three were answered	Unclear
18	Logitech	Wireless keyboard K350	Yes	All issues answered	Full answer
19	Mango Nederland BV	Dress	No		
20	Men at Work	Jeans	Yes	All issues answered	Full answer
21	Mexx	Dress	No		
22	Nestle	Coffee	No		
23	Nokia	Mobile phone, Nokia N97	No		
24	Philips	Lamp	No		
25	Samsung Electronics	Television	No		
26	Sara Lee	Toothpaste	Letter returned		Did not reach addressee
27	SCA Hygiene Products B.V.	Hankerchiefs	No		
28	Sony	Playstation	No		
29	Toshiba	Satellite	No		
30	Unilever	Textile Softener	Yes	Not answered (link to website)	Unclear
31	Unilever	Fabric softener	Yes	Vaguely answered	Unclear
32	Vorbrood Meubelen	Closet	No		

Part II

CASE STUDIES

Chapter 9.* Shell in Nigeria: from human rights conflicts to corporate social responsibility

I repeat that we all stand before history. I and my colleagues are not the only ones on trial. Shell is here on trial, and it is as well that it is represented by counsel said to be holding a watching brief. The Company has, indeed, ducked this particular trial, but its day will surely come and the lessons learned here may prove useful to it, for there is no doubt in my mind that the ecological war that the Company has waged in the Delta will be called to question sooner than later and the crimes of that war be duly punished. The crime of the Company's dirty wars against the Ogoni people will also be punished.

Ken Saro-Wiwa, Spokesman of the Ogoni people

9.1 Shell in Nigeria: background and context

In the aftermath of the execution of the Nigerian activist Ken Saro-Wiwa, the leader of the Movement for the Survival of the Ogoni People (MOSOP), several legal proceedings were brought against oil company Shell, its NIgerian subsidiary and the Government of Nigeria in connection with human rights violations and environmental damage caused by the oil exploitation. This chapter will review the major related cases and the problems for the claimants in obtaining legal remedies against MNCs considering, *inter alia*, the concept of the 'corporate veil' and the uncertain application of human rights treaties' obligations to corporations. This situation triggers the question to consider whether the present development of CSR, which habitually embraces the protection of human rights, could serve as an alternative response and have positive impacts with regard to regulating corporate conduct of the oil industry in a socio-political situation such as the one of the Ogoni People.

Section 9.1 will outline the background and the context in which the Shell operations in Nigeria took place. Section 9.2 will discuss the legal proceedings that have been commenced in connection with the exection of Ken Saro Wiwa. Section 9.3 will explain what the legal status is of an MNC under international

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human rights law and section 9.4 will provide an update of the Shell CSR activities in Nigeria. Section 9.5 contains the conclusion.

9.1.1 A short history of the political evolvements of post-colonial Nigeria[1]

Following successive constitutional conferences, Nigeria achieved independence from the UK on 1 October 1960 under a coalition government led by the Nigerian People's Congress (NPC). The establishment of its new federal constitution was undertaken with the aim to "promote efficiency in, and harmonious relations and unity among, the constituent parts of the Federation".[2] Yet, the challenge of unifying a nation composed of over 250 ethnic groups into a federal republic turned out to be overwhelming; ethnic rivalry and the desire for greater autonomy of certain regions rapidly led to the formation of multiple political groupings and alliances with different visions.[3] The emerging political parties were soon found to represent the three dominant ethnic groups: the northern Muslim Hausa/Fulani, the Yoruba in the southwest, and the Igbo, mainly Christian in the southeast.

The alleged corruption of the NPC government, mainly Hausa/Fulani, and a post-election crisis led Nigeria to its first military *coup d'état* in January 1966. Although the coup failed, several key politicians, including the Prime Minister Abubakar Tafawa Balewa, were murdered in the attempt.[4] The civil Prime Minister was replaced by a military Head of State, General Johnson Aguiyi-Ironsi, to bring law and order along with more honest and effective government. However, his plan to create a new unitary constitution generated strong reactions from the North. They felt threatened by the southern dominance that would result from a centralised government, and another successful *coup*

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1. The political history of Nigeria being an intricate matter – especially in regard to ethnic relations – the author deems it useful to offer a brief description of some political events of post-colonial Nigeria which are of particular interest from a legal perspective.
2. I. Okonta and O. Douglas, *Where Vultures Feast: Shell, Human Rights and Oil* (Verso: London: 2003), p. 17, referring to: O. Awolowo, *Thoughts on Nigerian Constitution* (Ibadan University Press: Ibadan: 1966), p. 26. Okonta is a writer and journalist. He worked closely with the late Ogoni leader Ken Saro-Wiwa and other MOSOP activists in Nigeria. Douglas was a member of the defence team that represented Saro-Wiwa in 1995. Both authors are on the management committee of the NGO Environmental Rights Action/Friends of the Earth, Nigeria.
3. The exact number of ethnic groups in Nigeria is unknown. For further information on these groups, see: A.R. Mustapha, 'Ethnic Minority Groups in Nigeria: Current Situation and Major Problems', presented to the UN Commission on Human Rights, Sub-Commission on Promotion and Protection of Human Rights, Working Group on Minorities (E/CN.4/Sub. 2/AC.5/2003/WP.10), 2003.
4. Okonta and Douglas, *supra* note 2, p. 17.

d'état was orchestrated by military officers.[5] This event was followed by ethnic tension and violence all across Nigeria.[6] Especially, the violence against the Igbos increased their desire for autonomy in the eastern region, where thousands of Igbos had taken refuge, with the end-result of the unilateral declaration of independence of the Republic of Biafra on 30 May 1967. This announcement sparked a civil war with the rest of the country that lasted until Biafra surrendered to the Federal Government, 31 months later.

The control of oil-related resources in this region was not indifferent to this conflict, which was described by Okonta and Douglas as "not so much a war to maintain the unity and integrity of the country […] as a desperate gambit by the Federal Government to win back the oil fields of the Niger Delta from Biafra". This civil war was also perceived as a "watershed in the political and economic development of the peoples of the Niger Delta. It created conditions for the accelerated exploitation of their resources and the devastation of their environment".[7]

Following a succession of military dictators who ruled Nigeria from 1966-1979 and from 1983-1999,[8] the country had witnessed a return to civilian rule since 1999. Nevertheless, the overall situation has not substantially improved since this return to democracy: "Ethnic and religious killings are recurrent; the over-centralisation of control over power and revenue; politicisation of ethnicity; decline of state-administered security and proliferation of non-state armed groups, notably in the oil-rich Niger Delta".[9] The resulting situation in the Niger Delta is best introduced by describing the effects of oil exploitation in the region.

9.1.2 A brief account of the economic, geographic and social features of oil exploitation in the Niger Delta (situation as of 1995)

The first discovery of oil in Nigeria traces back to 1956 at Oloibiri in the Niger Delta, four years prior to the country's independence.[10] In 1958, Nigeria joined

5. Human Rights Watch, 'The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities', January 1999, at: http://www.hrw.org/reports/1999/nigeria/nigeria0199.pdf, accessed on 28 June 2010.
6. See: Human Rights Watch, Violence, '"Godfathers" and Corruption in Nigeria', Vol. 19, No. 16(A), October 2007, at: http://hrw.org/reports/2007/nigeria1007/, accessed on 28 June 2010.
7. Okonta and Douglas, *supra* note 2, p. 21.
8. Human Rights Watch (2007), *supra* note 6. As the report indicated, a civilian Interim National Government was established during a three-month period in 1993.
9. International Crisis Group, 'Report by Region, Nigeria', at: http://www.crisisgroup.org/en/regions/africa/west-africa/nigeria.aspx, accessed on 28 June 2008.
10. Human Rights Watch (1999), *supra* note 5.

the ranks of oil producers and exporters.[11] During the worldwide oil boom of the 1970s, output from oil exploitation rose rapidly and significantly increased the revenue of the Federal Government. Billions of dollars worth of oil exploitation later, Nigeria became the largest oil producer in Africa and ranked as the eighth-largest world oil exporter.[12] The country is also the fifth largest oil producer in the Organisation of Petroleum Exporting Countries, of which Nigeria is a State Party since 1971.[13]

Indeed, Nigeria's economy is largely dependent on the petroleum sector, which provides around 95 per cent of the country's export earnings and over three quarters of government budgetary revenues.[14] Akin to other parts of the world which are characterised by a weak regulatory environment, the very resource dependence has 'cursed' Nigeria with an increased vulnerability to price shocks and lopsided investment.[15]

The main oil-related activities undertaken by foreign companies in Nigeria are performed in joint ventures with the Nigerian National Petroleum Corporation (NNPC), a public organisation founded in 1977 to manage all governmental interests in the Nigerian oil industry.[16] The NNPC enjoys a privileged position in the oil sector; it owns 55 to 60 per cent share in all joint ventures in the country. Of these joint venture companies, Shell Petroleum Development Company of Nigeria (SPDC) is the largest.[17] It accounts for more than 40 per cent of all oil production in the country, involving the following joint venture partners: NNPC as the majority share-holder (55 per cent); Shell (30 per cent); Elf Petroleum Nigeria Ltd (10 per cent), a subsidiary of the French oil company Total; and the Nigeria Agip Oil Company (10 per cent), a subsidiary of Agip of

11. Nigerian National Petroleum Company: 'History of the Nigerian Petroleum Industry', at: http://www.nnpcgroup.com/history, accessed on 28 June 2010.
12. Energy Information Administration, 'Official Energy Statistics from the US Government, Top World Oil Producers and Consumers', 2006, at: http://www.eia.doe.gov/emeu/cabs/topworldtables1_2.htm, accessed on 28 June 2010. Nigeria ranked as the twelfth-largest producer of oil in the world.
13. Human Rights Watch (1999), *supra* note 5.
14. WTO, 'Nigeria', Trade Policy Reviews: First Press Release, Secretariat and Government Summaries, June 1998, at: http://www.wto.org/english/tratop_e/tpr_e/tp75_e.htm, accessed on 28 June 2008.
15. K. Ballentine, 'Promoting Conflict-sensitive Business in Fragile States: Redressing Skewed Incentives', in O. Brown, M. Halle, S. Peña Moreno and S. Winkler (eds.), *Trade, Aids and Security: An Agenda for Peace and Development* (Earthscan: London 2007), p. 130.
16. NNPC, 'About NNPC', at: http://www.nnpcgroup.com/corporate-profile/about-nnpc, accessed on 28 June 2010. NNPC was established by statutory instrument-decree No.33 of 1977.
17. SPDC is one of the four companies operated in Nigeria and owned by Royal Dutch Shell plc (together referred to as "Shell Nigeria").

Italy.[18] SPDC's ultimate parent company is thus Royal Dutch Shell plc (Shell), which is incorporated in the UK.[19] SPDC operates under a Joint Operating Agreement, which governs the administrative relations between the partners, including the budget approval and supervision, the crude lifting and sale by the partners in proportion to equity, and funding by partners. A Memorandum of Understanding with the Federal Government sets the legal and fiscal framework, such as the allocation of oil income between the partners, namely the payments of taxes, royalties and industry margin.[20] According to Shell, the Federal Government received around 95 per cent of the profit derived of oil production.[21] The activities are financed proportionally to the shareholdings of the partners. As the operator of the joint-venture, SPDC is responsible for the day-to-day operations on the basis of the Joint Operating Agreement.[22] SPDC's framework of activities is described as follows:

The company's operations are concentrated in the Niger Delta and adjoining shallow offshore areas where it operates in oil mining lease area of around 31,000 square kilometres. SPDC has more than 6,000 kilometres of pipelines and flow lines, 87 flow stations, 8 gas plants and more than 1,000 producing wells. The company employs more than 4,500 people directly of whom 95 per cent are Nigerians. Some 66 per cent of the Nigerian staff members are from the Niger Delta. Another 20,000 people are employed indirectly through the network of companies that provide supplies and services.[23]

Most of the oil fields are located in the Niger Delta, a region that counts around 190 operational oil fields.[24] Despite its oil-rich soil, the Niger Delta is ironically described as one of the poorest and most underdeveloped parts of Nigeria. Its dense population suffers the consequences of high unemployment, which amounts to at least 30 per cent in the capital of the region, Port Harcourt.

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18. Shell, 'The Shell Petroleum Development Company of Nigeria' (SPDC), at: http://www.shell.com/home/content/nigeria/about_shell/who_we_are/companies/companies.html, accessed on 28 June 2010.
19. Shell is incorporated in the UK and headquartered and resident in the Netherlands for Dutch and UK tax purposes. Its shares are traded on London Stock Exchange, Euronext Amsterdam and New York Stock Exchange. Shell, 'Share Price Summary', at: http://www.shell.com/home/content/investor/share_price_and_dividends/share_price_summary/, accessed on 28 June 2010.
20. Both agreements were signed on 11 July 1991 and last revised in 2000. Shell, 'Shell Nigeria Annual Report 2006', p. 4, at: http://www.shell.com/static/nigeria/downloads/pdfs/2006_shell_nigeria_report.pdf, accessed on 28 June 2008.
21. *Ibid*., p. 11. This percentage includes royalties, tax, other levies and NNPC equity share. It should be noted that the data are related to the production of Ogoniland in the Niger Delta.
22. NNPC, 'Joint venture operations', at: http://www.nnpcgroup.com/nnpc-business/upstream, accessed on 28 June 2010.
23. Shell (SPDC), *supra* note 18.
24. NNPC, 'Development of Nigeria's Oil Industry', at: http://www.nnpcgroup.com/development, accessed on 28 June 2010. There are exactly 606 oil fields in the Niger Delta, including 193 currently operational.

Additionally, education levels rank below the (already low) national average.[25] In rural areas, basic commodities such as electricity, piped water or health facilities are still lacking.[26] Vital public services are underfunded by the government, despite the wealth generated by the petroleum industry.[27] High levels of corruption and poor governance are pointed out as some of the factors 'explaining' that oil royalties have not been adequately distributed to the population.

The same corruption and weak governance are said to affect the ability of the government to deliver its obligations to protect the environment against the negative impacts of the oil industry. There, the network of pipelines crossing the villages has caused hundreds of oil spills that often spoil agriculture and fishing.[28] Moreover, oil companies have continued the environmentally harmful practice of gas flaring despite repeated promises to phase it out. As a result, the region suffers from acid rain. The unfair redistribution of oil revenues is also linked to the environmental degradation of the region; for instance, the use of wood as daily fuel by the population and intensive agriculture have both accelerated the deforestation of the area.[29]

One of the richest oil-producing areas, Ogoniland – a district in Rivers State in the central part of the Niger Delta – is particularly threatened by the side effects of the oil industry. From within this predicament, some of its people, the Ogoni, decided to raise their voice and take action for a better future.

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25. Human Rights Watch (1999), *supra* note 5.
26. Okonta and Douglas, *supra* note 2, p. 19. See: B. Naanen, *Progress of the Ogoni People in Nigeria towards the attainment of the International Development Targets (IDTs) for poverty, education and health*, Draft Report for the Indigenous People and Socioeconomic Rights, Commonwealth Policy Studies Unit, March 2003, at: http://www.cpsu.org.uk/downloads/Ogoni%20People%20-%20Ben%20Naanen.pdf, accessed on 28 June 2008, and http://www.cidcm.umd.edu/mar/assessment.asp?groupId=47504, accessed on 6 September 2010. This report asserts the socio-economic disadvantages of ethnic minorities in Nigeria.
27. Joint UNDP/World Bank Energy Sector Management Assistance Programme, 'Taxation and State Participation in Nigeria's Oil and Gas Sector', August 2004, at: http://www.esmap.org/filez/pubs/05704NigeriaTaxationMcPherson.pdf, accessed on 28 June 2008 or www.worlbank.org. See also: http://www.bayelsa.org.uk/main/conflict-in-niger-delta/, both sites visited on 6 September 2010.
28. Human Rights Watch (1999), *supra* note 5.
29. Naanen, *supra* note 26, p. 4.

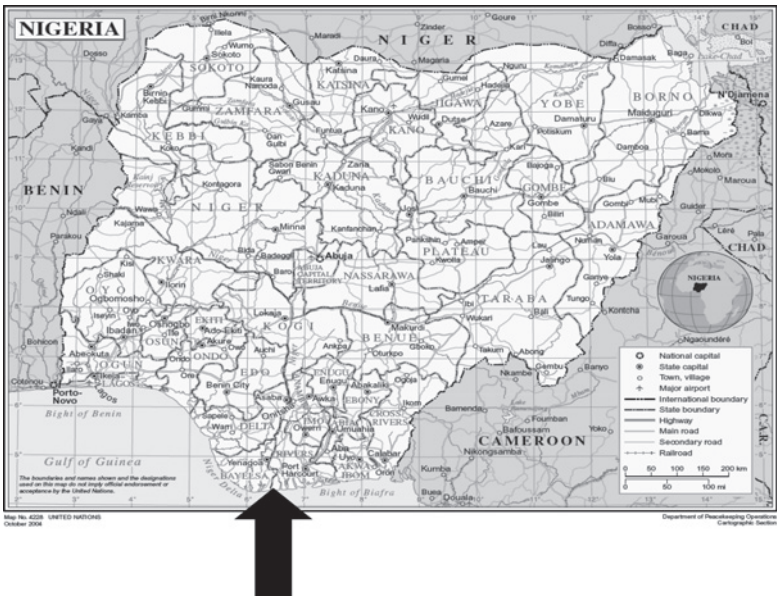

Figure 9.1 Map of Nigeria

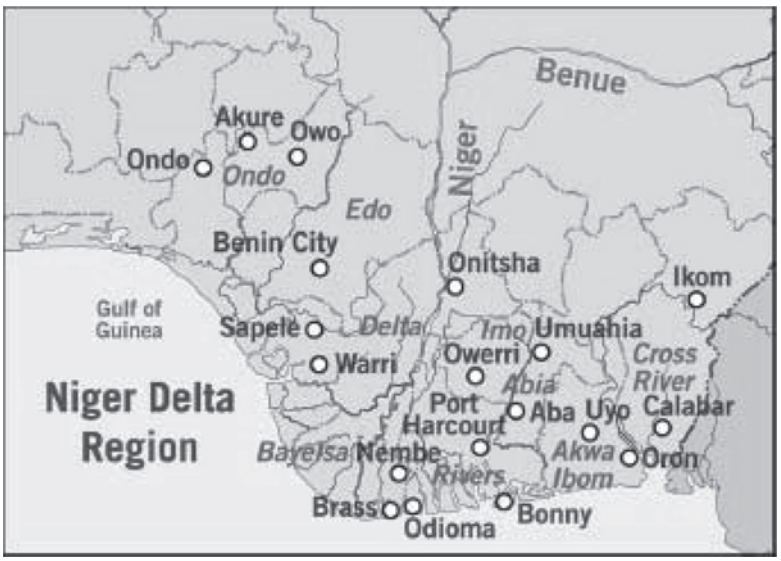

Figure 9.2 Map of the Niger Delta Region

9.1.3 Worldwide human rights movement for the rights of indigenous people and their right to self-determination with respect to the sustainable development of natural resources (until 1995)

9.1.3.1 Introduction: the Ogoni

This section outlines the deeds which were inflicted on Ken Saro-Wiwa, foreman of the Ogoni, in the struggle for self-determination, especially in relation to natural resources. As here revealed, the ideals of Saro-Wiwa concurred with the worldwide human rights movement for the right to self-determination of Indigenous People.

For hundreds of years, their rural community of fishermen and subsistence farmers has lived in the Niger Delta in a harmonious relationship with its environment, as for them: "The land was considered sacred, and to commit acts that polluted or desecrated, it was viewed as an abomination and promptly visited with appropriate sanctions." Saro-Wiwa reported how he perceived this change of situation in the early nineties:

> Thirty-five years of reckless oil exploration by multinational oil companies has left the Ogoni environment completely devastated. Four gas flares burning for twenty-four hours a day over thirty-five years in very close proximity to human habitation; over one hundred oil wells in villages backyards; and a petrochemical complex, two oil refineries, a fertiliser plan, and oil pipelines crisscrossing the landscape aboveground have spelled death for human beings, flora, and fauna. It is unacceptable.[30]

With over 600,000 inhabitants in an area of about 100,000 square kilometres, Ogoniland is densely populated.[31] Nonetheless, the Ogoni represent one of the smallest of the ethnic groups living in Nigeria. Similar to several minority groups, they suffered from ethnic discrimination. Few Ogoni held key positions in government or management in the industry active in the area.[32] Their exclusion as a minority group has translated into economic and social disadvantages as well as into underdevelopment of a corresponding magnitude.[33]

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30. Okonta and Douglas, *supra* note 2, pp. 75 and 94, referring to Saro-Wiwa's speech delivered on the occasion of a ministerial visit to Ogoniland in January 1993.
31. At the national census of 2001 the population was estimated at 635,825. Naanen, *supra* note 26, p. 8.
32. K. Wiwa, *In the Shadow of a Saint: A Son's Journey to Understand his Father's Legacy* (Black Swan, London, 2000), p. 83.
33. Naanen, *supra* note 26, p. 13.

9.1.3.2 The MOSOP

Against this background, Ken Saro-Wiwa, a Nigerian poet, writer, television-producer and environmentalist, launched the Movement for the Survival of the Ogoni People (MOSOP) in August 1990. This organisation was established as a vehicle to "mobilise the Ogoni People and empower them to protest against the devastation of their environment by Shell, and their denigration and dehumanisation by Nigeria's military dictators".[34] This non-violent organisation aimed to protect their endangered ecosystem and resources, and strive for greater social justice.

Saro-Wiwa was also known to be a fervent activist on the political plane; arguing for democratic accountability and direct representation of the Ogoni in all national institutions. Indeed, since the coming of the independence of Nigeria, the situation had not changed: the national politics were still dominated by the three larger ethnic groups. Consequently, the minorities, including the Ogoni, were – in their view – systematically excluded from power.[35]

In October 1990, the MOSOP presented the Ogoni Bill of Rights to the Government. This bill requested, among others, the political right of the Ogoni to self-determination in the Nigerian Federation; adequate representation and direct representation in national institutions; the right to control and use of a fair proportion of the economic resources in Ogoniland for its development; language and culture rights; and the right to protect their environment from further degradation.[36] The wording of the Ogoni Bill of Rights closely follows the fundamental principles contained in the United Nations Declaration on the Rights of Indigenous People (UNDRIP), which reaffirms the right to self-determination of Indigenous People.[37] The right to self-determination generally refers to the right of Indigenous People to freely determine their political status and pursue their economic, social and cultural development. By virtue of that right, Indigenous People "have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means of financing their autonomous functions."[38]

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34. Wiwa, *supra* note 32, p. 16.
35. Since political control is not a 'clear cut game', it could also be argued that the Niger Delta representatives should have created alliances with other progressive political platforms.
36. See: Wiwa, *supra* note 32, pp. 124-125.
37. Article 3 of the UNDRIP (A/RES/61/295), 2007. The UNDRIP was adopted by the General Assembly on 13 September 2007 after over 20 years of debate. The recorded vote was of 143 in favour to 4 against, with 11 abstentions, including Nigeria. See also: Article 1(2) of the UN Charter, 1945.
38. Article 4 of the UNDRIP.

The Ogoni Bill of Rights was followed by further instruments created by other groups (*e.g.* the Izon Peoples Charter, the Ogbia Charter) addressing similar issues related to access and control of land and resources in the Niger Delta.[39]

Another significant milestone for the MOSOP was the announcement in November 1992 of a thirty-day ultimatum to all the oil companies operating on their land, including SPDC, to pay back rents and royalties as well as compensation for lands devastated by the oil industry or otherwise, to leave. The companies ignored their request and pursued the usual course of business.[40]

The same year, Saro-Wiwa was imprisoned for several months without trial by the military government then headed by the dictator General Sani Abacha.

In January 1993, the MOSOP organised a peaceful protest march to draw attention to their cause during which approximately 300,000 Ogoni (*i.e.* three out of every five Ogoni) took the streets. That day "the Ogoni declared Shell *persona non grata* until it paid back rents and cleaned up the environment."[41]

9.1.3.3 The arrest and trial of Saro-Wiwa

As a result of these protests, SPDC decided to suspend its operations in Ogoniland in mid-1993, without resuming them to this day.[42] These events led some companies, including SPDC, to request assistance from the Government. A special military unit, the Rivers State Internal Security Task Force (RSISTF), was sent to Ogoniland to stop and prevent further unrest. The RSISTF is reported to have massacred hundreds of civilians and destroyed villages in 1994.[43] An investigation undertaken by Human Rights Watch on the means used for the suppression of protest at oil company activities in Nigeria found:

> […] repeated incidents in which people were brutalised for attempting to raise grievances with the companies; in some cases security forces threatened, beat, and jailed members of community delegations even before they presented their cases. Such abuses often occurred on or adjacent to company property, or in the immediate aftermath of meetings between company officials and individual claimants or community representatives. Many local people seemed to be the object of repression simply for putting forth an interpretation of a

39. Okonta and Douglas, *supra* note 2, p. 182.
40. *Ibid*., p. 117. Especially, MOSOP requested Shell, Chevron and NNPC to pay damages of 4 billion dollars for destroying the environment and 6 billion dollars in unpaid rent (back-rent) and royalties.
41. Wiwa, *supra* note 32, p. 17.
42. The company pursues its activities in other parts of the Niger Delta region and still try to conclude an agreement to resume its activities in Ogoniland.
43. Wiwa, *supra* note 32, p. 141.

> compensation agreement, or for seeking effective compensation for land ruined or livelihood lost.[44]

According to the same report, allegations were made of Shell collaboration with the military unit related to the suppression of local resistance to oil extraction policies.

On 22 May 1994, Saro-Wiwa and eight other MOSOP leaders were arrested for allegedly inciting the murder of four pro-government Ogoni chiefs during a riot at a meeting of the Gokana Council of Chiefs held in Giokoo, Ogoniland. Saro-Wiwa was nowhere near Goikoo at the time of the murders. Ironically, one of the victims was Saro-Wiwa's brother-in-law and another, an old friend of his.[45]

At their trial before the Civil Disturbances Special Tribunal, widely seen as flawed and unfair,[46] Saro-Wiwa and his compatriots were found guilty of murder and sentenced to death on 31 October 1995. Their execution occurred ten days later. In the week prior to the execution, Ken Saro-Wiwa's elder son, Ken Wiwa, flew to the Commonwealth Summit held in New Zealand to convince the world leaders to appeal for clemency.[47] Although his tentative attempt failed, the event drew worldwide condemnation of the then dictatorship of General Sani Abacha. The military government was known for violating rights related to free political activity including the freedom of expression and human rights abuses by its security forces. Reactions from the international community were translated into some actions including the suspension of Nigeria from the Commonwealth, the imposition of a ban on arms sales by certain countries, and calls for a multilateral oil embargo.[48] Nevertheless, as Human Rights Watch pointed out, international attention gradually lessened "as Nigeria's major trading partners have returned to protecting their short-term economic interests".[49]

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44. Human Rights Watch (1999), *supra* note 5.
45. Wiwa, *supra* note 32, pp. 144-145 and pp. 153-154; Okonta and Douglas, *supra* note 2, p. 130.
46. See: M. Birnbaum, 'Nigeria-Fundamental Rights Denied, Report of the Trial of Ken Saro-Wiwa and Others', Article 19, June 1995, at: http://www.article19.org/pdfs/publications/nigeria-fundamental-rights-denied.pdf, accessed on 28 June 2010. Birnbaum was asked to attend and report on the Saro-Wiwa's trial proceedings from 21-29 March 1995 as the representative of the Law Society of England and Wales with the support of Article 19, the International Centre against Censorship. See section 1.4 on the UN fact-finding mission.
47. See Wiwa, *supra* note 32, pp.181-194.
48. TED Case Studies, 'Ogoni and Oil', 1 November 1997, at: http://www.american.edu/TED/OGONI.HTM, accessed on 28 June 2010.
49. Human Rights Watch, 'Nigeria: Transition or Travesty?', Vol. 9, No. 6(A), October 1997, at: http://www.hrw.org/reports/1997/nigeria/, accessed on 28 June 2010.

9.1.4 Fact-finding mission of the UN in Nigeria

In March 1996, at the request of the Government of Nigeria, the UN Secretary-General decided to launch a fact-finding mission to Nigeria.[50] The mission was twofold, addressing: (1) the trial of Saro-Wiwa and the other co-accused including the examination of the judicial procedures based on Nigerian law and on the various international human rights instruments, to which Nigeria is party; and (2) the plans of Nigeria to implement its commitment to restore democratic rule.[51] The mission indeed took place at the end of March until mid-April 1996 and a report was subsequently delivered in April 1996.[52]

Concerning the first matter, the mission reported that the Civil Disturbance Committee had not been constituted as required by Part I, Section 1, of the *Civil Disturbances (Special Tribunal) Decree, No. 2 of 1987*. Hence, it concluded that the order composing the tribunal was void *ab initio* and therefore *non est*.[53] Furthermore, the report found that several procedures during the trial were unfair including *inter alia*, the denial of the defendants' access to counsel for an extended period before the opening of the trial, harassment of the members of the defence counsel by military personnel, and refusal of the tribunal to consider a statement prepared by Saro-Wiwa. Moreover, the accused were deprived of their right to have the death sentence reviewed pursuant to Section 7(1) of *Decree No. 2 of 1987*. In addition, the delay to submit a petition for clemency to the President was not respected. The mission also noted that the right of appeal was not respected as recognised under Nigerian law and article 14(5) of the ICCPR.[54] Finally, the report stressed that the presence of a military officer at the tribunal was contrary to the standard of impartiality and independence as set out in articles 7(1)(d) and 26 of the ACHPR[55] and 14(1) of the ICCPR.[56] Among the final recommendations on the trial, the report stressed that a legal panel should be

50. UN, General Assembly: Human Rights Questions: Human Rights Situations and Report of Special Rapporteurs and Representative (A/51/538) (1996). The mission was in accordance with: UN, General Assembly: Situation of Human Rights in Nigeria (A/RES/50/199) (1996).
51. UN, 'Secretary-General to Send Fact-Finding Mission to Nigeria', Press Release SG/SM/5929, 20 March 1996, at: http://www.un.org/News/Press/docs/1996/19960320.sgsm5929.html, accessed on 28 June 2010. The composition of the mission was: A.K. Amega, former Minister for Foreign Affairs and former President of the Supreme Court of Togo, and member of the African Commission for Human and People's Rights; Justice V.S. Malimath, member of the National Human Rights Commission of India; and J.P. Pace, Chief of Legislation and Prevention of Discrimination Branch, Centre for Human Rights.
52. Under the Terms of Reference, the Government of Nigeria undertook to fully cooperate with the mission team and to ensure access to all relevant individuals, premises and information.
53. A/51/538, § 77.
54. A/51/538, §§ 76-78. The Report also outlined Article 6(4) of the ICCPR.
55. African [Banjul] Charter on Human and Peoples' Rights (OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58) (1982).
56. A/51/538, § 76.

established by the Government to determine the modalities of the financial assistance to be accorded to the dependents of the deceased.[57]

Regarding the second matter of the report – on the implementation of a transitional programme – it was found that sanctions against Nigeria at this stage may prove unhelpful and retard the progress towards positive improvement. Among other measures, the mission advised the UN Secretary-General to continue the dialogue with the Head of State with an aim to creating conditions for the restoration of democratic rule.

Although the implementation of the recommendations of the UN fact-finding mission by the Government is not said to have yet produced the desired effects, the trial and execution of Saro-Wiwa itself has transformed the political national landscape.

9.1.5 Aftermath of the execution

Since the day of Saro-Wiwa's execution, the political equation is said to have changed in the Niger Delta; the ethnic minorities have raised their voices, insisting on being included in the economic development of their region and to be heard in their struggle for social and ecological justice.[58] Saro-Wiwa's execution also drew international attention to the human rights of Indigenous People to self-determination and to the accountability of companies for complicity in environmental and human rights abuses. In particular, it has set the stage for a collaborative campaign between the well-known NGOs Sierra Cl and communities at risk.[59] For the first time up to this level, this case demonstrates the close connection between underdevelopment, environmental concerns and human rights violations when linked to corporate activities in an area where they could afford the support of a dictatorial regime.

Furthermore, the period from December 1994 to 2004 was proclaimed by the UN General Assembly the International Decade of the World's Indigenous People,[60] with the goal to strengthen international cooperation for solving problems faced by Indigenous People in such areas as human rights, the environment, development, education and health.

In this wave, legal proceedings were filed against SPDC, its ultimate parent-company Shell and the Government of Nigeria in connection with human rights violations and environmental damages caused by the oil exploitation in the Niger Delta. The most important of these claims will be discussed in the next section.

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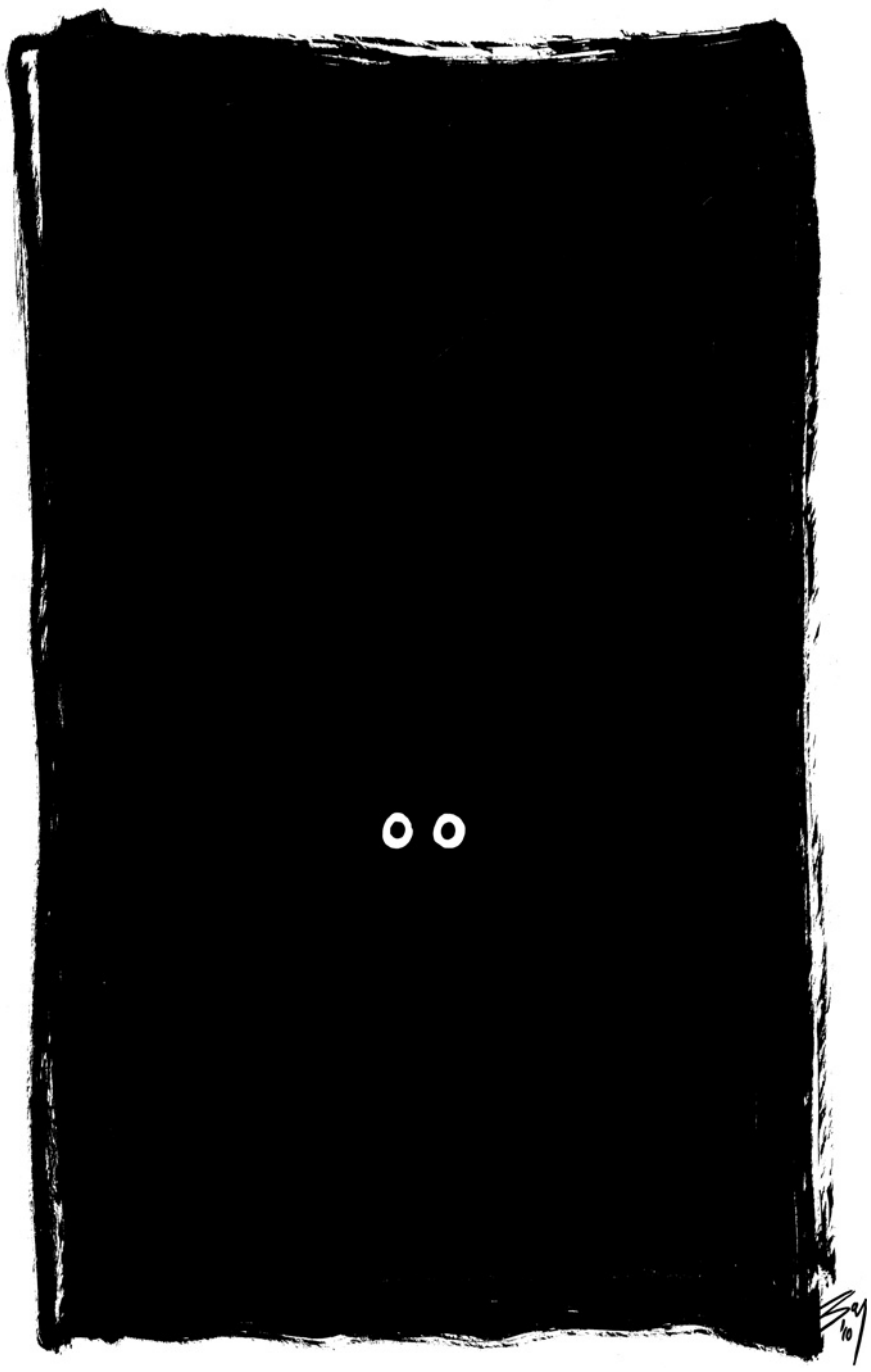
57. A/51/538, § 42.
58. Okonta and Douglas, *supra* note 2, p. 3.
59. S. Mills, 'Sierra Club, Human Rights and the Environment, Writer's Death Gives Life to a Movement', at: http://www.sierraclub.org/human-rights/nigeria/ken_saro.asp, accessed on 28 June 2010.
60. UN, International Decade of the World's Indigenous People (A/RES/48/163) (1994). A Second International Decade commenced on 1 January 2005 (A/RES/59/174), 2004.



9.2 Legal Proceedings – human rights and the environment

9.2.1 Civil law litigation

After the execution of Saro-Wiwa and the others, human rights groups worldwide blamed General Abacha and Shell. The reasons for blaming Shell were multiple. The allegations were, in general, that Shell had severely polluted the environment of the Niger Delta and had depleted – without permission of the Ogoni representatives – their mineral resources without redistributing the proceeds to the Ogoni. The protestations of Saro-Wiwa had led to his death. Shell was also said to have co-operated with the regime of General Abacha, not only by concluding oil concessions and participating in the joint venture SPDC, but also by requiring the Government to protect its oil installations, knowing that the available special security forces were 'licensed to kill'. Shell allegedly contributed financially and by furnishing equipments and arms.

Following the events, family members of Saro-Wiwa and the other executed Ogoni were afraid of being targeted as the next victim of General Abacha, and left the country for a safe harbour abroad. With support from NGOs, they filed several legal claims against Shell and the Government.

For various reasons, it appears generally difficult for victims to obtain justice in civil court proceedings against multinational companies. In the particular case of the families of Saro-Wiwa and the others, the issue of security was the primary obstacle to the initiation of legal action in Nigeria. Since SPDC is a Nigerian joint venture company, Nigeria would be the logical place to commence proceedings. In principal, victims cannot file a claim against a local company before a court in another country.[61] Secondly, successfully asserting a claim against Shell, the ultimate parent company of SPDC – which consisted of a dual-company structure, registered both in the Netherlands and in the UK – is not an easy undertaking.[62] The parent company would basically assert that it is only the (indirect) shareholder of SPDC and has no influence upon the wrong-doings of the local SPDC management. Parent companies establish local legal entities for protection against commercial risks and other liabilities incurred by their subsidiary ventures. This is especially true for operations abroad in risky regions of the world, such as Nigeria. To hold a shareholder liable for the behaviour of a subsidiary means that the claimant has to 'pierce the corporate veil'.[63] To be successful, several facts need to be

61. See A. Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press, Oxford, 2006), pp. 237-239.
62. In 2005, the two parent companies, Royal Dutch and Shell Transport, merged into one company, Royal Dutch Shell plc, registered in the UK.
63. Under the Dutch legal doctrine, this is known as the '*directe of indirecte doorbraak van aansprakelijkheid*' or '*vereenzelviging*' that is, respectively, piercing the corporate veil, →

established, principally concerning the involvement and interference of the parent company in the policies and activities of its subsidiary company.[64]

Despite the corporate veil, there are interesting examples of multinationals being held accountable for injuries in developing countries. In the UK, plaintiffs from South Africa and Namibia employed by local companies have been allowed to submit their claims for negligence against the ultimate UK parent companies. They held the defendant companies liable for breaches of a duty of care in tort, instead of alleging violations of human rights. In particular, these cases concerned miners in South Africa who claimed damages for personal injuries allegedly sustained as the result of exposure to asbestos (*The Cape Plc cases*[65]); a cancer victim who worked in a uranium mine in Namibia (*Connelly v. R.T.Z. Corporation Plc*[66]); and workers who suffered from lethal mercury poisoning in South African mines (*Thor cases*[67]). Meeran, who represented some of the defendants in these cases, emphasised that the plaintiffs had namely no access to justice in their home country.[68] In the UK, they could apply for legal aid. He advocated that multinational companies should not be able anymore – in this globalising world – to get away with a practice whereby their subsidiary companies located in developing countries apply lower health and safety standards than their factories elsewhere ("double standards"). In his view, the corporate veil should not limit the legal responsibility of the parent company. Since most of the multinational companies today work with operational divisions, which usually do not coincide with the legal 'corporate chart barriers', it would result in an unfair situation to hide legal responsibility for negligent behaviour towards their employees by 'legal group charts'. As the House of Lords stated with respect to the 12 to 35 times higher asbestos levels in the mines in South Africa in comparison to the UK level

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directly or indirectly, and identification. See, the leading jurisprudence: HR 19 February 1988, NJ 1988, 487 *(Alberda Jelgersma)*, HR 12 June 1998, JOR 1998, 107 *(Coral/Stalt Holding)*, HR 21 December 2001, commented by Lennarts in Ondernemingsrecht 2002, pp. 109-113 *(Hurks)* and HR 13 October 2000, JOR 2000, 238 (*Rainbow Ltd*).

64. See: P. Muchlinski, *Multinational Enterprises & the Law* (Oxford University Press: Oxford 2007), pp. 308-335.
65. See: *Rachel Lubbe v. Cape Plc*, (1998) CLC 1559 and *Lubbe et al.v. Cape Plc*. (2000) 2 Lloyd's Rep 383; (2000) 1 WLR 1545. A class action was later settled out of court. See: Clapham (2006), *supra* note 61, pp.199-201; N. Jägers, *Corporate Human Rights Obligations: in Search of Accountability* (Intersentia: Antwerpen 2002), pp. 204-209.
66. *Connelly v. RTZ Corporation Plc*, (1996) 2 WLR 251 and 1997, 3 WLR 373-388. Jurisdiction and standing accepted in 1994, claims denied in 1998.
67. *Ngcobo et al v. Thor Chemicals Holdings Ltd. and Others* (TLR 10/11/95); *Sithole et al v. Thor Chemical Holdings Ltd. and Another* (TLR15/2/99)*; Sithole et al v. Thor Chemical Holdings Ltd. and Others* (LTL 3/2/99). Thor agreed to settle the damage claims.
68. R. Meeran, 'Corporations, Human Rights and Transnational Litigation', lecture delivered at the Monash University Law Chambers, 29 January 2003, pp. 9, 14 and 18.

(*Lubbe v. Cape Plc*.): "[…] the corporation ought to have taken into account the scientific knowledge that was available to it, as it was situated in England".

These judgements are interesting considering that most of them were favourable to the plaintiffs. Some of the cases were settled out of court by paying compensation to the victims. It cannot not be a coincidence that a group action by over 20,000 African victims of the Ivory Coast scandal in 2006, regarding the illegal dumping of 400 tonnes of toxic waste, has been filed before the UK High Court against Trafigura, a UK-based multinational company (see also section 11.2.2).[69]

Another interesting development was the announcement of a possible lawsuit in May 2008 against Shell by Nigerian farmers and fishermen in the Niger Delta, supported by the NGOs Friends of the Earth Netherlands/Nigeria. Based on their rights to food and to a clean and healthy environment, they intend to claim damages caused by oil spills in their villages as a result of the exploitation of Shell's subsidiaries in the Niger Delta.[70]

In addition to the corporate veil obstacles in parent companies jurisdictions, civil litigation in the UK and the US face the additional hurdle of the *forum non conveniens* doctrine. This doctrine intends to protect the defendant who can challenge the forum chosen by the plaintiff if there is another more appropriate forum and certain other criteria are met.[71] A parent company will typically raise this defence stating that the complaint or the facts on which the case is based have a closer link with another jurisdiction and that it would be more appropriate to litigate the case there. In other EU countries, article 2 of the

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69. According to the law firm representing the local injured people, the claims are based on the fact that Trafigura were negligent and the nuisance resulting from their actions caused the injuries. In February 2007, the Ivory Coast Government signed an agreement with Trafigura, accepting an out-of-court settlement sum of around 100 million pounds "for damages sustained and the repayment of pollution cleaning costs". Nevertheless, by 2008 the group action against Trafigura still continued. Leigh Day & Co, 'Ivory Coast toxic waste disaster claim issued in High Court', 10 November 2006, at: http://www.leighday.co.uk/doc.asp?doc=964, accessed on 28 June 2008. For an update see 'Ivory Coast waste 'victims' receive Trafigura payout', BBC News, at : http://news.bbc.co.uk/2/hi/africa/8548216.stm, accessed on 7 September 2010. It states: 'People from Ivory Coast who said they had been made ill by dumped waste have begun to receive compensation cheques, after a four-year legal battle. […]. Some 30,000 people are in line for a share of a $45m (£30m) payout from the multi-national oil company Trafigura'.

70. Milieudefensie, 'The People of Nigeria versus Shell', 14 May 2008, at: http://www.milieudefensie.nl/wat-wij-doen/themas/internationaal/projecten/shell/olielekkages/the-people-of-nigeria-versus-shell, accessed on 28 June 2010. This site also provides regular updates on this law suit which indeed has started in May 2009 before a Dutch court. Case documents available at: http://www1.milieudefensie.nl/english/shell/documents-shell-courtcase, visited on 24 June 2010.

71. S. Kirchner, 'Legal Culture', Conference Report of the 6th Joint Conference held by the American and Dutch Societies of International Law, in *German Law Journal*, 4(8), 2003, p. 5. See also: Muchlinski, *supra* note 64, pp. 153-160; Jägers, *supra* note 65, pp. 196-198.

Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters[72] precludes the application of this doctrine where the defendant is based in the EU.[73]

Human rights violations have also been brought up in civil law cases in the US. Plaintiffs submitted claims against parent companies that were registered in other countries, making use of a special form of legal extra-territoriality: the over 200 years old *Alien Tort Claim Act* 28 U.S.C. §1350 (ATCA). This statute enables US courts to exercise extra-territorial jurisdiction over specified claims, including particular categories of human rights violations. The ATCA was originally enacted in 1789 to provide a remedy for foreigners (aliens) who were mistreated on American soil. The current text states that US district courts shall have jurisdiction over any civil action by an alien (an individual, his or her legal representative or a person who may be a claimant in an action for wrongful death) for a tort only, committed in violation of the law of nations or a treaty of the US. The alien does not need to be physically present in the US nor does the tort need to occur in the US. However, the defendant must be properly served notice in order for personal jurisdiction to arise. In the past 30 years, the ATCA has increasingly been used by non-US-nationals to bring up severe human rights violations, which took place outside the US, as a tort claim before a US court, even against non-US defendant companies.[74]

9.2.2 Claims versus Shell under the ATCA

In November 1996, a claim was filed against Shell by family members of some of the executed Ogoni leaders before the New York District Court, based on the ATCA, the TVPA, the RICO, international law and treaties, Nigerian law, and various state law torts.[75]

Plaintiffs were: Ken Wiwa, the son of Saro-Wiwa; Owens Wiwa, the brother of Saro-Wiwa; Blessing Kpuinen, the wife of the executed John Kpuinen; and another woman identified as Jane Doe. The first three plaintiffs were, at the time of filing the complaint, respectively, citizen and resident of the UK, Nigerian citizen and residing in Canada, Nigerian citizen and US citizen, and Nigerian citizen.

Defendants were the Royal Dutch Petroleum Company and Shell Transport and Trading Co. plc (collectively: Royal Dutch/Shell) headquartered and incorporated in the Netherlands and the UK respectively, at that time the two

72. Convention of 27 September 1968.
73. Meeran, *supra* note 58, pp. 9, 14 and 18.
74. Clapham (2006), *supra* note 61, pp. 261-263; Jägers, *supra* note 65, pp. 179-203, Meeran, *supra* note 58, p. 19.
75. 2002 U.S. Dist. LEXIS 3293. *Wiwa v. Royal Dutch Petroleum* (Shell), Docket Nos. 99-7223[L] United Stated Court of Appeals for the Second Circuit 2000 U.S. App. LEXIS 23274. Cert. Denied Mar 26 2001.

parent companies of the Shell group.[76] Royal Dutch/Shell wholly owned the Shell Petroleum Company, which in turn wholly owned Shell Nigeria, including SPDC. Defendant Brian Anderson was the Country Chairman of Nigeria for Royal Dutch/Shell and Managing Director of SPDC at that time.

More specifically, the plaintiffs alleged that Royal Dutch/Shell is liable for summary executions, crimes against humanity, torture, cruel, inhuman and degrading treatment, arbitrary arrest and detention, violations of the right to life, liberty and security of person and the right to freedom of peaceful assembly and association, wrongful death, assault and battery, intentional and negligent infliction of emotional distress and conspiracy. The allegations essentially concerned joint responsibility of Royal Dutch/Shell for the execution of the Ogoni leaders. In other words, they alleged complicity related to the human rights violations by the Nigerian military regime, because Royal Dutch/Shell was said to tacitly have endorsed and facilitated the actions taken by the military regime against the Ogoni leaders and activists and failed to exercise its influence to halt the executions.[77]

The first question to be answered was whether the US court was an appropriate forum. Royal Dutch/Shell filed a motion to dismiss the case on the grounds of *forum non conveniens*.[78] In this case, the defendants argued that the claims ought to be brought before an English or Dutch court, where Shell's headquarters were located. The District Court granted the motion. The Court of Appeals however, reversed the decision by ruling that Royal Dutch/Shell was "doing business in the State of New York", considering that Shell had had an investment office in New York for a long time. When assessing whether a *forum non conveniens* dismissal is appropriate, the Court of Appeal stated that a two-step process is employed: (1) the first step is to determine if an adequate alternative forum exists (*e.g.*, *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n. 22 (1981); *Gulf Oil Corp. v. Gilbert*, 330 U.S. at 506-07). If so, a series of factors must then be balanced involving "the private interests of the parties in maintaining the litigation in the competing *fora* and any public interests at stake." In this case, the fact that the plaintiffs were at that time US residents was taken into account as well as the American interest in litigating international human rights violations under both the ATCA and the TVPA. Human rights considerations were part of the equation, thus creating an innovative element in

76. They subsequently merged into one parent company registered in the UK. The unification of Royal Dutch and Shell Transport to one parent company, Royal Dutch Shell plc, was completed on 20 July 2005.

77. 2002 U.S. Dist. LEXIS 3293, pp. 4-5. Meeran, *supra* note 58, p. 19.

78. Motion to dismiss the complaint and the memorandum of law in support of their motion to dismiss were filed on 27 March 1997. Thus, the ATCA requires (1) a claim by an alien, (2) alleging a tort, and (3) a violation of international law.

the *forum non conveniens* test applied by the court.[79] In 2001, the US Supreme Court confirmed the Court of Appeals decision.[80] The hurdle of *forum non conveniens* had been successfully overcome by the plaintiffs.[81]

The second question concerned the subject matter: could a US court decide the claims? In order to give rise to a claim under ACTA, the plaintiffs must allege a violation of an international norm that qualified as "specific, universal, and obligatory" (*Doe v. Unocal*, 110 F. Supp.2d 1294, 1304 (C.D. Cal. 2000)). In 2002, this question was answered affirmatively: the District Court ruled that when the factual allegations could be proven, the complicity of Royal Dutch/ Shell in violations of international law norms was established. Further, the attribution of the acts of SPDC to its ultimate parent company was considered sufficiently demonstrated.[82] The case could proceed to the discovery stage: putting forward evidence to substantiate factual allegations, legal positions and defence.[83] At the time of writing this chapter (2008), twelve years after this case commenced, many authors have shed their light over this case and are eagerly awaiting a final sentence. Obviously, not only the legal world is anxious to learn of the outcome, but also the Ogoni People and the industry whose interests are at stake![84] Please see sections 1.9 and 7.4.3 about the settlement that was reached between the parties in 2009.

9.2.3 Human rights obligations: Nigeria

Nigeria is a party to the most important international human rights conventions and protocols: it has signed the UN Charter thereby accepting the Universal Declaration of Human Rights (UDHR) (1948) and it has accessed the ICCPR and the ICESCR – all in 1993.[85] Nigeria is also a party to the ACHPR.[86]

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79. Kirchner, *supra* note 71, p. 5, referring to *Gulf Oil Corp. v. Gilbert*, 330 US 501, 67 S Ct 839, 1947.
80. *Royal Dutch Petroleum Co. v. Wiwa*, 226 F.3d 88 (2d Cir. 2000), cert. denied, 532 U.S. 941 (2001).
81. Also compare Clapham (2006), *supra* note 61, pp. 255-265 on *Doe v. Unocal*, 2002 US App LEXIS 19263 (9th Cir 2002).
82. *Wiwa v. Royal Dutch Petroleum Co*., 2002 U.S. Dist. LEXIS 3293.
83. As to information obtained on 6 July 2007 from one of the plaintiffs, Ken Wiwa, and on 13 December 2007 from a representative of one of the law firms involved with the case, Earth Rights International, U.S. Office, on behalf of the plaintiffs. Research closed as of 28 June 2008.
84. For an analysis of case law and the tests developed by US courts in order to determine whether jurisdiction arises and whether a corporation can be held liable under the ATCA, see: Clapham (2006), *supra* note 61, pp. 252-270 and 443-450; Jägers, *supra* note 65, pp. 179-203.
85. As of March 2008, however, Nigeria had not signed the first Optional Protocol (1966) to the ICCPR, under which individuals – who claim that their rights under the ICCPR have been violated, and who have exhausted all domestic remedies – can submit written communications to the UN Human Rights Committee.
86. See: M. Shaw, *International Law* (Cambridge University Press: Cambridge: 2003), pp. 363-365.

Furthermore, since the independence of Nigeria, the most important human rights have been included in its Constitution.[87] Chapter IV, Section 33(1) of the Constitution of the Federal Republic of Nigeria (1999) guarantees the right to life of all Nigerians. According to Chapter II, Section 20, "the State shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria".[88] Thus, the Nigerian Government is committed (i) to protecting these human rights of the Nigerian people and (ii) to guaranteeing that the Nigerian people, including legal entities, comply with these human rights. The latter could be regarded as ensuring a horizontal application of human rights.

9.2.4 African Human Rights Commission ruling

The ACHPR is one of the most modern regional human rights treaties. Besides the traditional civil and political rights and economic, social and cultural rights, it also includes 'modern' human rights such as various 'peoples' rights': the right to self-determination, development and a generally satisfactory environment.[89] The ACHPR is also the first human rights charter that specifies the duties of individuals to the State, society and family.[90]

Part 2 of the ACHPR empowers the AHRC with a very wide and general mandate, including interpreting the ACHPR and investigation.[91] It may hear inter-state complaints and can receive communications from individuals and groups containing complaints against States.[92] Although the AHRC does not

87. Independence Constitution (1960), Republican Constitution (1963), Constitution of the Federal Republic of Nigeria (1979), Chap. V, and Constitution of the Federal Republic of Nigeria (1999), Chap. IV.
88. See Okonta and Douglas, *supra* note 2, p. 212.
89. Articles 19-22 and 24 of the ACHPR. Article 21 provides the right to natural resources while Article 24 guarantees the "right to a satisfactory environment favourable to their development". On the right to self-determination of Peoples under the ACHPR, see: 'Katangese Peoples' Congress v. Zaire, African Commission on Human and Peoples' Rights', Comm. No. 75/92 (1995) where the AHRC recognised the right to exercise a variant of self-determination that was compatible with the sovereignty and territorial integrity of the country.
90. Articles 27-29 of the ACHPR. Shaw, *supra* note 86, p. 365. Included are duties to avoid compromising the security of the State and to preserve and strengthen social and national solidarity and independence.
91. Articles 45-59 of the ACHPR.
92. See: Articles 47-56 of the ACHPR and rule 88 of the ACHPR Rules of Procedure. There are annual activity reports from the AHRC on decisions on communications.

have the power to render binding sentences, it can issue recommendations to States and suggest provisional measures where appropriate.[93]

In 1996, a communication was submitted to the AHRC by the Lagos-based Social and Economic Rights Action Centre (SERAC) and the New York-based Centre for Economic and Social Rights (CESR) against the government of General Abacha. The communication alleges that the oil consortium, including NNPC and SPDC, has exploited oil reserves in Ogoniland with no regard for the health or environment of the local communities in violation of international environmental standards. It added that the consortium neglected to maintain its facilities causing numerous avoidable oil spills around the villages.[94]

An important aspect in this case was NNPC's active involvement in the oil joint venture. The petitioners of the communication maintained that the State was directly responsible for the allegations against the joint venture company. This aspect is of interest considering that there is no *communis opinio* on the position of State companies under the international human rights regimes.[95] Based on article 21 of the ACHPR, the AHRC noted:

> despite its obligation to protect persons against interferences in the enjoyment of their rights, the Government of Nigeria facilitated the destruction of the Ogoniland. Contrary to its Charter obligations and despite such internationally established principles, the Nigerian Government has given the green light to private actors, and the oil Companies in particular, to devastatingly affect the well-being of the Ogoni.[96]

In discussing the merits of the case, the AHRC: (i) emphasised the need to protect individuals from non-state actors with regard to the right to housing; (ii) found that the right to food was implicit in the ACHPR and stressed that the Government "should not allow private parties to destroy or contaminate food sources"; and (iii) referred to violations by private actors in the context of its

93. Rule 111(1) of the ACHPR Rules of Procedure. Shaw, *supra* note 86, p. 365. In addition, the African Court of Human and Peoples' Rights (Court) was established in 2004 having advisory, conciliatory and contentious jurisdiction. The AHRC, the State Parties and the African intergovernmental organisations have access to the Court. Under certain conditions, it also has jurisdiction over complaints of individuals or groups. See: Articles 5(3) and 34(6) of the Protocol to the ACHPR on the establishment of the Court. See also: A. Nollkaemper, *Kern van het Internationaal Publiekrecht* (Boom Juridische: The Hague 2005) pp. 421-422; Clapham (2006), *supra* note 61, p. 92.

94. African Human Rights Commission, *Social and Economic Rights Action Center/Center for Economic and Social Rights v. Nigeria*, ACHPR/COMM/A044/1 (27 May 2002), § 2. The Communication and the decision of the AHRC are available on: CESR, Nigeria, see: http://cesr.org/nigeria, accessed on 28 June 2010.

95. *SERAC/CESR v. Nigeria*, § 54. See: Clapham (2006), *supra* note 61, pp. 434-435; Jägers, *supra* note 65, p. 157.

96. *SERAC/CESR v. Nigeria*, § 58.

finding of a violation of the right to life and integrity of the person.[97] Moreover, it commented on the impact of corporate led globalisation in developing countries by stating: "The intervention of multinational companies may be a potentially positive force for development if the State and the people are ever mindful of the common good and the sacred rights of individuals and communities".[98]

Finally, the AHRC found the Nigerian Government in violation of the ACHPR for the period 1993-1996 based on the rights to non-discrimination (artice 2), life (artcle 4), property (artile 14), health (rtcle 16), family life (article 18(1)), the environment (artcle 24), and the rights of people to "freely dispose over their wealth and natural resources" (article 21).[99] The AHRC appealed to the Government to ensure protection of the environment, health and livelihood of the Ogoni by, amongst others: (i) stopping all attacks by the RSISTF; (ii) conducting an investigation into the said human rights violations; prosecuting officials of the security forces, NNPC and relevant agencies involved in the violations; (iii) ensuring compensation to the victims; (iv) ensuring appropriate environmental and social impact assessments for any future oil development and the safe operations of any further oil development; and (v) providing information on health and environmental risks and meaningful access to regulatory and decision making bodies to communities likely to be affected by oil operations.[100]

The regional human rights system of Africa does not provide for a mechanism where private parties can be held directly accountable for human rights violations.[101] However, this decision shows that the AHRC acknowledged that economic, social and cultural rights can be threatened by the behaviour of multinational companies.[102] In addition, it should be noted that collective rights concerning natural resources were successfully claimed by the Ogoni.

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97. *SERAC/CESR v. Nigeria*, §§ 59-67. See: F. Coomans, 'The Ogoni Case Before The African Commission on Human and Peoples' Rights', in *International and Comparative Law Quarterly*, 4(8), 2003, pp. 749-760. He draws attention to a *Note verbale* 127/2000 submitted in October 2000 to the AHRC by the Nigerian Government. The then new President Obasanjo admitted that "there is no denying that a lot of atrocities were and are still being committed by the oil companies in Ogoniland and indeed in the Niger Delta area".
98. *SERAC/CESR v. Nigeria*, § 69.
99. 30th Ordinary Session, held in Banjul, The Gambia, 13-27 October 2001.
100. *SERAC/CESR v. Nigeria*, *in fine*. Information confirming the implementation of the said recommendations other than on the Niger Delta Development (see: section 9.4) has not been found.
101. Jägers, *supra* note 65, p. 219.
102. Clapham (2006), *supra* note 61, p. 434.

9.2.5 Nigerian law – oil and the environment

The question, 'in which way and under which conditions is oil exploration allowed and can extraction from Nigerian soil take place' must be answered first and foremost in accordance with Nigerian law. There are various sources: (1) contemporary English law, comprising common law, doctrines and statutes of general or specific application and English law made before 1960 and extending to Nigeria; (2) Nigerian legislation, which consists of the Constitution, ordinances, acts, laws, decrees and edicts; (3) customary law in existence in all the various rural communities of Nigeria (originating from social/moral rules, now accepted as 'jural postulates'. In Nigerian legal jurisprudence, customary law is the organic living law of the Indigenous People of Nigeria, regulating their lives and transactions); and (4) Nigerian case law.[103]

Since the sixties, Nigerian law provides for detailed environmental law regulations resulting in the requirement that anyone exploring or extracting oil needs a permit subject to environmental protection requirements. The environmental laws are not to be found in any one volume; relevant acts and regulations are, for instance:[104]

- Petroleum Act 1969;
- Petroleum (Drilling and Production) Regulations 1969;[105]
- Associated Gas Re-Injection Act (1979);[106]
- Oil in Navigable Waters Decree No. 34 (1968);[107]
- Federal Environmental Protection Agency Decree (1988);[108]

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103. Okonta and Douglas, *supra* note 2, pp. 212-213, regarding customary law, referring to: *Eshugbayi Eleko v. Government of Nigeria* (1931), Ac 662 and Justice R.O. Fawehinmi, guest speaker on the occasion of the Nigeria Bar Association (Ondo) on 22 September 1988.
104. A. Adeoye Idowu, 'Human Rights, Environmental Degradation and Oil Multinational Companies in Nigeria: The Ogoniland Episode', in *Netherlands Quarter of Human Rights* 17(2) (1999), pp. 172-177.
105. Regulations 54 and 55 require oil companies to respect communal areas and customs. The authority to issue an oil exploration or drilling licence is vested in the Head of the Petroleum Inspectorate, who can revoke it in case of non-compliance. The licences are subject to work obligations relating to the prevention of oil pollution, safety standards and confinement of petroleum. See: Regulations 25, Part IV and 36; Idowu, *supra* note 104, p. 173.
106. This Act regulates the use and conservation of natural gas.
107. Cap. 337, *Laws of the Federation of Nigeria*, 1990. See: Articles 4(2)(a), 4(5), 4(4), 5, 7(1), 7(2), 7(5)(b) and 10. This is the most comprehensive legislation in Nigeria on oil pollution, also providing penalties.
108. This Decree is related to the pollution, piercing the corporate veil, spells out liability, and penalties for spillers of hazardous substances whether on land or on water. Spillers must bear the cost of removal; replacement of natural resources damaged or destroyed by the discharge; and report to the relevant agencies. Corporations are explicitly addressed as well as their managers.

- Harmful Waste (Special Criminal Provisions, etc.) Decree (1988);[109]
- Environmental Impact Assessment Decree No. 86 (1995);
- Oil Pipeline Act 1956;
- Oil & Gas Pipelines Registration;
- Agricultural Act, LFN 1990;[110] and
- Customary rules regulating the protection of the environment as a whole, *e.g.* forests, wildlife and soil.[111]

Nigerian law allows for claims regarding land use, including tort claims. Traditional rules of tort apply to the trespassing of land, nuisances and negligence. Damages caused by oil pollution are also addressed under criminal law.[112]

Although the Nigerian laws provide clear guidance for oil production in regard to the environment and lives of people, Nigerian authors often point out that the Government's policy to own approximately 60 per cent of the equity shares in the operational oil companies leads to a practice in which the focus is often more on profit maximisation than on taking the necessary measures against environmental degradation. They state that the overall governmental policy is that the oil trade should not be jeopardised. Finally, penalties under Nigerian law are unsubstantial and, hence, do not provide a substantial deterrent effect against oil spills.[113]

9.2.6 Clean-up claim against Shell

The Ijaws, one of the ethnic groups inhabiting the Niger Delta have been campaigning since 2000 for compensation for environmental degradation. With the support of the NGOs Friends of the Earth and Environmental Rights Action, they filed a legal claim for environmental damages against SPDC. The Federal High Court sitting in Port Harcourt rendered judgments on 24 February 2006 ordering the SPDC joint venture to pay US$1.5 billion (corresponding Shell share: US$450 million) in damages as compensation to communities in Bayelsa

109. No. 42, Articles 1(3) and 5.
110. This Act prohibits the import of plant seed, soils and containers that could harm the land.
111. Okonta and Douglas, *supra* note 2, p. 215.
112. Articles 234, 245 and 257 of the Nigerian Criminal Code.
113. Idowu, *supra* note 104, pp. 172-176. See: J.P. Eaton, 'The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment', in *Boston University International Law Journal*, 15, 1997, pp. 284-288. He indicated that the amount of the fines is "a pittance to the foreign oil companies and their managers may opt to pay the daily fine and defer clean-up to some undetermined time, instead of defraying clean-up costs at the time of the spill".

State for degrading their creeks and spoiling crops and fishing.[114] SPDC has disputed the judgment, stating that most spills are caused by saboteurs trying to steal oil for sale by criminal syndicates on the world market. SPDC also argued that the parliamentary committee that had made the original order in 2000 did not have the power to require payment.[115]

The dispute was presented to the Lower House of Representatives in 2003 and reviewed by an independent legal advisory panel set up by the Lower House, resulting in the decision that SPDC had to pay compensation. This was approved by the National Assembly in 2004. When the case was subsequently presented to the Federal High Court, Judge Okechukwu Okeke ruled that since both sides had agreed to submit their dispute to the National Assembly, the order was binding on both sides. The Court denied a request from SPDC to postpone the payment and set a deadline to pay the fine. Nonetheless, SPDC appealed the judgment and refused to pay the fine until judgment had been reached by the appellate court. SPDC issued a press statement declaring that it "believes that the appeal has strong grounds as independent expert advice demonstrates that there is no evidence to support the underlying claims. SPDC remains strongly committed to dialogue with the Ijaw People and all its other stakeholders."[116]

This news triggered a series of attacks on oil installations and kidnappings of foreign oil workers by Ijaw militants who want the oil wealth to benefit the local community. Ijaw leader Ngo Nac-Eteli declared: "if Shell wanted to buy time by taking the case to the appellate court, the company would not be allowed to operate on Ijaw land until the case was settled."

Apart from the appeal, Shell maintains that paying would not help resolve the existing problems: money tends to 'disappear'. In view of the high scores of Nigeria in the Transparency International's Corruption Perception Index[117] and a history of disappearing oil revenues at all levels of governance, this point has some merit.

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114. *Shell v. Ijaw Aborigines of Bayelsa State* (2006), text of the judgement not found in public sources. Sources accessed: BBC News, Shell Contests Huge Nigeria Fine, 22 May 2006, at: http://news.bbc.co.uk/go/pr/fr/-/2/hi/africa/5004854.stm, accessed on 28 June 2010; R. Alford, Case of the Month: *Shell v. Ijaw Aborigines of Bayelsa State, Opinio Juris*, January 2007, at: www.opiniojuris.org/posts/1141148695.shtml. Guardian.co.uk, accessed on 28 June 2008; The Guardian, 'Shell told to pay Nigerians US$1.5 billion pollution damages', 25 February 2006, at: www.guardian.co.uk/world/2006/feb/25/oil.business, accessed on 28 June 2010.
115. Compare: Shell Nigeria Annual Report 2006, *supra* note 20, pp. 6-7 and 14-16.
116. Shell, 'Press Statement on Nigeria Judgement', 24 February 2006, at: http://www.shell.com/home/content/media/news_and_media_releases/archive/2006/nigeria_24022006.html, accessed on 28 June 2010.
117. Transparency International, 'Corruption Perceptions Index 2007', at: http://www.transparency.org/policy_research/surveys_indices/cpi/2007, accessed on 28 June 2010.

9.2.7 Ruling on gas flaring

Gas flaring is considered notoriously detrimental to the environment and the people living in its vicinity. According to a report of an NGO, more gas is flared in Nigeria than anywhere else in the world; it is estimated that 40 per cent of all of Africa's natural gas consumption in 2001 was flared off in Nigeria. The loss of potential earnings to Nigeria corresponds to around US$2.5 billion a year.[118] In fact, routine gas flaring was first outlawed in Nigeria by a law approved in 1984. However, this had no immediate effect on company practice. In particular, SPDC made a commitment in 1996 to end gas flaring of associated gas by 2008. Nigeria's President Obasanjo had agreed on this voluntary deadline with the oil companies.[119] This required SPDC to prepare a plan to collect and put to economic use the gas otherwise flared from its network of 73 flow stations. It also entailed a commitment not to develop new oil fields without a clear plan for the utilisation of the associated gas. In 2007, however, SPDC admitted that it could not meet the 2008 deadline. They claimed that the target was predicated on the joint venture's programme being fully funded to deliver the required Associated Gas Gathering Projects, which was not achieved due to reduced funding of the programme.[120]

The controversial issue of gas flaring was the subject of a decision by the Federal High Court of Nigeria, *Gbemre v. Shell Petroleum Development Company Nigeria*, dated 14 November 2005.[121] The case was brought up by the minority Iwherekan community, with the support from Environmental Rights Action, the Nigerian branch of the NGO Friends of the Earth. The claims were directed against SPDC and NNPC, as co-defendants, and against the Attorney-General of the Federation. Similar suits were commenced by seven other minority communities, including Ogoni ethnic groups.

In this case, Justice C.V. Nwokorie decided that the gas flaring in the course of the oil exploitation and production activities of SPDC and NNPC violates the rights to life and dignity as provided under articles 33(1) and 34(1) of the Nigerian Constitution and reinforced by articles 4, 16 and 24 of the ACHPR,[122]

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118. Friends of the Earth International, 'Poverty, Climate Change and Energy: the Case against Oil Aid', June 2008, http://www.foei.org/en/publications/pdfs/pdf-oil-poverty-briefing, accessed on 28 June 2010.
119. See: www.shell.com/home, accessed on 28 June 2010. President Obasanjo is of Yoruba origin.
120. *Ibid*.
121. *Jonah Gbemre (for himself and as representing Iwherekan Community in Delta State, Nigeria) v. Shell Petroleum Development Company Nigeria Ltd and Nigeria National Petroleum Corporation*, Federal High Court of Nigeria in the Benin Judicial Division, Suit No. FHC/B/CS/53/05, 14 November 2005.
122. ACHPR (Ratification and Enforcement) Act, Cap. A9, Vol. 1, Laws of the Federation of Nigeria, 2004.

which guarantee the right to a clean poison-free, pollution-free and healthy environment.[123] He ordered the companies to stop such further practice in this community immediately and the Nigerian Government to take immediate action.

This judgment is in line with the 2001 ruling of the AHRC (*vide* section 9.2.4), that appealed to the Government to compensate the Ogoni for abuse against their lands, housing and health caused by oil production including flaring by multinational companies. In its annual report, Shell asserted that the procedures followed by the High Court did not allow witness testimonies, expert evidence or cross-examination. SPDC appealed the judgment, which was granted, and filed a stay of execution of the judgment. In a press release, SPDC explained having already spent US$2 billion to reduce and eventually phase out the practice of gas flaring in 2009.[124] This explanation clearly did not satisfy the NGO *Milieudefensie*, a branch of Friends of the Earth. It decided to start an 'anti-gas flaring campaign' against Shell on 30 April 2007 by creating a 15-meter high flame in front of Shell's headquarters in The Hague, the Netherlands.

9.3 Multinational companies under international law

9.3.1 Background and developments on the application of human rights to companies

We are nowadays facing a situation where some multinational companies – the giant Shell among others – possess and control resources more extensively than certain States and where their decisions shape the international political landscape. As an effective way of illustrating their growing part in the world's economy, it is commonly reported that companies represent 51 of the top 100 largest economies worldwide (Institute for Policy Studies, 2000).[125] Therefore, their effective powers permit them to negotiate, agree, including on concession agreements, and litigate as equals with governments. Moreover, companies 'freely' exploit and control economic, natural as well as human resources of several States. From this initial consideration, one may consider that States are even losing powers to these corporate entities and it then justifies the need to

123. *Gbemre v. Shell Petroleum Development Company Nigeria*, pp. 30-31.

124. Shell Nigeria Annual Report 2006, *supra* note 20, p. 14.

125. S. Anderson and J. Cavanagh, 'Top 200: The Rise of Global Corporate Power', Institute for Policy Studies, 2000, at: http://www.corpwatch.org/article.php?id=377, accessed on 28 June 2010. It indicated: "Two hundred giant corporations, most of them larger than many national economies, now control well over a quarter of the world's economic activity." For instance, it mentions that Shell is "bigger" than Venezuela (this is based on a comparison of corporate sales and country GDPs).

affect these multinational companies with corresponding responsibility on an international plane. In fact, corporate responsibility and the accountability of multinational companies are of growing concern among the international community considering this perception that the ability of States to act in the public interest, including securing human rights within their jurisdiction, has been weakened by the consequences of globalisation. In other words: everybody wants to see multinational companies held responsible for their actions, and especially in the case of human rights violations. Nevertheless, States remain the sole parties to international conventions under international law, including human rights treaties.

As this section will underline, this issue has been extensively discussed by legal scholars and human rights activists with specific reference to respecting obligations formulated under human rights instruments, such as the UDHR. Some current academic developments on the application of human rights treaties to companies will be further explored. It will also be evaluated whether *ius cogens* norms apply directly to companies. As an important development in this matter, a review of the UN 'Ruggie Report' is inserted. Following a current trend, it will be followed by an analysis of the scope and legal effects of the adoption of Voluntary Codes of Conduct by companies with respect to human rights, which is based on the fact that the observance of human rights is now considered to be 'Good for Business'.[126]

It has become commonly accepted that individuals possess some international rights and obligations under international law. Since World War II, the establishment of international supervisory organs allows individuals to bring claims against a State for violations of human rights. With the establishment of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, individuals can be prosecuted at an international level, and it is accepted that individuals are subject to duties under international law.[127]

Whether international rights and obligations should be extended to a legal person, such as multinational companies, has been the subject of great debate.[128] Concerning their rights, it has been rightfully suggested that this question should be centred "not so much [on] whether, as a conceptual matter, corporations should enjoy the benefit of human rights protection, but whether,

126. Muchlinski, *supra* note 64, p. 515.

127. A. Clapham, 'MNCs under International Criminal Law', in M.T. Kamminga and S. Zia-Zarifi (ed.), *Liability of Multinational Corporations under International Law* (Kluwer: The Hague: 2000), p. 189.

128. See: K. de Feyter, *Human Rights: Social Justice in the Age of the Market* (Zed Books: London: 2005). This aim of this article is not to address the question of the international legal personality of private actors such as corporations. Nevertheless, the topic plays a role in this regard. See especially: I. Brownlie, *Principles of Public International Law* (Oxford University Press: Oxford: 2003), p. 57. W. Friedmann, *The Changing Structure of International Law* (Stevens & Sons: London: 1964), p. 213.

given the nature, characteristics, and functions of corporations, they should enjoy the same human rights and to the same extent as natural persons".[129] Obviously, there are some violations which can only be suffered by natural persons (*e.g.* torture, rape). Nevertheless, some rights may be enjoyed by both entities, including the legal person, "although the precise nature of the right may need to be modified to take account of realities of corporate activity".[130] For instance, a company may enjoy the right to own property, to fair trial or the right to free speech. The question remains: What is the scope of their parallel obligations based on existing human rights treaties?

9.3.2 Legal opinions on the application of human rights treaties to companies

According to Clapham, the network of international treaties concerned with the criminalisation of the acts of legal persons lead to conceive that legal persons, such as companies, can commit international crimes, and that they may be put on trial, in some circumstances, outside the jurisdiction in which the crime took place.[131] Importantly for him, the lack of the International Criminal Court's jurisdiction over legal persons for war crimes should not be misleading to consider that the human rights law does not apply to companies; the international legal order has already been adapted to define corporate crimes in international law and to oblige States to criminalise this behaviour. It clearly appears that "lack of international jurisdiction to try a corporation does not mean that a corporation is under no international legal obligation".[132] Treaties on corruption, environmental crimes, financing of terrorism groups, and trafficking by organised criminal groups illustrate that international law treaties are in fact used to address the behaviour of companies.[133] States are bound under international law to ensure that companies respect the particular obligations as defined by these international instruments.[134] Therefore, these treaties require that State Parties implement the said obligations into national law,

129. Muchlinski, *supra* note 64, p. 510.
130. *Ibid*. This author provides the following interesting example related to the right to corporate free speech: "[…] not all corporate speech will be protected. A distinction between commercial speech, aimed at improving the commercial performance of the company, and non-commercial speech has been developed, with greater protection being accorded to the latter than the former".
131. Clapham (2000), *supra* note 127, p. 172. For instance, the International Convention on the Suppression and Punishment of the Crime of Apartheid (1976) states that apartheid is an international crime and declares 'criminal those organisations, institutions and individuals committing the crime of apartheid' (Article I (2)).
132. Clapham (2000), *supra* note 127, pp. 139, 189 and 267,
133. *Ibid*. p. 241.
134. *Ibid*. p. 267. See: M.K. Aldo, 'Human Rights and Transnational Corporations – an Introduction', in M.K. Aldo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations* (Kluwer Law International: The Hague 1999), p. 31.

including the adoption of related sanctions. For instance, article 26 of the *UN Convention against Corruption* on the liability of legal persons indicates that "Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in the offences established in accordance with this Convention".[135]

Moreover, Clapham upheld that protection should exist for all violations of human rights, thus not exclusively when the violator is an agent of the State. For instance, in the case of the ECHR, this could be legally justified by a dynamic interpretation considering the general evolution of international law and in particular the international law of human rights.[136]

Nevertheless, there is an existing limitation on imposing direct obligations on companies *via* treaties:

> There is currently little appetite among states to develop new international treaties focused on the issue of human rights abuses facilitated or committed by corporations. Nor does it appear that the human rights treaty bodies are ready to interpret the UN human rights treaties to directly impose obligations on non-state actors or individuals.[137]

For Muchlinsky, common arguments against the extension of human rights responsibilities to multinational companies can be refuted. He explained that companies "have been expected to observe socially responsible standards of behaviour for a long time" in national and international law (as well as in Codes of Conduct) set by inter-governmental organisations; their social responsibility is then not limited to making profits for the shareholders.[138] This implies that multinational companies should be subject to human rights obligations because human dignity must be protected in every circumstance.[139] Despite this justification, Muchlinsky concluded that the content of legal obligations of multinational companies in regard to human rights violations remains uncertain and the actual related claims are still to be adequately developed. States remain the ultimate responsible actors for human rights protection and, therefore, multinational companies "should not become scapegoats for failures of governance on the part of host country governments".[140]

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135. The Convention was adopted by the General Assembly by its Resolution 58/4 of 31 October 2003 and entered into force on 14 December 2005.
136. A. Clapham, *Human Rights in the Private Sphere* (Clarendon Press: Oxford: 1993), p. 89.
137. Clapham (2006), *supra* note 61, p. 240.
138. Muchlinski, *supra* note 64, p. 515, referring to UNCTAD, The Social Responsibility of Transnational Corporations (New York and Geneva: United Nations, 1999); UNCTAD World Investment Report 1999, chap. XIII (New York and Geneva: United Nations, 1999).
139. Muchlinski, *supra* note 64, p. 516, referring to Clapham (2006), *supra* note 61, chap. 6.
140. *Ibid*., p. 536.

Interestingly, Jägers pointed out that human rights instruments might entail obligations for companies via the doctrine of horizontal effect or *Drittwirkung* or 'third-party effect'.[141] Following this doctrine, certain rights do not only apply to the vertical relationship between governments and individuals but also apply to the horizontal relationship, for instance between an individual and a company.[142] She explained that the horizontal effect of human rights emanate from the very nature of human rights and from general provisions contained in human rights treaties, notably the UDHR, the ICCPR, ICESCR and the ECHR. This doctrine is gaining recognition based on "the increased attention to infringements on human dignity by non-State entities".[143]

Jägers concluded that general provisions do not independently provide enough strong evidence that norms of international human rights law can be applied horizontally. An examination of each right is necessary to establish whether it is indeed applicable to non-State actors, *i.e.* has horizontal effect.[144] Her analysis of the provisions of the above mentioned human rights instruments reveals that a significant number of norms are, in her opinion, applicable to companies "in practice and on the grounds of principles". Equality and prohibition of discrimination, right to life, prohibition of slavery and forced labour and prohibition of torture should be guaranteed by companies. Her analysis is based on the fact that these provisions "aim to protect interests of a fundamental nature"; they belong to the category of *ius cogens*. In her view, other norms are applicable to companies "in practice". For instance, the right to property based on article 17 of the UDHR[145] can be violated by companies, in certain circumstances, in the light of a subsistence right to property.[146]

According to Jägers, the activities of oil companies in the Niger Delta resulting in the destruction of local livelihood, such as fishing grounds, can constitute a violation of the corporate duty to respect the right to food of the inhabitants. Articles 25 of the UDHR and 11 of the ICESCR, for example, contain the right to an adequate standard of living including the right to food. As stressed by Jägers, this right to food can be interpreted as including the duty

141. Jägers, *supra* note 65, pp. 10, 32-37.
142. The term *Drittwirkung* originates from a doctrinal debate held in Germany.
143. *Ibid*. pp. 40-45.
144. Following the general rules of interpretation of treaties based on the Vienna Convention on the Law of the Treaties, the said provision will be interpreted by examining its general wording, the context and, if necessary, the preparatory work and the circumstances of its conclusion.
145. Article 17 of the UDHR reads: "Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property."
146. Jägers, *supra* note 65, pp. 61-62, referring to: C. Krause and G. Alfredsson, 'Article 17', in G. Alfredsson and A. Eide (eds.), *The Universal Declaration of Human Rights, a Common Standard of Achievement* (Martinus Nijhoff: The Hague 1999), pp. 359-378. In other words, a company that deprives an individual of his means of existence by taking away property violates the interest protected by Article 17 of the UDHR.

of a company to not interfere with the ability of people to satisfy their food needs. In addition, it could be argued that the right to life (articles 3 of the UDHR and 6 of the ICCPR) implies that a company shall take measures to ensure that its business partners do not violate this right. Jägers refers to the security arrangements of oil companies operating in Nigeria with private security forces to protect their property. Especially, a violation would occur by providing arms to such security forces that are notorious for violating the right to life. In addition, this concerns an additional type of corporate obligations: the duty not to cooperate.[147]

Hence, there is on the one hand, a common agreement among these authors that multinational companies should be held responsible for infringements of human rights. Several arguments have been explored to support this principle, for instance, by referring to human dignity or to the horizontal effects of human rights. On the other hand, it remains uncertain to which extent human rights law applies to companies under international public law – and even more uncertain whether it is an extent commensurate with their effective role and influence in the present global society.[148] As underlined, human rights treaties do not impose direct obligations on non-state actors such as companies. This results in a lack of clear guidance for businesses. Furthermore, none of the international bodies dealing with human rights have jurisdiction over companies directly. In the case of enforcing human rights obligations on multinational companies operating in Nigeria, additional challenges should also be considered.

As highlighted in section 9.2, companies have been accused of violating human rights in collusion with the Nigerian Government. Considering the profits received directly from the oil industries owned by foreign companies, the host-state government may lack the political will to prevent or mitigate the negative economic, environmental and social impacts of natural resource extraction.[149] This indifference can also be motivated by fear that greater accountability can provoke companies to withdraw their much-needed foreign investments.[150] Consequently, human rights treaties have little impact in such a situation where a government lacks the willingness – or sometimes the means – to enforce them. On the one hand, it is doubtful whether the adoption of an international treaty related to human rights abuses by companies would improve the situation, for instance, in the Niger Delta. It is uncertain whether

147. Jägers, *supra* note 65, pp. 85-89. This vision has been confirmed in the decision of the Commission, see: section 9.2.4.

148. See: T. Kamminga and S. Zia-Zarifi, 'Liability of Multinational Corporations under International Law: An introduction', in M.T. Kamminga and S. Zia-Zarifi (eds.), *Liability of Multinational Corporations under International Law* (Kluwer: The Hague 2000), p. 1.

149. Ballentine, *supra* note 15, p. 130.

150. S. Joseph, *Corporations and Transnational Human Rights Litigation* (Hart Publishing: Oxford 2004), p. 5.

governments would take subsequent national measures – including penal sanctions – to implement and enforce the said treaty within their territory. On the other hand, such a treaty could contain provisions on its extraterritorial application, which would allow foreign governments to control the behaviour of their multinational companies operating abroad. Nevertheless, the efficiency of such a regime can be discussed considering, among others, the principle of State sovereignty, the related costs of conducting an investigation abroad, and the feasibility at the technical level.

The lack of certainty on the application of human rights to companies led the UN Human Rights Council to call for further analysis in this field. The result is an important development on the application of human rights responsibility on companies: the Ruggie Report.

9.3.3 The Ruggie report: "Protect, Respect and Remedy" principles and its application to the oil industry

On 7 April 2008, the Ruggie Report was released (see chapter 7, in particular section 7.5).[151] John Ruggie, the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises had elaborated on a framework toward the aim of providing more effective protection against corporate-related human rights harms. The framework states that the State has a duty to protect people, companies have a duty to respect human rights and both have a duty to remedy violations. The approach taken by Ruggie has the merit of formulating specific and tangible measures, including changes in national laws and regulatory policies, international mechanisms and voluntary initiatives. Although the human rights regime "rests upon the bedrock role of States", the Ruggie Report clearly stresses that companies have the responsibility to respect human rights, and so, independently of States' duties.[152] Consequently, failure in this regard can subject a company to domestic jurisdiction. Concerning the allegation of complicity, the Ruggie Report points out that: "The number of domestic jurisdictions in which charges for international crimes can be brought against corporations is increasing, and companies may also incur non-criminal liability for complicity in human rights abuses". A recommendation at this level is to

151. UN Human Rights Council, Promotion and Protection of all Human Rights, Civil, Political, Economic, Social, and Cultural Rights, including the right to Development. Protect, Respect and Remedy: a Framework for Business and other business enterprises, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie (A/HRC/8/5), 2008.

152. See: Corporate Responsibility under International Law and issues in Extraterritorial Regulation: Summary of Legal Workshop, A/HRC/4/35/Add.2, 2007, at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/108/45/PDF/G0710845.pdf?OpenElement, accessed on 28 June 2010.

strengthen the judicial capacity to hear complaints and enforce remedies against all companies operating in their territory. It implies that obstacles to access to justice should be addressed. Moreover, the Ruggie Report draws attention to the significant role of national human rights institutions which have the capacity to handle grievances related to the human rights performance of companies.[153]

At the level of the State's duty to protect, the Report especially recommends that all actors should work towards developing better methods for balancing investor interests and the needs of host States to discharge their human rights obligations. This is based on the fact that the expansion of legal rights of transnational companies has created imbalances between companies and States that may be detrimental to human rights. The Report also upholds that host States offer protection through bilateral investment treaties to attract foreign investment. Such protection generally covers a promise not to modify the law to the disadvantage of the investor. Consequently, States find it difficult to strengthen domestic and environmental standards, including those related to human rights.

In conclusion, although the Report does not intend to 'withdraw' the responsibility of States to protect human rights, it clearly points out the responsibility of companies to respect human rights. It sketches them as complementary responsibilities. When applied to the exploitation of natural resources, several human rights related issues are to be addressed by both the States and the companies (extractive industry).

Firstly, companies shall respect the right of Indigenous People to self-determination when the extractive natural resources are located in areas inhabited by Indigenous People. In such cases, either the people wish to continue their traditional way of living – when they are not interested in the so-called 'modern economic development' and prefer the area to remain untouched – or they are interested in profiting from the economic benefits that could be generated in the area (*e.g.* to use it to improve their infrastructure or welfare).[154]

Secondly, whenever it has been firmly, voluntary and democratically established that the local people agree to the exploitation of their area,

153. Business & Human Rights Resource Centre, 'Business and Human Rights: A Survey of NHRI Practices', at: http://www.business-humanrights.org/Gettingstarted/UNSpecialRepresentative, accessed on 28 June 2010.

154. Articles 3 and 4 of the UNDRIP and Article 1 of ICESCR. See: Lubicon Lake Band v. Canada, Communication No. 167/1984 (26 March 1990), UN Doc. Supp. No. 40 (A/45/40) (1990), See also: M. A. Orellana, 'Indigenous People, Energy and Environmental Justice: The Pangue/Ralco Hydroelectric Project in Chile's Alto BíoBío', in *Journal of Energy and Natural Resources Law*, 23(4), 2005, p. 511; B. Harvey and S. Nish, 'Rio Tinto and Indigenous Community Agreement Making in Australia', in *Journal of Energy and Natural Resources Law*, 23(4) 2005, p. 499; S. Joseph, 'Taming the Leviathans: Multinational Enterprises and Human Rights', in *Netherlands International Law Review*, 46, 1999, p. 173.

companies shall respect the rights of the inhabitants during the preliminary phase of exploitation. That can mean providing a fair market value for the expropriated property; providing alternative areas for living; a profit-sharing agreement with the community; implementation of a transparent investment policy; environmental assessment, involving external expertise.[155]

Thirdly, during exploitation and exploration, companies should implement the highest standards regarding environmental and social concerns. This should be the case even where local law does not itself impose high standards or does not enforce them. Another important element of best practices concerns avoiding corruption. A company shall not facilitate the governmental abuse of the 'community money' derived from natural resources.

Fourthly, after the exploitation phase, the company shall restore the area, to the extent possible to its original status, requesting assistance from the relevant experts. People should be offered financial compensation and/or the choice to move back to their traditional grounds.

Finally, from preliminary phase to post-exploitation phase, companies shall ensure transparency in their operations by publishing clear and complete sustainability reports; for example, by following the GRI's Guideline 400, supported by evidence and verified by independent experts. As it became clear from a 2008 survey conducted by the GRI and the Roberts Environmental Centre on Reporting on Human Rights: "more quantitative results and performance-orientated indicators are needed to measure the effectiveness of policies and actions that a company implements to ensure human rights".[156]

9.3.4 Corporate responsibility from a sustainable development perspective

Several authors have argued from a sustainable development perspective that there are ethical grounds to foster the position that multinational companies shall not only comply with human rights instruments but shall also share the duty to actively promote them. Without being 'bound' by the generally accepted principles of international law, this position is based on moral

155. Compare: Coomans, *supra* note 97, p. 7. He indicated that "instances of forced eviction are *prima facie* incompatible with the requirements of the Covenant" (ICESCR). See: D. Shelton, 'Human Rights, Health and Environmental Protection: Linkages in Law and Practice', in *Human Rights & International Legal Discourse*, 1(1), 2007, p. 9; S. Giorgetta, 'The Right to a Healthy Environment, Human Rights and Sustainable Development', in *International Environment Agreements: Politics, Law and Economics*, 2(2), 2002; A. Hildering, *International Law, Sustainable Development and Water Management* (Eburon Publisher: Delft: 2004). See also: Right to Environment.org, 'Environment and Rights', at: http://www.righttoenvironment.org/, accessed on 28 June 2008.

156. GRI, 'Reporting on Human Rights', 2008, at: http://www.globalreporting.org, accessed on 28 June 2010. Shell was one of the companies reviewed.

responsibility.[157] When referring to economic, social and cultural rights (second-generation), for instance, companies should constructively use their powers and resources to contribute to a better world. This perspective goes beyond the actual framework established by international law scholars, and appeals for a situation where multinational companies have the burden of implementing human rights as well as measures to protect the environment. This sustainable development perspective leads to explore another facet of corporate responsibility based on voluntary initiatives.

9.3.5 Corporate practice to adopt voluntary codes of conduct

There is a trend for western companies to adopt voluntary codes of conduct as part of their CSR policies, which habitually embrace the protection of human rights. Generally, these codes of conduct set minimum standards for the company's own behaviour, as well as standards for the types of countries the company will be willing to invest in, and standards for the behaviour of business partners, including suppliers and contractors.[158] At first glance, multinational companies appear to reject a role which would be seen as "purely non-social" through the adoption of such instruments.[159] Furthermore, their creation can have some value in terms of creating 'soft law' that could gel into 'hard law' regulating the activity of companies and the States in which they operate.[160] Some suggest that the increasing use of these codes of conduct could be seen as a new form of 'privatisation' of human rights, "as an allusion to the increased self-regulation instead of State regulation".[161] Corporate self-regulation may then be used to fill the regulatory gap left by national legislators.[162]

Nevertheless, the adoption and implementation of codes of conduct does not receive only positive commentary. A frequent initial remark is that their provisions do not generally impose legally binding obligations on companies. Some argue that their effectiveness necessitates an independent supervisory and enforcement mechanism, which is in most cases lacking. Moreover, the limited

157. E. Nieuwenhuys, 'Social, Sustainable Globalisation Requires a Paradigm Other Than Neo-Liberal Globalism', in E. Nieuwenhuys (ed.), *Neo-Liberal Globalism and Social Sustainable Globalisation* (Brill: Leiden/Bosto n: 2006), p. 221. See: N.J. Schrijver and E. Hey, *Volkenrecht en duurzame ontwikkeling* (T.M.C. Asser Press: The Hague: 2003).
158. Joseph, *supra* note 150, pp. 7-8.
159. Muchlinski, *supra* note 64, p. 516.
160. Kamminga and Zia-Zarifi, *supra* note 148, p. 9, referring to H.W. Baade, 'The Legal Effects of Codes of Conduct for Multinational Enterprises', in R.N. Horn (ed.), *Legal Problems of Codes of Conduct for Multinational Enterprises* (Antwerp: 1980), p. 3.
161. A. Reinisch, 'The Changing International Legal Framework', in P. Alston (ed.), *Non-State Actors and Human Rights* (Oxford University Press: Oxford: 2005), p. 43.
162. Muchlinski, *supra* note 64, p. 113.

space occupied by human rights among the CSR scheme is sometimes deplored. According to the research of Kamminga and Zia-Zarifi on the liability of multinational companies under international law, the real impact on the problematic situation is often modest; voluntary codes of conduct are seldom useful in ameliorating the problems caused by companies.[163] These authors give the example of the adoption of Shell's internal Code of Conduct in response to the massive public disapproval in the wake of the oil crisis in the Niger Delta where the company reduced its activities. The result of the actions taken decreased the vulnerability of the company to public pressure, but did not improve the situation of the local population.[164] In contrast, one might reply that Shell has since started a sustainable community development programme in Nigeria (see section 9.4.3) and has explicitly declared its commitment to several external codes of conduct and principles.[165]

Most of the global codes of conduct adopted today were not yet developed when the events in the Niger Delta took place in 1994. In that case, what are the potential impacts of these emerging codes of conduct with regard to regulating corporate conduct of petroleum industries in such a socio-political context? Such questions could hypothetically be answered by analysing the main voluntary initiatives and external codes of conduct supported by Shell:[166] the OECD MNE Guidelines,[167] the International Labour Organisation Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy,[168] the GRI,[169] the Global Compact,[170] and the Voluntary Principles

163. Kamminga and Zia-Zarifi, *supra* note 148, p. 9.
164. In particular, some parts of Shell's operation were simply transferred to competitors.
165. Shell, 'External voluntary codes', at: http://www.shell.com/home/content/environment_society/reporting/external_voluntary_codes/, accessed on 28 June 2010.
166. Shell is also committed to the Extractive Industries Transparency Initiative, see: section 4.2.
167. OECD, 'Guidelines for Multinational Enterprises', at: www.oecd.org/daf/investment/guidelines, accessed on 28 June 2008. See: S.C. van Eyk, *The OECD Declarations and Decisions concerning Multinational Enterprises: An Attempt to Tame the Shrew* (Ars Aequi Libri: Nijmegen: 1995); Jägers, *supra* note 65, pp. 101-119; D. Leipziger, *The Corporate Responsibility Code Book* (Greenleaf Publishing: Sheffield: 2003), pp. 52-56.
168. Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, adopted by the Governing Body of the International Labour Office at its 204th Session (Geneva, November 1977), as amended at its 279th Session, Geneva, November 2000.
169. Global Reporting, 'Sustainability Reporting Guidelines', at: http://www.globalreporting.org, accessed on 28 June 2008. See: T.E. Lambooy, 'Sustainability Reporting by Companies is Necessary for Sustainable Globalisation', in E. Nieuwenhuys (ed.) *Neo-Liberal Globalism and Social Sustainable Globalisation* (Brill: Leiden/Boston 2006), pp. 215-235. Governments are excluded from this initiative for the GRI to keep its independence from their intervention.
170. Global Compact, 'About the Global Compact', at: http://www.unglobalcompact.org, accessed on 28 June 2010.

on Security and Human Rights (VPSHR).[171] Generally speaking, a review of these key international corporate initiatives reveals that the recommended standards encourage companies to take an active role toward human rights fulfilment by stimulating development and improving social conditions. The adoption of such instruments by Shell certainly indicates an increased awareness of the impact of its activities on the society and the environment, including in the Niger Delta. Although, a comprehensive analysis of each of these mentioned instruments goes beyond the scope of the present chapter, the last two instruments will be further discussed considering the particular relevance of their content to the present matter.

It should be noted here that the VPSHR were created in 2000 especially to assist extractive and energy companies in maintaining the safety and security of their operations while at the same time respecting human rights. The VPSHR addresses three important core areas: risk assessment, interactions between companies and public security, and interactions between companies and private security. In particular, the VPSHR state that companies should consider risk assessment when transferring equipment (including lethal equipment) to public or private security forces in order to mitigate foreseeable negative consequences, including human rights abuses. It also involves considering the available human rights records of public security forces, paramilitaries, law enforcement, as well as the reputation of private security agencies that are to be hired. From an internal report published after the first five years of existence of the VPSHR, it has been reported that they provide "guidance on managing security and human rights, especially for companies that operate in challenging environments where expectations regarding human rights and security may be inconsistent".[172] Nevertheless, it has been mentioned that the VPSHR suffer from a lack of clarity and vague language, which often results in confusion among operations-level staff. Furthermore, they are difficult to monitor and audit and thus, may foster the perception that they lack transparency. Shell could give these points some attention in its reporting on sustainability.

The same comments are generally applicable to the Global Compact which merely relies on public accountability, transparency and the self-interest of its stakeholders to promote and to implement its principles; it has not been developed as a regulatory instrument as such. Companies are simply invited to produce an annual Voluntary Communication on Progress on the implementation of the UN Global Compact Principles, which reports are subsequently

171. Voluntary Principles on Security and Human Rights, 'Welcome', at: http://www.voluntaryprinciples.org/, accessed on 28 June 2008. Examples of other participants are: ExxonMobil, Rio Tinto and Talisman Energy.

172. Voluntary Principles on Security and Human Rights, 'Five-Year Overview + Overview of Company Perceptions of the Principles', at: http://www.voluntaryprinciples.org/reports/2005/company-perceptions.php, accessed on 28 June 2010.

posted on the website of the Global Compact.[173] Since the Global Compact consists of ten principles rather than detailed rules, it could be described more as a network opportunity than as a practical tool for companies. However, since Shell is among the corporate founders of the Netherlands Network (GCNL),[174] and the national Global Compact network, public pressure could be counted as an element promoting its implementation.

Such voluntary codes of conduct and corporate initiatives can play a positive role with regard to the accountability of companies for human rights violations. When code provisions coincide with mandatory local law, companies surely have to comply. When such provisions are incorporated into a contract to which a company is a party to (*e.g.* loan agreement or supply agreement), they will be enforceable before the Court. Codes of conduct can also be used by Courts to apply higher standards. Furthermore, public reference to these instruments can lead to certain expectations; violations of these codes may give rise to claims. In addition, codes of conduct can encourage the adoption of higher standards in national regulation, the so-called "bottom-up pressure" in legislation. Considering that the private sector usually moves faster than the government, adoption of corporate voluntary codes of conduct can be considered as a major step forward. The credibility and effectiveness of such codes of conduct could nevertheless be greatly improved if companies that have adopted them were to commit themselves to the establishment of clear, common and verifiable performance obligations.[175]

The following will conclude on certain significant aspects of the operations of Shell in the Niger Delta – mainly at the political and economical level – following the trial of Saro-Wiwa.

9.4 Corporate social responsibility in the Niger Delta region

9.4.1 Reconciliation process between the Ogoni People, Shell and the Nigerian Government

In 2005, a decade after the execution of Saro-Wiwa and his compatriots, President Obasanjo announced the establishment of a reconciliation process

173. The Global Compact's coverage is considerable, with over 5,000 participants, including over 3,700 businesses in 120 countries. Global Compact, 'Participants', at: http://www.unglobalcompact.org/ParticipantsAndStakeholders/index.html, accessed on 28 June 2010.

174. Global Compact, 'The Global Compact in the Netherlands', at: http://www.gcnetherlands.nl/, accessed on 28 June 2010. The network focused on raising awareness of the Global Compact in the Netherlands and providing a valuable learning and action platform for signatories of the Global Compact.

175. Ballentine, *supra* note 15, p. 136.

involving Shell, the Ogoni, and both the Federal and Rivers State Governments.[176] Reverend Father Matthew Hassan Kukah, a well-known figure in Nigeria, was appointed as a facilitator to handle the peace process. Among the items for negotiation, an environmental assessment of Ogoniland and its eventual clean-up of oil spills were set as priorities by the parties.[177]

As a long-term commitment to the reconciliation process, Shell stated that it will assess and proceed with cleaning-up of oil spills that occurred in the area since the company left in 1993, irrespective of how the oil spills did occur. Shell offered to initiate dialogue with the Ogoni communities.[178] Pursuant to a press release, its development programme in Ogoni has been maintained despite the fact that the company has ceased its activities there in order to maintain a good relationship with the communities. Additionally, Shell stressed that it needs the freedom to conduct normal operations in order to assess the conditions of its facilities in Ogoniland and to make them safe. Shell Nigeria Annual Report 2006 stated that the company: "remains committed to an amicable resolution of issues and will continue to do its part to support the reconciliation process".[179]

From the side of the representatives of the Ogoni, MOSOP stressed that steps should first be taken by Shell, the Federal and the State Government to ensure the integrity and confidence-building in the entire process. After this, measures should be taken regarding the environmental degradation and rehabilitation of Ogoniland, including the conduct of an independent audit, a substantive clean-up of oil spills, and prevention of further damages.[180]

They also requested an apology for "past injury and firm commitments against future repetition" and connected damages. Furthermore, MOSOP stressed the opportunity to provide solutions concerning the political marginalisation of the Ogoni, their struggle for self-determination and to promote their socio-economic development, including sharing the benefits of oil exploitation.

In the course of the reconciliation process in 2005-2006, MOSOP considered that it has not been properly consulted and informed by the facilitator of all developments. In particular, they were concerned about the public announcement of an eventual clean-up plan of the polluted area to be sponsored by Shell and executed by UNEP, under which project MOSOP had not been duly

176. Coventry Cathedral, International Centre for Reconciliation, 'Ogoni Reconciliation', 15 June 2005, at: http://www.coventrycathedral.org.uk/ogonireconciliation.pdf, examined on 28 June 2008. See for an update: Coventry Cathedral, 'The Potential for Peace and Reconciliation in the Niger Delta', Report February 2009, at: http://www.coventrycathedral.org.uk/downloads/publications/35.pdf, accessed on 28 June 2010.

177. Shell Nigeria Annual Report 2006, *supra* note 20, p. 31.

178. Shell, 'Shell in Nigeria', Press Release: The Ogoni Issue, at: http://www.shell.com.ng/home/content/nga/environment_society/reconciliation/ogoni/, accessed on 28 June 2010.

179. Shell Nigeria Annual Report 2006, *supra* note 20, p. 31.

180. MOSOP, 'Whiter Ogoni-Shell Reconciliation', 2006, at: http://www.unpo.org/downloads/Whither%20Ogoni-Shell%20Reconciliation.pdf, accessed on 28 June 2010.

informed and consulted.[181] Some estimated that MOSOP saw this clean-up as a manoeuvre by Shell to service its facilities in preparation for its return to Ogoniland.[182]

As a measure of reconciliation in 2005, the Federal Government inaugurated an Oil Spill Compensation Committee towards finding solutions to the problem of oil spillage in the Niger Delta.[183] The work of the Oil Spill Compensation Committee was subsequently transferred to a national regulatory agency; the National Oil Spill Detection and Response Agency (NOSDRA). In accordance with the *National Oil Spill Detection and Response Agency Act*, NOSDRA is responsible for ensuring compliance with all existing environmental legislation and detection of oil spills in the petroleum sector.[184] At the beginning of 2008, the Director General of NOSDRA announced that the guidelines on spillage management and related compensation for damaged property were being prepared by the relevant authorities.[185]

For its part, the Rivers State Government announced in 2006 the creation of a special fund to enable development projects in Ogoniland.[186]

From an external perspective, it appears difficult to ascertain the outcome of this reconciliation process for the different parties involved. From the information provided by the facilitator, Shell and the governmental authorities, progress has been achieved and concrete steps taken. From the perspective of MOSOP

181. See also: MOSOP, 'The Father Kukah Cooked OGONI Mou', Press Release, 27 February 2007, at: www.escr-net.org/usr_doc/MOSOP__on_MoU_27_Feb_07.doc, accessed on 28 June 2008.
182. UNEP, 'The Environment in the News, UNEP and the Executive Director in the News', 12 June 2007, http://www.unep.org/cpi/briefs/2007June12.doc, accessed on 12 July 2010. See also: http://www.nuos-international.org/id27.html, accessed on 28 June 2010. SPDC reported that it would not resume oil production operations without the welcome of the people. Shell, Press Release: 'Shell in Nigeria', SPDC's Submission, 23 January 2001, at: http://www.shell.com/home/content/nigeria/news_and_library/press_releases/2001/2001_2301_01031504.html, accessed on 28 June 2010.
183. National Oil Spill Detection and Response Agency (Establishment) Act, 2006 (Act No. 15, 18 October 2006). Federal Government of Nigeria, Official Website of the Office of Public Communications, 'President Obasanjo's Role in Reconciling the Ogonis', 17 July 2006, at: http://www.nigeriafirst.org/cgi-bin/artman/exec/view.cgi?archive=1&num=6181, accessed on 28 June 2008. See for an update: l.P.E Yo-Essien, National Oil Spill Detection & Response Agency (Nosdra), Abuja – Nigeria, presentation, 'Oil spill management in Nigeria: challenges of pipeline vandalism in the Niger Delta region of Nigeria', available at http://ipec.utulsa.edu/Conf2008/Manuscripts%20&%20presentations%20received/Eyo_Essien_2.pdf, visited on 7 September 2010.
184. Article 6(4) of the National Oil Spill Detection and Response Agency Act.
185. O. Bassey, 'Guidelines to Check Oil Spill Out Soon', *in Legal Oil*, 8 February 2008, at: http://www.legaloil.com/NewsItem.asp?DocumentIDX=1202628848&Category=news, accessed on 28 June 2008.
186. UNPO, 'Ogoni: Rivers State Government Earmarks N2bn for Ogoniland Development', 5 January 2006, at: http://www.unpo.org/content/view/3461/236/, accessed on 28 June 2010.

though, no solution has clearly emerged; these negotiations have simply ceased without solving anything.[187]

Nevertheless, a significant proposal connected to the objectives of the reconciliation process is on its way to being concretised. At the request of the Nigerian Government, UNEP announced in November 2007 its plan of undertaking a comprehensive environmental assessment of oil-impacted sites in Ogoniland in association with the United Nations Development Programme (UNDP). The project started in the autumn of 2007 and was expected to be completed by the end of 2008.[188] Following the survey, recommendations will be drafted on the basis of international standards for a subsequent clean-up programme.[189] Only the future can tell if this project can generate concrete positive impacts in the region.

As mentioned, one capital aspect of the reconciliation process for the Ogoni was to reconsider the distribution of oil proceeds. It is deemed necessary to further explore this matter.

9.4.2 Distribution of oil proceeds: "negotiations" between the Nigerian Government and the Niger Delta People and further concerns

According to Human Rights Watch, former President Obasango rejected the idea of negotiation surrounding further reallocation of oil revenue generated in the Niger Delta.[190] Rather, he opted in 2000 for the establishment of the Niger Delta Development Commission. This Commission aimed to reorganise management and administrative structure for a more effective use of the sums received from the federation account for tackling environmental pollution and other related problems arising from oil operations in the area.[191] Its mandate is also to implement the Niger Delta Regional Development Master Plan in

187. UNPO, 'Ogoni: MOSOP Alerts of Plot', 26 October 2006, at: http://www.unpo.org/article.php?id=5676 /, accessed on 28 June 2008.
188. UNEP, 'UN Environment Programme to Assess 300 Oil-Polluted Sites in Nigeria's Ogoniland', at: http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=521&ArticleID=5692&l=en, accessed on 28 June 2010. This assessment is financed by funds which are made available to the Government by SPDC in which it has a 55 per cent share.
189. UNEP, 'Ogoniland Environmental Assessment, UNEP in Ogoniland', at: http://postconflict.unep.ch/ogoniland/, accessed on 28 June 2010. It mentioned that the goal is to "identify the impacts of oil on environmental systems such as land, water, agriculture, fisheries and air – as well as the indirect effects on biodiversity and human health." Although the UNEP website indicated that bulletined information about the mission progress will be posted, no such information has been released as of 28 June 2008.
190. Human Rights Watch, 'Update on Human Rights Violations in the Niger Delta', 14 December 2000, at: http://www.hrw.org/backgrounder/africa/nigeriabkg1214.htm, accessed on 28 June 2008.
191. Niger-Delta Development Commission (Establishment etc) Act (2000 Act No 6).

consultation with stakeholders, such as local government, State government, oil companies (including SPDC), the National Planning Commission and NGOs.[192]

Unfortunately, critics say that there is little evidence that the Niger Delta Development Commission is succeeding in fairly distributing the oil proceeds to the population.[193] They consider that corruption is likely to affect its functioning. MOSOP representatives considered that it has failed to solve the region's problems.[194] The rising tide of violence in the Niger Delta can be perceived as a direct sign that the actual redistribution of oil revenues is not satisfactory to all parties. In place of the non-violent manifestations as previously promoted by MOSOP, violence and hostage-taking are now employed by militants to draw international attention to the Delta crisis. In particular, a group of activists, the Movement for the Emancipation of the Niger Delta (MEND), has orchestrated attacks on oil installations and hostage-taking of foreign oil workers since 2006.[195] In particular, MEND demands that the Government grants oil revenue concessions to Delta groups. Nonetheless, there is hope that the situation will improve following the election in May 2007 of President Umaru Yar'Adua, who has begun dialogue with militants groups and some ethnic organisations.[196]

The question of the distribution of oil proceeds was examined by Shell. In response, the company publishes data in its annual reports on the sharing of oil revenues between the private joint venture partners, including SPDC, together with the paid royalties, Petroleum Profit Tax and other levies.[197] This initiative is in line with its commitment to the Extractive Industries Transparency Initiative (EITI), which represents a multi-stakeholders initiative to improve transparency and accountability in the extractives sector. Among the main principles stated for revenue transparency, the EITI encourages an independent

192. Niger Delta Development Commission, Partners for Sustainable Development, at: http://www.nddcnet.com/Partnerships.html, accessed on 28 June 2010.
193. See H. Ekwuruke, 'The Niger Delta Youth in Nigeria's Development', in *Panorama*, at: http://www.tigweb.org/express/panorama/article.html?ContentID=12677, accessed on 28 June 2010.
194. UNPO, 'Ogoni: A Deprived Community', 10 January 2007, at: http://www.unpo.org/article.php?id=6121, accessed on 28 June 2008.
195. See: P. Collin, *The Bottom Billion: Why the Poorest Countries Are Failing and What Can Be Done About It* (Oxford University Press: Oxford 2007), pp. 30-31.
196. International Crisis Group, 'Nigeria: Ending Unrest in the Niger Delta', Africa Report, No. 135, 5 December 2007, at: http://www.crisisgroup.org/en/regions/africa/west-africa/nigeria/135-nigeria-ending-unrest-in-the-niger-delta.aspx, accessed on 28 June 2010. MEND also requests the Government to withdraw troops and releases imprisoned ethnic leaders. President Yar'Adua (Fulani origin) is the second elected President after the end of the military regime in 1999.
197. Shell Nigeria Annual Report 2006, *supra* note 20.

verification and publishing of payments by extractive companies and receipts by governments.[198]

At this point, the real issue seems to be defining the extent of responsibility of oil companies. This appears to raise difficult legal and ethical questions. For instance; to what extent should a multinational company be held to ascertain that its contractual partner deals legitimately with the interests of the inhabitants it represents and whether it has indeed been granted the authority by the representatives of the Indigenous People. The field of CSR and its connection to sustainable development definitely contain complex research questions worthy of further exploration.

9.4.3 Shell & the Millennium Development Goals in the Niger Delta region

Regarding the linkage between CSR and sustainable development, it is noted that Shell has expressed its commitment to the MDGs – the well-known eight targets universally agreed upon in a common effort to reduce extreme poverty by 2015.[199] This section briefly presents some of Shell's initiatives taken under the MDGs in relation to the problems facing the population of the Niger Delta; the intention is not to offer an analysis of the MDGs themselves which has been dealt with in chapter 6.

Shell supports the view that achieving the MDGs stems mainly from the role of governments as "reducing poverty depends on effective public institutions that allow business to create jobs and wealth."[200] Its greatest contribution to the MDGs is through providing energy needed for economic and social development.

Nevertheless, Shell has undertaken development projects dedicated to the MDG, such as participating together with the International Finance Corporation and Diamond Bank in a risk-sharing credit programme to finance indigenous contractors operating in the Niger Delta.[201] The programme aims to develop the capacities and competitiveness of Nigerian contractors. Moreover, Shell maintains a sustainable community development programme in Nigeria since 2003,

198. EITI, 'EITI Summary', at: http://eitransparency.org/eiti/summary, accessed on 28 June 2010. See: A. Al Faruque, 'Transparency in Extractive Revenues in Developing Countries and Economies in Transition: A Review of Emerging Best Practices', in *Journal of Energy & Natural Resources Law*, 24, 2006, p. 66.
199. UN, 'UN Millennium Development Goals, What are the Millennium Development Goals?', at: http://www.un.org/millenniumgoals/, accessed on 28 June 2010.
200. Shell, 'Millennium Development Goals', at: http://www.shell.com/home/content/envirosoc-en/society/millennium_development_goals/millenium_dev_goals_26042007.html, accessed on 28 June 2010.
201. The project is a 30 million dollars revolving credit facility in which Shell, the International Finance Corporation and Diamond Bank participate equally in the funding and risk sharing of the facility.

which is said to be integrated into the oil and gas project planning. This programme is established through the conclusion of global memoranda of understanding between Shell and the involved communities, which set long-term agreements allowing for sustainable development activities. Such agreements are aimed specifically at improving the management of projects on the levels of accountability and transparency.[202] Shell indicated having increased its assistance to reach US$53 million in 2006 on community development projects in Nigeria. Concretely for the Niger Delta, this assistance is translated into, for instance; the construction of roads, the renovation of a health centre, aid to start up community cassava enterprises (a SPDC/USID partnership), university scholarships and malaria drugs for children. In addition, Shell has provided financial support for the publication of the UN Development Programme "Niger Delta Human Development Report", a study analysing why abundant human and natural resources in this region have had little impact on poverty.[203] One of the conclusions of this Report is the necessity to undertake a multi-stakeholder approach while involving all levels of government, the Niger Delta Development Commission, the oil companies, the organised private sector, civil society organisations, the representatives of local groups and development agencies in partnership for ensuring a sustainable development and the achievement of the MDGs.

Another last event with a substantial impact on the region needs to be flagged: the emergent presence of China.

9.4.4 The Nigerian Government talks with Chinese oil companies and privatisation of the oil industry: what future for the Ogoni?

In the context of the booming economy of China and its increasing drive for energy resources, the Nigerian Government started to concretise talks with Chinese oil companies vividly interested in its rich natural reserves.

In 2005, China National Offshore Oil Corporation (CNOOC), the largest Chinese gas and oil producer, agreed to disburse close to US$2.3 billion for a 45 per cent stake in an oil block in the Niger Delta.[204] In 2006, the Government offered the state-owned company China National Petroleum Corporation

202. Shell Nigeria Annual Report 2006, *supra* note 20, p. 24.
203. UNDP Nigeria, 'Niger Delta Human Development Report on the Niger Delta', 2006, at: http://web.ng.undp.org/reports/nigeria_hdr_report.pdf, accessed on 28 June 2010.
204. See: Embassy of China to the US, 'CNOOC Takes 45 per cent Stake in Nigerian Oil', 1 October 2006, at: http://www.china-embassy.org/eng/xw/t230362.htm, accessed on 28 June 2010.

(CNPC) four out of 17 oil exploration licences in an auction.[205] Two of the oil explorations are located in the Niger Delta.[206] In exchange for the drilling rights, China agreed to invest in Nigeria's infrastructure.[207]

Additionally, the media have reported that Shell may sell stakes in some of its oil and gas fields in Nigeria to CNOOC.[208] The willingness of China to acquire its share of the oil industry is also facilitated by the intent of the Nigerian Federal Government to privatise the oil industry.[209] The Federal Government has already approved licences to several independently-owned refineries.

Some may perceive the arrival of China in the Niger Delta as an improvement to the region's resources and as an opportunity for funding a better future for the Delta population. However so far, the opinion of the Niger Delta militants is squarely different; it has been reported that militants of the MEND have detonated a car bomb as a warning against China's further expansion in the region. Kidnapping of Chinese workers by militants has also been reported.[210]

Indeed, the general security situation surrounding the oil industry in the Niger Delta is still problematic. In its attempts to control the situation, "Nigeria has criticised Washington for failing to help protect the country's oil assets from rebel attack, forcing it to turn to other military suppliers, including China, for

205. I. Taylor, 'Sino-Nigerian Relations: FTZs, Textiles, and Oil, Association for Asian Research', The Jamestown Foundation, China Brief, 25 July 2007, at: http://www.jamestown.org/programs/chinabrief/single/?tx_ttnews%5Btt_news%5D=4197&tx_ttnews%5BbackPid%5D=197&no_cache=1, accessed on 28 June 2008.

206. E. Goujon, 'China Gets Nigerian Oil Rights', News Item, 19 May 2006, at: http://www.news24.com/News24/Africa/News/0,,2-11-1447_1936128,00.html, accessed on 28 June 2008. They were sold to CNPC for around 5 million dollars and 10 million dollars, respectively. Two Nigerian oil firms from the Niger Delta were also allocated operating production licences.

207. Global Insight, 'Indian and Chinese Oil Companies Dominate Mini Licensing Round in Nigeria', at: http://www.globalinsight.com/SDA/SDADetail5934.htm, accessed on 28 June 2008.

208. BBC News, 'Shell 'Mulls' Nigerian Oil Sale', 22 November 2007, at: http://news.bbc.co.uk/1/hi/business/7107717.stm, accessed on 28 June 2010. For an update, see also http://www.upstreamonline.com/live/article210793.ece (examined on 31 July 2010).

209. Energy Information Administration, 'Official Energy Statistics from the US Government, Nigeria', at: http://www.eia.doe.gov/emeu/cabs/Nigeria/Oil.html, accessed on 28 June 2010.

210. BBC News, 'Car Blast near Nigeria Oil Port', 30 April 2006, at: http://news.bbc.co.uk/2/hi/africa/4959210.stm, accessed on 28 June 2010; D. Naku, 'Legal Oil, Militants Kidnap 10 Chinese Oil Workers', 26 January 2007, at: http://www.legaloil.com/NewsItem.asp?DocumentIDX=1169971443&Category=news, accessed on 28 June 2010. See on CSR best practices of Chinese companies in Africa the following benchmark:. http://www.chinadialogue.net/article/show/single/en/741-China-s-environmental-footprint-in-Africa (examined 31 July 2010).

support".[211] It might be said that concerns over the level of corruption within the Nigerian security forces and human rights violations have made the Americans reluctant to supply additional equipment. As a consequence, Nigeria has turned to China as a military ally to protect its oil fields, especially by providing supply. Considering further critique of China's commercial engagements with controversial regimes – such as its involvement in Darfur related to the oil industry[212] or its investment and military supplies in Zimbabwe and its loans to Angola – one may doubt whether this development forecasts a better future for the Ogoni. It would probably depend firstly on the concretisation of promises related to the development of selected infrastructure by Chinese companies.

9.5 Conclusion

The severe problems encountered by the Ogoni People as a result of the oil wealth of the Delta region were outlined in this chapter. For the Ogoni, oil exploration and exploitation have had a devastating effect on their environment and on the local economy. The existing balance of the inhabitant's livelihood, which was based on fishery and agriculture, was severely disturbed. On the political plane, the military dictatorship of General Abacha in the nineties was accused of numerous human rights violations. Shell, the leading oil company in the region, was blamed, among others, for complicity with the Abacha regime, environmental pollution, threatening food security and health. In particular, Shell was said to have requested the national security forces for protection of their operations in the Niger Delta and to have contributed by furnishing equipments, including arms, and other aid. In addition, the political situation at that time did not allow for the Ogoni's participation as stakeholders in the decision-making process affecting their homeland. Neither did they profit from the financial benefits of oil exploitation, which went directly to the Federal Government. As corruption indices point out, Nigeria is said to have had a long history of corruption. Therefore, it is likely that even the thin percentage of profits actually allocated to the region has generally 'disappeared'.

The execution of Saro-Wiwa and the eight other Ogoni in 1995 was the beginning of a new era which, unfortunately, did not bring much relief for the Ogoni People. In 1996, a UN fact-finding mission reported that the trial and execution of Saro-Wiwa and the others violated a number of fundamental rights of the defendants as guaranteed both by Nigerian law and by international

211. D. Mahtani, 'Nigeria Turns to China for Defence Aid', in *Financial Times*, at: http://www.ft.com/cms/s/0/ef8dbc30-a7c6-11da-85bc-0000779e2340.html, accessed on 28 June 2010.
212. Human Rights Watch, 'World Report 2007, China', at: http://www.hrw.org/wr2k7/essays/introduction/3.htm, accessed on 28 June 2010.

human rights instruments to which Nigeria is a party. In the meantime, family members of the sentenced activists fled Nigeria in fear of their lives. Expatriated abroad, they commenced legal proceedings in 1996 – still pending today – against Shell based on the ATCA alleging complicity in human rights violations perpetuated by the then Nigerian military regime (*Wiwa v. Shell*).

The same year, complaints were filed against the Government of Nigeria under the ACHPR to the AHRC. The allegations stated that the Government did not prevent the oil exploitation in the Niger Delta from leading to human rights violations. The complaints were awarded. The AHRC thereby recognised collective rights of the Ogoni People regarding natural resources and the environment. Moreover, the AHRC applied 'modern academic thinking' on how to protect economic, social and cultural rights by emphasising the duties of a State Party: (1) not to allow private actors to destroy or contaminate food sources; (2) to protect individuals from non-state actors with regard to the right of housing; and (3) to prevent violations by private actors with regard to the right to life. Furthermore, the AHRC recommended that the Government investigate the allegations of human rights abuses, prosecute those responsible, award compensations to the victims, and, finally, ensure environmental clean-up.

Concerning the environment, a decision favourable to the Niger Delta People was reached in *Shell v. Ijaw Aborigines of Bayelsa State*, where in 2006 the Federal High Court of Nigeria ordered SPDC, the entity which runs Shell's operations in Nigeria to pay US$1.5 billion in damages to the Ijaw community as compensation for degrading the environment. However, SPDC has since appealed the judgment and has refused to pay. Similarly, farmers and fishermen from the Delta region have publicly announced in May 2008 the preparation of a court case against Shell in the Netherlands, alleging damages to their food sources caused by oil spills.

Another controversial issue in the region is gas flaring. Whereas the Government and Shell are committed to phasing out gas flaring, the practice has not yet been stopped. As mentioned, the decision of the Federal High Court in November 2005, which found that gas flaring violates certain rights guaranteed by the Nigerian Constitution and the ACHPR, was appealed by SPDC and a stay of execution was granted.

Still today, the Ogoni seem not to benefit from the oil exploitation of their homeland and suffer the effects of the same oil industry. As the overview of the legal proceedings in section 9.2 has illustrated, these cases and claims did not bring any concrete results for the Delta people.

As discussed in section 9.3, human rights and the role of companies in that respect represents a complex matter. Although most Governments, international organisations, NGOs and academia, in one way or the other, express the insight that private actors, including multinational companies, should respect human rights, the legal reality shows a different picture. On the one hand, international human rights treaties do not allow human rights tribunals to assess claims

against companies directly. Nevertheless, it is possible to request human rights tribunals and commissions to issue an order against a Government for it to undertake measures against private actors, in order to ensure respect for human rights. This was demonstrated in section 9.2 by reporting on the ruling of the African Human Rights Commission ordering the Nigerian Government to actively protect its people from human rights violations. On the other hand, international private law is for a large part organised territorially. As shown in section 9.2, various legal obstacles, such as *forum non conveniens*, together with financial obstacles make it complicated for local people to commence a legal claim against a parent company located in another country. In addition, legal proceedings before a foreign court are often lengthy; the multinational companies do not hesitate to extend the proceeding to appellate courts. Consequently, it might well be concluded that both the national legal systems and the international public legal systems do not provide practical solutions in the short term for the environmental and human rights problems as a result of the on-going globalisation process. Companies have recognised this and have expressed their willingness to cooperate with Governments and other stake-holders to achieve solutions and results.

As section 9.4 outlined, Shell is actively seeking ways in which to cooperate with the Ogoni People and the Nigerian Government. For instance, by the adoption of codes of conduct, its participation in the reconciliation process and the training of local contractors. Its sustainable community development programme in Nigeria and annual reports provide an insight into its corporate activities and the distribution of oil revenues. These actions show commitment to CSR. Certainly, the complex reality of the Niger Delta, including ethnic tension and violence, the high level of corruption, the weak governance structure and the Chinese competitors knocking at the door will not make CSR an easy win. Natural resources and easy money can in fact amount to a 'curse' on sustainable development. However, as has been observed in this case study, a multi-stakeholder dialogue and transparency on business operations and income flows appear to be the best option for the people concerned rather than having to await the outcome of a lengthy court case.

Since CSR is at an early stage, there is still room for improvement. An important point for attention is the quality and quantity of sustainability reporting. Although GRI continuously improves its reporting standards and formulates industry criteria, companies can make a more concrete contribution. They can improve instructions and control mechanisms, provide additional information in their annual reports and decide to proceed with full external verification of such information. Only information based on true facts can assist people in formulating their "wish-list on corporate behaviour". At the same time, companies can defend themselves against political rent-seekers, sabotage and false allegations. Transparency based on correct facts will support the transition from human rights conflicts to CSR.

Chapter 10.* Case study: the international CSR conflict and mediation. Supply-chain responsibility: Western customers and the Indian textile industry

10.1 Introduction

On 6 December 2007, the Dutch denim brand G-Star publicly announced that it had pulled out of its long-term relationship with the Indian/Italian jeans manufacturer and supplier Fibres & Fabrics International (FFI/JKPL).[1] G-Star's loss of appetite towards its Indian supplier was the consequence of being trapped for two years between international campaigning by the Dutch campaigning organisations Clean Clothes Campaign (CCC) and India Committee Netherlands (ICN, hereafter together referred to as: CCC/ICN)[2] and the destructive litigation undertaken by its supplier. Due to the cancellation of further orders by G-Star, the Indian jeans manufacturer, which at that time employed approximately 5,500 people in Bangalore and 100 to 150 people in Italy, risked going out of business in three months' time. Including family members and other dependents, this meant that over 20,000 people would lose their source of income.

In this chapter the effects of campaigning and litigating in issues concerning CSR will be examined. Limiting the analysis to CSR conflicts in the textile

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1. *I.e.* Fibres & Fabrics International Private Limited, its fully owned subsidiary Jeans Knit Private Limited, and its Italian fabric design division Tintoria Astico s.r.l.
2. Given the fact that ICN is a founding member of CCC and that the two organisations acted jointly from the beginning in respect of this case, they will be referred to as CCC/ICN. Also, see Box 2.

industry, the author will reflect on these new types of international conflicts in a globalising world and will share her view on appropriate ways to avoid them or, ultimately, to (re)mediate them if necessary.

Sections 2 to 5 inform the reader about the events in India and the Netherlands which led to the escalation of the conflict. Section 6 provides an overview of the conflict resolution procedures employed in this case and section 7 elaborates on the outcome of the 'Lubbers Mediation'. Section 8 compares the applicable legal and soft law labour standards in order to provide the reader with an insight into the different viewpoints of the parties. Section 9 analyses the parties' communication strategies, thereby illustrating that each side used certain terminology to influence public opinion. Section 10 contrasts this case with other CSR conflicts in the textile industry and also reveals a hidden conflict that played a role in this case: the clash between CSR codes.

In the concluding remarks the author will comment on five dilemmas that present themselves in international CSR conflicts, and will provide suggested guidelines.

10.2 Events in India

10.2.1 The jeans manufacturer FFI/JKPL

India is well known for its large textile industry. A major production area lies in and around Bangalore in the state of Karnataka. This region was booming and more than 600,000 people worked in the textile industry until the global financial crisis also reached India.

The companies Fibres and Fabric International Private Limited (FFI), its subsidiary Jeans Knit Private Limited (JKPL; hereinafter together referred to as FFI/JKPL), and its Italian affiliate Tintoria Astico s.r.l. (Tintoria) are led by a fabric designer and a software expert. Due to this combination, the company processes are progressive and innovative, not only by Indian standards, but also by European standards. They develop new fabrics and fashionable jeans, mainly designed for Western customers. Many of the fabrics used in the Bangalore production process are developed and produced by Tintoria in Italy. Consequently, retail prices are not targeted at the local market. Also, labour conditions for the Italian and Indian employees appear to follow the high standards required by FFI/JKPL's Western clients: salaries are above the legal minimum wage level, safety measures are prescribed and protective eyewear, gloves and shoes are provided to employees where necessary. Medical services are provided for by a full-time female doctor whocan be consulted by all employees and their family members. A free Indian lunch and bus services are offered to employees. There are also four grievance committees, made up of employee representatives, each on the basis of circulation: a committee to

redress sexual harassment, a health and safety committee, a workers' grievance committee, and a canteen committee. Since 1994, the company has made use of a waste water cleaning installation; purified water is reused for washing activities and for watering the garden.

FFI/JKPL has four production units in Bangalore, adjacently located, which deal with (i) the cutting of materials, (ii) the sewing of trousers and other clothes, (iii) the washing and brushing of the jeans, and (iv) the packaging and dispatching of orders. Many of the 5,500 employees have been employed for several years. The majority of them come from rural areas in the state of Karnataka.[3]

For legal advice FFI/JKPL usually turns to Pramila Associates, a law firm based in Bangalore. Ms Pramila Nesargi is a qualified lawyer and for more than three decades she has been a Member of the Legislative Assembly of the State of Karnataka. She focuses on, among other things, women's rights and labour issues. Besides advising companies on their labour policies, she also assists individual women in their fight for equal treatment and against sexual harassment.

In the spring of 2006, after improving its internal performance and control standards and being submitted to an external SA 8000 audit, FFI/JKPL obtained an SA 8000 certification. FFI/JKPL established monthly checks, carried out by the employees and managers jointly. In addition to the regular external SA 8000 audits, over the past few years many other audits have been carried out at the request of FFI/JKPL's customers. Independent consultant agencies and *multi-stakeholder-initiatives* (MSI) thereby interviewed employees on as well as outside the factory premises and in their homes.[4]

Box 10.1 SA 8000

Social Accountability 8000 is an international standard for improving working conditions based on the principles of 13 international human rights conventions, covering child labour, discrimination, discipline, working hours, freedom of association and the right to collective bargaining, forced labour, wages, health and safety, and management systems. Assessment of compliance with the SA 8000 standard and the issuance of SA 8000 certifications are only available through independent organisations accredited by Social Accountability Accreditation Services. The SA 8000 certification scheme was initiated in 1999 by Social Accountability →

3. Instructions on the premises are in English and Kannada (the language spoken in Karnataka).
4. For instance, the audit by SGS and the Indian NGO ASK which took place in September/October 2007 (see section 10.2.2).

International, a non-governmental, international, multi-stakeholder organisation, dedicated to improving workplaces and communities by developing and implementing socially responsible standards. Social Accountability International partners with trade unions, local NGOs, multi-stakeholder initiatives and other relevant stakeholders to carry out research, training and capacity-building programs. Amnesty International is one of the partnering NGOs. For more information, please visit www.sa-intl.org.

10.2.2 GATWU, a new trade union

As responsible as the set-up of FFI/JKPL towards its employees may seem, one may wonder why Dutch campaigning organisations (CCC/ICN) have targeted FFI/JKPL.

Box 10.2 CCC and ICN

CCC is an international campaigning organisation established in 1991. It aims to improve working conditions in the global garment and sportswear industry, and to empower the labourers in this industry. CCC is made up of an international secretariat and national campaigning organisations. It has special task forces in garment production countries.

ICN is a Dutch campaigning organisation, focused on improving the lot of the dalits – casteless people in India – and specific issues such as child labour and human rights in India. A special focus of ICN is the garment industry. For that reason, ICN is a member organisation of CCC Netherlands. See: www.cleanclothes.org and www.indianet.nl/english.html.

Things started late 2005. A new trade union, the Garment and Textile Workers Union (GATWU), was in the process of being established. As the Bangalore area employs many textile workers, and labour conditions sometimes give rise to great concern, GATWU wanted to obtain a foothold there. GATWU approached the FFI/JKPL management in February and March 2006, but did not find an enthusiastic reception. At that time GATWU had not yet been officially registered as a union or organisation of any kind. The Indian Trade Unions Act of 1926 (as subsequently amended, hereafter referred to as the Trade Unions Act)[5] stipulates that no trade union shall be *registered* unless at least ten per cent, or 100 of the workforce, whichever is less, are engaged in the

5. Indian Trade Unions Act 1926, section.4, Mode of Registration of a Trade Union. See also section 7.

establishment or industry with which it is connected and are members of this trade union on the date of applying for registration. On 29 March 2006, GATWU was registered under the Trade Unions Act.[6] However, Indian labour law jurisprudence[7] shows that a union needs to represent a majority of the workforce of a particular establishment in order to be entitled to *recognition* as a representative, thereby enabling it to enter into negotiations and to reach settlements with the management of this establishment. Moreover, several states in India have enacted separate legislation dealing with the recognition of a trade union, in some cases lowering the representation threshold to a minimum of 30 per cent.[8] Since GATWU – once registered – did not have any FFI/JKPL members, it was unclear to the FFI/JKPL management who GATWU represented. Consequently, FFI/JKPL could not recognise GATWU as a representative of the workforce.

GATWU subsequently teamed up with its sister organisations that are also supportive of garment workers: Civil Initiatives in Development and Peace 'Cividep',[9] and the Women Garment Workers' Front 'Munnade'.[10] Lastly, the New Trade Union Initiative (NTUI), a labour union with a communist ideology, joined GATWU's campaign.[11] As most of the FFI/JKPL employees were not unionised, this team of organisations (together referred to as: the Indian Organisations) decided to actively persuade FFI/JKPL employees to sign up with GATWU. These actions proved, however, unsuccessful. The FFI/JKPL management therefore considered that there was no legal basis for entering into dispute settlement or collective bargaining negotiations with GATWU.

Later on, in December 2006, the Government of Karnataka Labour Department (Labour Department) investigated whether FFI/JKPL workers enjoyed freedom of association and other issues, pursuant to a complaint by CCC/ICN. The resulting report showed that employees felt free to become union

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6. Registration certificate issued by the Government of Karnataka, Department of Labour, No. ALCB-4/DRT/TUA/18/2005-06, GATWU Articles of Association and membership list (Form C) which show that there were no FFI/JLPL members.
7. Confirmed by various Courts and various enactments on this subject (information by Indian legal counsel on 24 March 2009).
8. *E.g.*: the State of Maharshtra in India has enacted the Maharashtra Recognition of Trade Union and Prevention of Unfair Labour Practices Act, 1971. section11 of this Act specifies that in order to gain recognition a trade union should not have less than 30 per cent of the total number of employees employed in that undertaking as its members.
9. Cividep's work is made possible with support from Oxfam-GB in India, and Netherlands-based OECD Watch and SOMO (source: www.cividep.org, visited on 14 February 2009).
10. Munnade is linked with Cividep. See: www.cividep.org/munn.htm, all websites accessed on 12 July 2010.
11. In India, signing up with a trade union is generally not only about labour conditions; it also has political significance, as the more traditional, national unions are affiliated with national political parties.

members.[12] In March 2007, an SA 8000 audit was carried out by the international audit firm SGS.[13] Another extensive audit took place in the autumn of 2007, at the instigation of G-Star. SGS was hereby assisted by the Indian NGO ASK.[14] One of the focal aspects was freedom of association. Employees were interviewed onsite as well as outside of the FFI/JKPL premises in order to create an atmosphere in which interviewees could speak freely. Former FFI/JKPL employees were also interviewed to help understand the factory from a different perspective and to make a comparison between the earlier and the present scenario. The answers showed that employees were aware of their right to associate and felt free to do so, but were not motivated to become union members.[15]

The pertinent question is therefore, what caused the Indian Organisations and CCC/ICN to campaign against FFI/JKPL and G-Star as they did, and to convince other Western customers to cancel their orders with FFI/JKPL?

10.2.3 June-July 2006, the complaints

In late 2005, GATWU claimed to have received information from Cividep concerning complaints from FFI/JKPL employees in September and November

12. Report of the Government of Karnataka: Labour Department: No.GLA-1/Investigation/Report/06-07 dated 19 December 2007, p. 8, and the letter re 'Submission of report on labour situation on the question of child labour at G-Star's suppliers in Bangalore Fiber & Fabrics International (FFI) and Jeans Knit Pvt. Ltd (JKPL) and background of Landelijke India Werkgroep (India Committee of the Netherlands (ICN) organisation'; D.O.No.LD84 CLC 2006, dated 26 December 2006. This report discloses the results of an inspection by the Karnataka Government Labour Department on 11 December 2006 pursuant to complaints filed by CCC/ICN on 14 July 2006 regarding 'information sought in respect of labourers and child labourers, employed by FFI/JKPL.' By a letter of 1 February 2007 from the Embassy of India in the Netherlands, the results of this investigation were shared with CCC.
13. SGS: Société Génerale de Surveillance, a Swiss-based auditing and certification firm, accredited by Social Accountability Accreditation Services to give SA 8000 certifications. See: www.sgs.com.
14. Association for Stimulating Know-how (ASK) is a capacity-building, self-supporting, voluntary organisation that works countrywide in India, as well as internationally, to promote the best interests of marginalised groups in society. Its expertise covers capacity building, evaluation and studies, and corporate social accountability, amongst other things. See: www.askindia.org, accessed on 12 July 2010.
15. SGS Management System Certification Audit Summary Report dated 20 March 2007; SGS Summary Findings from the Visits to FFI Factories in Bangalore dated 27 November 2007; ASK Summary Reports for Workers Discussions of FFI Units 1-5 (audits conducted respectively on 31 October/1 November, 14/15 September, 11/12 September, 2/3 November and 30/31 October 2007). Reports were made accessible by G-Star, also to CCC/ICN. The reasons for workers not becoming union members relate to the good payment and other working conditions at the FFI/JKPL sites, and the possibility to discuss any issues with management, amongst others through the workers committees; workers generally stated that the need to unionise had not arisen.

2005 concerning working conditions. GATWU was not able to commence a dialogue on this with FFI/JKPL management, as their letters of February and March 2006 remained unanswered. In order to investigate the complaints, a 'fact-finding committee' was established, consisting of representatives of various social, human rights and women's rights organisations, and social activists (Fact-finding Committee). This Committee prepared a so-called 'fact-finding report' which stated that it reflected the outcome of interviews with 14 workers jointly conducted on 23 April 2006 (Fact-finding Report). The interviewees, although anonymous, stated that they worked at the FFI/JKPL washing unit. This unit employs 1,400 people excluding office staff.[16] The workers' complaints concerned mainly the non-payment of overtime work, working without employment contracts, working in the washing unit without protective clothing, and physical and verbal abuse.[17]

On 9 June 2006, FFI/JKPL and GATWU/NTUI had a meeting in which the complaints were discussed one by one. The minutes of this meeting as presented by GATWU differ substantially from FFI/JKPL's report.[18] The FFI minutes reveal that some complaints were countered by FFI/JKPL management by producing letters of employment, payroll registers and identity cards, and that others, such as physical abuse and the arbitrary termination of services, could not be substantiated by GATWU/NTUI as no specific occurances could be named. GATWU's minutes emphasise that FFI/JKPL 'categorically denies all allegations' and claim that FFI/JKPL 'did not want trade union disturbances within the company premises.' During this meeting, GATWU informed FFI/JKPL about the research that was being carried out by the Fact-finding Committee. FFI/JKPL indicated that it was not aware of this as no such committee had met with management. GATWU and NTUI provided assurances that they would get back to FFI/JKPL's legal advisors concerning any issue.

A draft Fact-finding Report with complaints was sent by the Fact-finding Committee to FFI/JKPL on 21 June 2006. On 3 July 2006 a meeting took place attended by the Fact-finding Committee members, FFI/JKPL management and its lawyer to discuss the allegations. In the report on the meeting, the Committee concluded that GATWU needed to recheck with the workers, because all allegations were successfully countered. Consequently, a second round of interviews with a group of 16 FFI/JKPL employees was held on

16. Fact Finding Report on Violation of the Rights of Workers at Washing Unit of FFI/JKPL, Peenya Industrial Area, Bangalore, final version of 24 August 2006; http://www.clean-clothes.org/ftp/06-08-Fact_Finding_Report-FFI/JKPL.pdf, visited on 9 March 2009.
17. A list of alleged violations of Indian law forms part of the Fact-finding Report; *ibid*. p. 7-8.
18. GATWU 'Report on meeting with FFI/JKPL at the FFI/JKPL office at Peenya, Bangalore on 9 June 2006'; http://www.schonekleren.nl/index.php?option=com_content&task=view&id=69&Itemid=519, visited on 9 March 2009, and FFI/JKPL 'Minutes of the meeting dated 9 June 2006', made available by Indian legal counsel. FFI/JKPL shared these minutes with CCC/ICN and G-Star in June 2006.

30 July 2006,[19] during which workers claimed that their complaints had been addressed. Subsequently, the Committee amended the draft report. The conclusion of the final report, dated 24 August 2006, reads:

> (…) our hope is that the management of FFI/JKPL initiates steps towards creating a free and fair work atmosphere for the workers and also that the palpable sense of suspicion towards the workers is replaced by a genuine recognition of their legal and labour as well as human rights.[20]

10.2.4 Non-stop campaigning and legal proceedings

For some reason, the Indian Organisations kept on repeating the complaints alleged during the first round of interviews, which were subsequently labelled as 'solved' in the final report. They complained to FFI/JKPL's and several of its customers', including G-Star's, Labour Department,[21] but also publicly on the internet. They asserted that FFI/JKPL employees were not free to join a labour union, that they would be dismissed if they did so and that the company had already dismissed employees who had become GATWU members. FFI/JKPL rejected the allegations, asking GATWU for substantiation. When it turned out that the Fact-finding Committee had interviewed anonymous workers, FFI/JKPL wanted to close the case, assuming that these employees might also have come from other Bangalore garment factories.[22] GATWU and the others were disappointed; in their view FFI/JKPL had not considered their complaints seriously. FFI/JKPL, on the other hand, felt insulted by the complaints. During the meeting with the Fact-finding Committee, it seemed that all complaints had been resolved or had been found to be incorrect. Moreover, FFI/JKPL found it difficult to address complaints that were not individualised, as this makes it virtually impossible for management to take corrective measures.

In late July 2006, FFI/JKPL commenced legal proceedings before the Civil Court of Bangalore against several representatives of GATWU, Cividep, NTUI, Munnade, and the CCC Taskforce Tamilnadu.[23] FFI/JKPL successfully requested an *ex-parte* injunction order restraining the said organisations and others from

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19. It is unclear which people were interviewed at this meeting: the same workers as interviewed in the 23 April meeting, or others, in which case the report does not state with which production unit they worked.
20. Fact-finding Report, Conclusion, p. 12.
21. See *supra* note 12.
22. Due to the decision by the Fact-finding Committee and GATWU not to reveal the identities of the interviewees, not even to independent mediators, they were unable to substantiate that the interviewees were indeed employees of FFI/JKPL. The company suggested that the interviewees may just as well have been former FFI/JKPL employees, or employees of another textile company. FFI/JKPL feared attempts at defamation by its competitors.
23. City Civil Court Bangalore for injunction on disseminating false information; OS16337/2006 (FFI v. GATWU *et al*.) and OS16338/2006 (JKPL v. GATWU *et al*.).

'disseminating any untrue and unsupported information.' In response, the Indian Organisations appeared before the Court to oppose the injunction, but did not submit any material substantiating the campaign and allegations. Indian law prescribes that the Courts should immediately lift an injunction order if only a small portion of the allegations or other allegedly untrue and unsupported information proves to be true and justified.[24] The Indian Organisations, however, did not succeed in persuading the Civil Court to lift the order.

The Bangalore Court's injunction against members of the Indian Organisations fuelled CCC/ICN's campaign. On their websites they presented the court cases in India as a 'restriction of the freedom of speech and the freedom of association.' They now actively and publicly solicited support for their cause, with success, from other NGOs such as Amnesty International, Oxfam, and Dutch and international trade unions.[25]

In August 2006, CCC/ICN called upon FFI/JKPL's Western (former, current and potential) customers to exert their influence in order to ensure freedom of association and to allow GATWU and NTUI to negotiate with FFI/JKPL management. Several customers subsequently confronted FFI/JKPL with this message.[26] FFI/JKPL management explained to them that its employees enjoy freedom of association and that if GATWU or NTUI or any other trade union would represent the legally required number of FFI/JKPL employees, they would be happy to allow them to consult and negotiate.[27] The customers remained at first, but as CCC/ICN put pressure on them to end their relationship with FFI/JKPL, some large American brands, such as Ann Taylor, Guess, Levi's and Tommy Hilfiger – afraid of damaging their good reputation if public campaigns would be targeted against them – stopped ordering from FFI/JKPL.

Although invited to visit the production units and to personally carry out an investigation with regard to the truth of the allegations, CCC/ICN decided not to become involved on a local scale, other than filing the aforementioned complaint with the Labour Department. They took the position that the Indian Organisations, with whom they had previously worked, were responsible for

24. The defence of 'truth and justification' is based on the judgment of the Karnataka High Court decided in a similar case of an injunction relating to defamation (information provided by Indian legal counsel).
25. See *e.g.* public statement Amnesty International, India: Continued Harassment of Defenders of Women Workers' Rights and Campaigners Abroad, 2 October 2007; at: http://www.amnestyusa.org/document.php?id=ENGASA200172007&lang=e, accessed on 18 April 2009; and press release by MVO Platform (CSR Platform) of 4 December 2007. MVO Platform facilitates NGO-cooperation. CCC, Amnesty International, Oxfam Novib, Friends of the Earth and OECD Watch are amongst its members.
26. CCC, Demands to the Brands, 31 August 2006; http://www.cleanclothes.org/urgent/06-08-16.htm, accessed on 9 March 2009. Indian legal counsel confirmed that FFI/JKPL had received letters from customers.
27. Information received from Indian legal counsel.

the 'field work'. CCC/ICN asserted that the Fact-finding Committee had carried out a proper investigation as an 'independent' committee;[28] the fact that the Committee was paid for its investigation was – in their opinion – of no relevance to the independence thereof. Generally, that should indeed not be considered to be of any relevance. However, the substantiation of the accusations by the Indian Organisations of FFI/JKPL should have been of professional concern to CCC/ICN, especially given the observations of the Fact-finding Committee after its meeting with FFI/JKPL management and the far more moderate tone that was heard in the second round of interviews.[29] CCC/ICN should at least have paid attention to the reported improvements as well as investigating the explanations by FFI/JKPL. Yet, the CCC/ICN communications concerning FFI/JKPL do not mention the customer audits,[30] which show that the complaints communicated in the draft Fact-finding Report were either remediated, incorrect, or could not be retraced. Also, the positive outcome of the inspection carried out by the Labour Department was disregarded. This report stated that FFI/JKPL did not employ child labour, was strictly complying with all labour laws and was paying wages, bonuses, leave benefits and gratuities, as well as providing free food and transport facilities, and that it also ensured the health, safety and social welfare of its employees.[31] In the opinion of CCC/ICN, such a government report as well as the Civil Court injunction could have been 'purchased'. This type of public statement regarding the Indian legal system infuriated Indian government officials.[32]

In June 2007, two members of the Fact-finding Committee, jointly with a CCC/ICN representative, were interviewed in a Dutch radio broadcast.[33] They

28. FFI/JKPL questioned the independence of the members of the committee as all members and organisations they represent work together with GATWU and Cividep in various programmes.
29. The final observation of the Fact-finding Committee after meeting with the FFI/JKPL management team reads: 'GATWU has to recheck with workers and share the statements of the management to see what the real situation is now for the workers.' The claims stemming from the first round of interviews appear to have been questioned by the Fact-finding Committee.
30. The audits were conducted in the period January 2006 – October/November 2007 at the request of G-Star and other customers, and showed positive results, for instance as to the question whether FFI/JKPL employees enjoy freedom of association.
31. See reference 12. The report stated that the complaints made against the company were 'baseless and imaginary' (p. 15).
32. For instance, the letter of 1 February 2007 from the Embassy of India in the Netherlands to CCC (reference 12), states: 'India's strong democratic credentials, free press, independent judicial system and a strong and active civil society are well recognised. It is surprising that you have questioned the court orders issued in India, which is serious and represents an attempt to undermine the entire judicial process in India, which is open, fair and based on the rule of law.' See also section 8.
33. De Ochtenden, [the Mornings], Argos Radio, 13 June 2007; http://www.ochtenden.nl/afleveringen/33962621/, visited on 9 March 2009.

repeated the complaints listed in the draft Fact-finding Report, including human rights violations such as physical abuse. However, they made no mention of the response by management, the outcome of the second round of interviews or the Labour Department investigation. After the radio interview, additional customers terminated their business relationship with FFI/JKPL. The company decided to protect its interests by suing the two Fact-finding Committee members in order to claim financial compensation for the cancelled orders.[34]

In the autumn of 2007, the Bangalore Magistrate Court (a criminal law Court) took cognisance of the charge of defamation against CCC/ICN and their Dutch internet provider XS4All Internet B.V. and the website host Antenna Foundation (the Internet Service Providers).[35] The procedure of the Court on the filing of a private complaint is to record the statements of witnesses and to peruse all the documents and materials placed before it. The Court then decides whether a *prima facie* case of criminal defamation has been made. In the case at hand, the Magistrate Court concluded that this was indeed the case. The Court then issued notices calling upon the defendants to appear. The counsel representing CCC/ICN and the Internet Service Providers gave an undertaking on behalf of their clients that they would appear in Court. However, the Dutch parties did not appear. Their counsel stated that their non-appearance was due to the fact that they had not received visas. Several dates were given to enable them to appear. When FFI/JKPL submitted materials to show that most of them had not even applied for a

34. City Civil Court Bangalore for defamation and compensation; OS26845/07 (*JKPL v. Geetha Menon and Shagun*) and OS26846/07 (*FFI v. Geetha Menon and Shagun*).

35. Criminal Court Bangalore for criminal defamation CC11592/07 (FFI v. Representatives of CCC/ICN, Internet Service Providers) and CC11593/07 (JKPL v. representatives of CCC/ICN, Internet Service Providers. The cases for defamation against Geetha Menon and Shagun were filed later and the Magistrate had not yet taken cognisance of the case and had not yet ordered appearance of the said two persons; *i.e.* PCR15457/07 (*FFI v. Geetha Menon and Shagun*) and PCR 15458/07 (*JKPL v. Geetha Menon and Shagun*). The charges also mentioned defamation, cyber crime and xenophobia. Codes of conduct and jurisprudence in Europe and the US generally demonstrate that internet service providers and hosts should only close a website when displaying or spreading child pornography or terrorist activities. However, since that was not the case in respect of CCC/ICN's website, Antenna and XS4All had not restricted the content published on the website. XS4All, which only provided CCC's office with internet access, was not even able to adjust the content of this website. However, this contribution does not go into this interesting legal matter. For further study, see for instance: http://www.sidn.nl/ace.php/c,728,5940,,,,Heemskerk_launches_code_of_conduct_to_tackle_cybercrime.html; http://www.sidn.nl/ace.php/p,728,5935,1662650090,NTD_Gedragscode_UK_pdf; and D. Lichtman, E. Posner, Holding Internet Service Providers accountable, in: John M. Olin Law & Economics Working Paper 2004-217; http://www.law.uchicago.edu/Lawecon/WkngPprs_201-25/217-dgl-eap-isp.pdf. Sites visited on 24 March 2009.

visa, the Court considered itself to have been misled and it issued non-bailable warrants against the Dutch defendants to appear before the Court.[36]

10.3 Political conflicts

The Dutch government assured the Dutch defendants that it would not – when so requested by India – extradite its citizens for such a case. It stated, however, that it could not guarantee that other countries would not extradite the defendants if they were to go abroad.[37] Given the Netherlands' small size combined with its international orientation, the defendants therefore considered themselves limited when travelling abroad. CCC/ICN furiously exclaimed that this lawsuit was setting a dangerous precedent for all human right activists worldwide. Members of the Dutch and EP were informed and encouraged to discuss the case at a political level. In August and December of 2007, questions were asked in the Dutch Parliament as well as in the EP concerning the arrest warrants and other aspects of the case.[38]

At the same time, the Indian Minister for Commerce and Industry, Mr Kamal Nath,[39] wrote letters of complaint to the Dutch Minister for Foreign Trade,[40] Mr Heemskerk, and the EU Trade Commissioner, Mr Mandelson.[41] Mr Nath asserted that the campaigns by the Dutch NGOs were ruining India's textile industry since they were based on false facts. In addition, Mr Nath raised the issue at a bilateral meeting with the Dutch Minister of Economic Affairs during a visit by Queen Beatrix of the Netherlands to India. He claimed that the financial support provided by the Dutch government to CCC created a *de facto*,

36. The Indian Code of criminal procedure requires that the parties against whom the cognisance is taken should appear before the Court. The Court can then exempt the appearance of the accused until the trial commences. The accused could also request that the case be dropped before it goes to trial. The non-bailable warrants were not (yet) made enforceable on an international level. Information received from Indian legal counsel.
37. Answers by the Dutch Ministers of Justice, Economic Affairs, for Development Cooperation and Foreign Trade to questions by Parliament, 27 September 2007; (in Dutch) http://static.ikregeer.nl/pdf/KVR29631.pdf, visited on 1 March 2009.
38. Written questions posed in Dutch Parliament by Member of Parliament (hereafter: MP) Gesthuizen on 27 September and by MP Van Gennip on 7 December 2007; (in Dutch) http://parlis.nl/pdf/kamervragen/KVR30474.pdf, accessed on 1 March 2009; resp. written question by Member of EP Meijer on 4 December 2007; http://www.indianet.nl/ffi.html, visited on 27 March 2009.
39. Mr Nath was appointed Union Cabinet Minister for Commerce and Industry on 23 May 2004. In March 2009 he was still in office.
40. The Dutch State Secretary of Economic Affairs is entitled to bear the title of Minister for Foreign Trade when abroad.
41. Mr Mandelson was the EU Trade Commissioner from November 2004 until he announced his return to the UK Government in October 2008. He was succeeded by Baroness Ashton of Upholland.

unfair and unjustified, non-tariff barrier to trade.[42] He stated that he was considering filing a complaint with the WTO about this 'neo-colonial behaviour.'[43]

10.4 Events in the Netherlands

10.4.1 G-Star

G-Star was established in 1989 and has grown significantly since 1996 after the introduction of its specific concept and style referred to as 'raw denim'.[44] By March 2009, the brand has sales operations in more than 17 countries and has over 5,400 sales outlets.[45]

In October 2005, CCC/ICN contacted G-Star in order to discuss their international supply-chain management. G-Star and CCC/ICN agreed to hold

42. CCC receives substantive subsidies from the Dutch Ministry for Development Cooperation (see *e.g.* the joint letter by the Ministers for Development Cooperation and Foreign Trade of 15 April 2007; (in Dutch) http://static.ikregeer.nl/pdf/KST117886.pdf, visited on 1 March 2009). Whereas CCC/ICN's campaign against FFI/JKPL negatively affected India's international trade relations, Mr Nath asserted that by subsidising CCC, the Dutch Government was creating illegal barriers to trade. Though understandable from Mr Nath's position, this assertion was incorrect in that the Dutch Government does indeed subsidise CCC, but has no direct role or impact whatsoever in CCC's policy and actions, nor does it bear responsibility for CCC's policy and actions. The activities of civil society organisations subsidised by the Dutch government are either supportive of the government's international development goals or meant to keep government and business alert as to possible CSR issues and abuses. See for more information: www.minbuza.nl/en, accessed on 12 July 2010.
In international trade one can distinguish between tariff barriers to trade, such as import duties, and non-tariff barriers to trade, such as technical safety requirements. Both can be legal or illegal. WTO member states are allowed to raise import duties as long as (i) they do not exceed the maximum level a member state has laid down in the WTO import duties Schedule, and (ii) the duties are levied equally on all imported products from all WTO member states (*i.e.* General 'Most-Favoured Nation' Treatment). WTO member states can also create non-tariff barriers to trade by setting technical requirements as permitted by the WTO Technical Barriers to Trade Agreement. Illegal non-tariff barriers are barriers not explicitly recognised by any WTO agreement or allowed by article XX of the GATT1947, setting out the general exceptions to the legal obligations laid down in the GATT 1947.
43. Mr Nath has strong views on international trade systems and the role of India. See *e.g.* Indiase minister ster van Doha, Dutch newspaper NRC Handelsblad, 25 July 2008; and Kamal Nath, India's Century, Tata McGraw-Hill Publishing Company Limited: New Delhi, India 2008, p. 130-147 and108-110 (re Indian textile industry).
44. See www.g-star.com, visited on 5 December 2008.
45. Information from G-Star Communications, Amsterdam, 23 March 2009. The international appeal of the brand continues to increase: by July 2010, G-Star had established itself in 18 countries, and occupied 32 offices around the globe with over 5300 points of sale in 60 countries (see www.g-star.com, visited on 27 July 2010).

a meeting in December 2005. Shortly after this initial contact, the Dutch newspaper *Trouw* published an article on the maltreatment of labourers in the Indian textile industry.[46] Several apparel brands were mentioned, including G-Star. In preparation for the December meeting, the parties agreed on an agenda, containing not only labour conditions in general, but also the article in *Trouw* and the institutionalised verification of good labour conditions through certification by the Fair Wear Foundation (FWF).

Box 10.3 Fair Wear Foundation

Fair Wear Foundation is a MSI founded by several stakeholders in the Dutch fashion industry, that supports and promotes good labour conditions in the garment industry. Among the initiators are trade unions, sector organisations and also NGOs. CCC is one of the founding members of FWF. ICN, being a member organisation within CCC, can be considered an indirect member of FWF. Apparel brands and producers can become a member of FWF, obliging them to sign the Code of Labour Practices, inform supplier companies and manufacturers of the membership, and pay an annual contribution. FWF is different from other labour conditions certification initiatives by involving local stakeholders in its company audits, rather than in-company audits executed by independent third parties. For more information, please visit www.fairwear.org.

Unfortunately, there are no agreed upon minutes of the December meeting, but in the correspondence following the meeting G-Star acknowledged considering membership of FWF. G-Star then scheduled a meeting with FWF for January 2006. The day before this meeting, CCC stressed in an email the need for action against FFI/JKPL and it attached a list of violations. G-Star stated that it would raise the issue with the FFI/JKPL board and it later confirmed that it had done so. Between January and June 2006, CCC wrote several letters and emails to G-Star in which it urged G-Star and its supplier to engage in dialogue with the Indian Organisations. Furthermore, CCC stressed that only the FWF approach is a sufficient guarantee for the structural improvement of labour conditions, contrary to other social compliance initiatives such as BSCI[47] or SA 8000.[48]

46. G. Moes, 'De Indiase textiel heeft ze graag onderdanig' (The Indian textile industry prefers to keep them humble), Dutch newspaper *Trouw*, 6 November 2005.
47. Business Social Compliance Initiative (BSCI) is a European business initiative for the improvement of working conditions in all (labour extensive) industries such as textiles, electronics and toys. See: www.bsci-eu.com, accessed on 3 May 2009.
48. Emails sent on 31 January and 14 March 2006, and letters sent on 31 March and 4 May 2006, made available by G-Star.

10.4.2 Public campaigning and the termination of the supplier relationship

On 1 June 2006, CCC/ICN went public with its campaign against G-Star. First, an online press statement was issued alleging labour rights violations at G-Star's Indian supplier FFI/JKPL and G-Star's general lagging behind in the field of CSR. Conversely, G-Star also published press statements on its website explaining the events and facts presented by CCC/ICN and how these were addressed. G-Star also stated that it had opted to rely on the internationally well-known SA 8000 certification to ensure decent working conditions at its suppliers (Box 10.1). On 11 June, G-Star informed CCC/ICN that SGS would audit the FFI/JKPL production units on the basis of the SA 8000 certification requirements. In its letter of 12 June, G-Star concluded that the violations alleged by GATWU could not be substantiated, thereby relying on FFI/JKPL's report concerning its meeting with GATWU on 9 June. Subsequently, G-Star pointed out that it was not a party to the conflict between FFI/JKPL and the Indian Organisations and it required CCC/ICN to amend its website by deleting any and all references to G-Star. However, CCC/ICN refused to remove these references – to the contrary, CCC/ICN informed G-Star that it would continue to frequently release updates on the issue. In response, G-Star's lawyer informed CCC/ICN about the respective legal responsibilities of G-Star and CCC/ICN.[49] The latter responded that it no longer considers direct contact with G-Star to be of any added value. The dialogue seemed to have come to an end.

CCC/ICN indeed continued its campaigning. In early August 2006, G-Star made a move by conveying to CCC/ICN that it was considering terminating its relationship with FFI/JKPL. CCC/ICN approved of this step and the parties agreed to meet. However, shortly thereafter, the Bangalore Civil Court issued the abovementioned restraining order against the Indian Organisations. CCC/ICN deemed the order to be an obstruction to consulting with its Indian partners and it postponed the scheduled meeting with G-Star. Since then, CCC/ICN and G-Star no longer had any direct contact, but frequently updated their position on their respective websites.

A year later, in December 2007, after various audits, the Labour Department inspection, the interference by Mr Nath on behalf of the Indian government, and the failure of a joint mediatory attempt by Dutch NGOs and unions (see Section 6), G-Star announced its withdrawal of future orders from FFI/JKPL. It publicly stated that it could no longer afford to be held hostage by two fighting groups both trying to use G-Star as a means of leverage in managing their dispute. CCC/ICN was satisfied with this decision but it urged G-Star to implement a 'socially responsible exit strategy' by placing orders with other Bangalore apparel suppliers, while demanding first-hire preference regarding former FFI/JKPL employees.[50]

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49. Explained in detail in a letter of 20 June 2006. Letter made available by G-Star.
50. Press statement CCC/ICN at http://www.cleanclothes.org/news/07-12-06.htm, visited on 2 March, 2009.

Table 10.1 – Overview of events in the Netherlands and India

Date	The Netherlands	India
2005		
October	First contact G-Star and CCC/ICN re CSR and FWF.	Cividep receives complaints from workers.
November	Article in the newspaper *Trouw* concerning Bangalore textile labour conditions.	
December	Meeting G-Star and CCC/ICN re *Trouw* and FWW	
2006		
January	Meeting G-Star with FWF board.	
February/ March	Several letters of protest sent by CCC/ICN.	FFI/JKPL starts implementing SA 8000. GATWU sends letters to FFI/JKPL re complaints. GATWU registered as trade union.
April	Second meeting G-Star and CCC/ICN.	First round of interviews by Fact-finding Committee. FFI/JKPL receives SA 8000 certification.
June	CCC/ICN starts public campaign based on information received from GATWU. G-Star and CCC/ICN keep updating their websites with new position papers.	Meeting FFI/JKPL and GATWU/NTUI.
July	CCC/ICN complaint with Karnataka Department of Labour.	SGS audits of FFI/JKPL units on SA 8000 basis. Meeting FFI/JKPL and Fact-finding Committee re draft Report. Second round of interviews by Fact-finding Committee.
August		Final Fact-finding Report presented to FFI/JKPL. Court case by FFI/JKPL against GATWU *et al.* for spreading false information.
October	CCC/ICN complaint with NCP NL against G-Star, and with NCP Italy against Tintoria – OECD Guidelines.	Bangalore Court issues restraining order against representatives of GATWU *et al.*

Date	The Netherlands	India
November	Complaint by CCC/ICN with SAI against FFI/JKPL.	
December		Investigation by Karnataka Department of Labour resulting in positive report.
2007		
March		SA 8000 audit by SGS with positive results
April	Public statement by SAI on SA 8000 and legal proceedings.	
June	Informal NCP meeting G-Star and CCC/ICN. Interview with CCC/ICN and Fact-finding Committee members on Dutch radio.	Court case initiated by FFI/JKPL against CCC/ICN and Internet Service Providers for criminal defamation.
August	Questions in Dutch Parliament on litigation in India against NGOs and unions. CCC/ICN releases a report by FWF at the request of Mexx repeating GATWU accusations against FFI/JKPL.	Bangalore Magistrate Court issues arrest warrants against CCC/ICN and Internet Service Providers.
September/ October	CCC/ICN campaign discussed by Mr Nath during NL Royal Visit to India.	Audit of FFI/JKPL by SGS+ASK at the request of G-Star resulting in positive report. Letters of Mr Nath to Dutch cabinet and EU Commission.
November	Complaint by CCC/ICN with SAI re FFI/JKPL's SA 8000 certification	
December	Failed mediatory attempt by Amnesty *et al.* Interview with CCC/ICN on Dutch radio. G-Star announces withdrawal from FFI/JKPL. Questions in Dutch and EP. Start of Lubbers Mediation.	Failed mediatory attempt by Amnesty *et al.* Start of Lubbers Mediation.


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10.5 Failing dialogue leading to lawsuits

An important element of CSR is maintaining good relations with one's stakeholders. Where possible, one should involve them in the company's decision-making process in order to ensure that 'planet people profit' concerns are balanced against each other, the so-called *stakeholder dialogue*. Literature and practice offer different definitions of the concept of a 'stakeholder'. A common definition is the following:

> a person, group, or organisation that has a direct or indirect stake in an organisation because it can affect or be affected by the organisation's actions, objectives, and policies. Key stakeholders in a business organisation include creditors, customers, directors, employees, government (and its agencies), owners (shareholders), suppliers, unions, and the community from which the business draws its resources. Although stake-holding is usually self-legitimising (those who judge themselves to be stakeholders are *de facto* so), all stakeholders are not equal and different stakeholders are entitled to different considerations.[51]

Regarding the FFI/JKPL-GATWU dispute, the question arises who can be considered a stakeholder. From a legal perspective, considering the representation threshold requirement for trade unions[52] and the fact that GATWU did not represent any FFI/JKPL employees, FFI/JKPL was not obliged to enter into negotiations with GATWU. On the other hand, GATWU, co-operating with the other organisations, undoubtedly had an influence on public opinion concerning FFI/JKPL – after all, many apparel brands stopped ordering from FFI/JKPL.

In practice it may thus be difficult to determine what constitutes a stakeholder. For instance, the SA 8000 Guidelines refer to 'stakeholder engagement' (clauses 9.13 and 9.14), but do not define this term. Consequently, parties had a difference of opinion concerning the term 'stakeholder': FFI/JKPL considered its employees and their families,[53] people living on neighbouring plots,[54] and any acknowledged unions, as stakeholders; whereas the Indian Organisations and CCC/ICN considered themselves as stakeholders of FFI/JKPL and G-Star, based on the argument that they campaign for better labour conditions in the textile industry in general.

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51. WebFinance, Inc.; http://www.businessdictionary.com/definition/stakeholder.html, accessed on 2 March 2009.
52. See above: section 1, and notes 5 and 6.
53. Employees' family members can visit the company doctor when needed. FFI/JKPL also paid for several hospital visits of family members.
54. Neighbours of the production units were consulted when appropriate in respect of upcoming issues of water use and the purification thereof, smell, as well as noise.

Moreover, companies have an understandable preference for resolving any CSR issue behind closed doors. They fear reputation damage and setbacks vis-à-vis competitors.[55] As this case seems to confirm, information that damages one's reputation is easily spread and tends to meander for a considerable length of time.[56] Attempts to start a healthy dialogue did not lead to success in this case. After the first official meeting, FFI/JKPL and GATWU could not even agree upon the minutes. The same is true for the first meeting minutes between G-Star and CCC/ICN.

Another issue that particularly bothered FFI/JKPL was CCC/ICN's pressure on SAI to repeal FFI/JKPL's SA 8000 certification for suing its 'stakeholders'. Although SA 8000 has no official grievance mechanism, CCC/ICN filed a 'formal complaint' with SAI in November 2006, in which it 'expressed fundamental doubts regarding the quality and reliability of the certification process: with the restraining order in place, no meaningful consultation of the directly concerned local stakeholders could have taken place, which is a prerequisite of the SA 8000 procedures.'[57] In reaction, SAI released a public statement on 30 April 2007, stating that:

> The existence of a court order or other impediments to discussion of the company's internal affairs by external stakeholders renders a full investigation impossible. … It is SAI/SAAS's policy that, in cases where a legal or other impediment exists to consultation with external stakeholders regarding issues affecting the certified organisation, the continuation of certification is inappropriate. (SAI Statement)[58]

Subsequently, SAI suspended FFI/JKPL's SA 8000 certification. The company was furious about this sudden change of certification requirements giving in to pressure from CCC/ICN. FFI/JKPL considered this to be a restriction of its democratic right to litigate and protect its interests. Meanwhile, FFI/JKPL communicated that they were still keeping their factories in compliance with the SA 8000 standards.[59] Monthly checks by staff revealed

55. *E.g.* R. van Tulder, A. van der Zwart, *International Business-Society Management – Linking corporate responsibility and globalisation* (Abingdon (UK), Routledge, 2006; simultaneously published in the US and Canada), chapters 11 and 19.
56. When searching 'CCC' and 'FFI', Google produced easily over 60,000 hits containing approximately the same information.
57. S. Frost, 'Suing stakeholders: solution or setback?', in *CSR Asia weekly*, Vol.3, Week 33, 15 August 2007.
58. SAI Public Statement, 30 April 2007, at: http://www.saasaccreditation.org/docs/SAI_Public_Statement043007.pdf, accessed on 2 March 2009.
59. Information communicated to Ms Lambooy when visiting the factories in Bangalore, in March 2008, and later confirmed on various occasions by FFI/JKPL management by email. However, due to their disappointment about the SAI decision, FFI/JKPL management considered liaising with other CSR initiatives such as BSCI.

good results.[60] SAI indicated that as soon as the litigation had ended, FFI/JKPL's SA 8000 certificate would be revalidated, subject to the outcome of regular external audits.[61]

The main reason, however, why the stakeholder dialogue between FFI/JKPL (and G-Star) and the Indian Organisations (and CCC/ICN) had failed relates to the diverging opinions about the factual labour conditions at FFI/JKPL. Since the first meeting in which FFI/JKPL refuted GATWU's accusations and explained which measures the management (and lawyers) had taken to resolve any issues, FFI/JKPL persistently denied all allegations made by GATWU *et al.* The Indian Organisations and CCC/ICN on the contrary kept on repeating those allegations. Apart from that, accusations, whether true or not, tend not to be the most fruitful starting point for a stakeholder dialogue.[62] As FFI/JKPL was convinced of its own beneficial behaviour towards its labour force while nevertheless incessantly being attacked by GATWU *et al.*, the FFI/JKPL management felt insulted. FFI/JKPL considered that it had no option other than to resort to one means: legal proceedings to stop the public allegations and insults and to recover damages suffered from lost business.

10.6 Overview of the conflict resolution procedures

10.6.1 First mediatory attempt: the Dutch NCP

After their dialogue with G-Star ended in a stalemate CCC/ICN decided to file a complaint with the Dutch NCP (NCP) against G-Star for violating the OECD

60. Also, independent audits confirmed that FFI/JKPL's units conformed to all labour laws and CSR standards. Information by Indian counsel, March 2009.
61. Information provided during a meeting, and also by email, to Ms Lambooy by a SAI representative in the spring of 2008.
62. M. van Huystee, P. Glasbergen, 'The Practice of Stakeholder Dialogue between Multinational and NGO', *Wiley InterScience* 2007, p. 10; at: www.interscience.com, accessed on 1 May 2009.

MNE Guidelines.[63] During the same period, CCC Italy filed a complaint with the Italian NCP against FFI/JKPL's Italian affiliate.[64]

Box 10.4 OECD MNE Guidelines

The OECD MNE Guidelines are a set of recommendations of the 30 OECD countries' governments, and currently also 11 non-OECD countries, so-called adhering countries. The recommendations address multinational companies, both large companies as well as small and medium sized enterprises from OECD countries and the adhering countries. They offer a basic outline for corporate conduct vis-à-vis social, environmental and other aspects of doing business, such as human rights, corruption and consumer interests. The guidelines were negotiated in a multipartite way, meaning that they were drawn up by the OECD member states governments in cooperation with business and civil society, trade unions, and non OECD-member states. →

63. Most NCPs are staffed by civil servants from, and usually have their office at, the Ministries of either Foreign Affairs, Economic Affairs or Trade. Since July 2007, the Dutch NCP consists of a committee of four *independent* members appointed on a personal basis. Each has a background that represents one of the stakeholder groups in the CSR discussion. The NCP is supported by four advisory members from the Ministries of Economic Affairs, Foreign Affairs, Social Affairs and Employment, and Housing, Spatial Planning and the Environment respectively, and a secretariat consisting of three full-time employees. See also Resolution EP (EP) (INI/2006/2133), March 2007; the EP 'calls on the (EU) Commission and the Member States to improve the functioning of national contact points (NCPs) in particular in dealing with specific instances raised concerning alleged violations throughout operations and *supply chains* (emphasis added) of European companies worldwide' (§ 47) and 'calls for a broad interpretation of the definition of investment in the application of the OECD Guidelines to ensure supply-chain issues are covered under (the) implementation procedures' (§ 65). Furthermore, see Report of Professor John Ruggie, Special Representative of the UN Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, 7 April 2008. This report contains a basic framework for addressing business' responsibility towards human rights issues and was warmly welcomed in the UN Human Rights Council on 8 April 2008 as well as by the business society and the labour unions. It attaches great value to grievance mechanisms for victims and stakeholders of multinationals' practices. Special mention is made of the British and Dutch NCP because of their far more independent structure. Professor Ruggie also praised the Dutch NCP as 'the gold standard for NCPs' during a special seminar on Business and Human Rights on 1 December 2008, organised by the Dutch Ministry of Foreign Affairs. Currently, the meetings of the Investment Committee, in which *inter alia* the OECD Guidelines are discussed, appear to have a quadripartite structure: member state governments, business society, labour unions, and NGOs (jointly organised in OECD Watch; see: www.oecdwatch.org, accessed on 1 May 2010.
64. Regarding this complaint, the author could not trace any public information.

Every OECD country or adhering country is obliged to establish a so-called National Contact Point for the OECD Guidelines (NCP). The NCPs are given the task of promoting the Guidelines, and of dealing with complaints ('specific instances') of alleged violations. This grievance mechanism regards investment-related issues, thus ruling out complaints on trade-related issues. The grievance must relate to an enterprise registered in an OECD member state or to an 'investment-like' business affiliate of such enterprise. In this unique procedure, the NCPs can offer mediation services between the parties in order to contribute to an amicable resolution of a conflict. When no agreement is reached, the NCP can issue a public statement on the issues at hand. See for more information www.oecd.org or www.oesorichtlijnen.nl (website Netherlands NCP).

In the complaint of October 2006, CCC/ICN alleged that G-Star had failed to use its influence towards FFI/JKPL to remediate the allegedly poor labour conditions. Strictly speaking, FFI/JKPL was not an investment of G-Star as the two companies were trading partners. Nevertheless, the NCP accepted the grievance, which was a novelty from an NCP perspective. The NCP decided that the G-Star-FFI/JKPL relationship was sufficiently 'investment-like' since G-Star was a major buyer and had been cooperating closely with FFI/JKPL in designing fabrics and jeans models for more than seven years and all products were provided with G-Star labels.[65] FFI/JKPL thus fell within G-Star's 'sphere of influence', hence G-Star bore a certain extent of responsibility towards the situation at FFI/JKPL. The NCP was requested to consider whether G-Star had sufficiently used its leverage with FFI/JKPL in order to foster a local stakeholder dialogue in Bangalore.[66] Although the investment nexus imposes a 'duty of care' on an accused enterprise for possible issues at the foreign company, it does not make the latter a party to the procedure. Also, since India is not an adhering country to the OECD MNE Guidelines, these guidelines do not apply directly to FFI/JKPL. Consequently, there was no way for the NCP to directly engage in a dialogue with FFI/JKPL. Nevertheless, the NCP sought to mediate between the parties.[67] However, there was a lack of trust between G-Star and CCC/ICN. G-Star indicated that it did not expect any positive outcome to an NCP-led dialogue, since CCC/ICN refused to cease its public campaign against G-Star during the mediation process. Consequently, the NCP

65. Final NCP Statement Concerning a Specific Instance notified by CCC/ICN against G-Star, 18 March 2008, p.1; (in Dutch and English), www.oesorichtlijnen.nl, accessed on 12 July 2010.
66. *Ibid.*, p. 2.
67. OECD MNE Guidelines, Part III. Commentaries, Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises, §16-17, p. 61; at: www.oecd.org/dataoecd/56/36/1922428.pdf, accessed on 12 July 2009.

first held separate meetings with each of the two parties. In June 2007, a first joint meeting was scheduled to discuss various solutions. G-Star announced that FFI/JKPL would be audited once again in the early autumn by SGS/ASK (section 10.2). CCC/ICN stressed that it deemed SGS a controversial firm for not having withdrawn FFI/JKPL's SA 8000 certification despite the fact that FFI/JKPL had commenced litigation against its criticasters.[68] CCC/ICN also pointed to the SAI Statement (section 10.5). The NCP considered the outcome of the audit to be of importance for judging G-Star's local involvement before initiating further steps.

However, when G-Star presented the audit results to the NCP and CCC/ICN in October/November 2007, the whole situation had become out of hand and had turned into an international conflict between G-Star, FFI/JKPL, CCC/ICN, the Indian Organisations, and – to a lesser extent – the governments of India and the Netherlands. Despite the positive outcome of the audit, G-Star announced the termination of its business relationship with FFI/JKPL on 6 December 2007. After the resolution of the conflict in 2008 by the Dutch Minister of State Ruud Lubbers (section 10.7), CCC/ICN withdrew its complaint at the NCP. Consequently, the NCP had to terminate the procedure with a formal rather than a substantive final statement. Similarly, CCC Italy also withdrew its complaint at the Italian NCP.

10.6.2 Second mediatory attempt: Amnesty et al.

In October 2007, the Dutch NGOs Amnesty International Netherlands and Oxfam-Novib, and the Dutch labour union FNV, initiated a joint mediatory attempt between FFI/JKPL, G-Star and CCC/ICN. All three belonged to the group of FWF initiators (Box 10.3).[69] The mediators demanded that FFI/JKPL withdraw all legal proceedings. FFI/JKPL could not accept this as CCC/ICN intended to continue their campaigns. FFI/JKPL stated that it was its democratic right to defend itself in court against false accusations from the Indian Organisations and CCC/ICN, and to claim damages. Although understandable, FFI/JKPL's attitude was not conducive to reaching an agreement. Furthermore,

68. This objection though is not based on correct assumptions; an auditing firm, like SGS, can audit a company on its SA 8000 conformity at one specific moment. When all the requirements are met, the company will obtain SA 8000 certification. If, however, the circumstances change after the certification, the auditing firm is not in a position to withdraw the certification. If it would, it would endanger its neutral position as an auditing firm. Therefore, companies with SA 8000 certification are audited regularly to make sure that the labour conditions are still in conformity with the SA 8000 requirements.
69. Each of these organisations is a member of the FWF executive or advisory board. Interestingly, Amnesty International Netherlands was a founding organisation of the FWF, while Amnesty International is a partner of SAI. This raises questions concerning, for example, Amnesty's position towards CCC/ICN's fierce critics on CSR initiatives other than FWF.

the fact that the mediators – through FWF – were directly linked with CCC/ICN did not help to establish a position of impartial mediator.[70] Moreover, at the beginning of October, Amnesty had released a press statement in which it expressed its concerns regarding:

> the continuing harassment of defenders of women workers' rights in the garments export industry in Bangalore city in the Southern Indian State of Karnataka, as well as associated campaigning activists based in the Netherlands. The harassment has included the filing of apparently false criminal charges against them, aimed at curbing their freedom of expression.[71]

This may have resulted in the FFI/JKPL management feeling that it was being pressed by 'third organisations' to acknowledge the allegations of the Indian Organisations and CCC/ICN in a roundabout way. The mediatory attempt failed.

10.6.3 Third mediatory attempt: Dutch Minister of State Ruud Lubbers

Now that the conflict also affected diplomatic relations between India and the Netherlands, the Dutch government offered to facilitate a high-level mediatory attempt in November 2007. All parties had reached a difficult situation: CCC/ICN and their Internet Service Providers felt troubled because of the pending international arrest warrants and FFI/JKPL was concerned about bankruptcy. All parties acknowledged the added value of such mediation. Each of them proposed names for a mediator. As it turned out, all parties involved accepted Mr Ruud Lubbers, the former Prime Minister and Minister of State of the Netherlands,[72] as an independent mediator. In mid-December 2008, the Dutch government requested him to make himself available as a mediator. He agreed to take up this challenge.[73] Just two weeks earlier, G-Star had announced the termination of its relationship with FFI/JKPL. The continuity of the Indian company was in jeopardy. The completion of the work-in-process orders would take approximately three months, after which FFI/JKPL would probably have to close its doors in Bangalore and Italy.

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70. See for instance: chapter 2 of the European Code of Conduct for Mediators on Independence and Impartiality, published by the EU Commission, and H. Verbist, 'Bemiddeling in handelszaken in internationale context' (Mediation in commercial matters in an international context), *TMD* 2008-3, p. 16-36.
71. See reference 25.
72. Mr Lubbers was Prime Minister from 1982 to 1994. From 2001 to 2005, he was the UN High Commissioner for Refugees. Mr Lubbers is also one of the founding fathers and a member of the Earth Charter Commission, which was released in 2000. He lectured in Globalisation Studies at Tilburg University, the Netherlands, and at John F. Kennedy School of Government, Harvard University, US (1995-2000).
73. Mr Lubbers requested the assistance of Ms Lambooy because of her expertise regarding CSR.

10.7 The Lubbers Mediation

10.7.1 The first mediation results

The mediation attempt by Mr Lubbers took place in the Netherlands behind closed doors. After having heard the parties, Mr Lubbers informed the governments that he would try to mediate the case as long as the arrest warrants against the Dutch persons would not be issued at an international level. He also considered that besides the direct parties to the conflict, CCC/ICN, the Internet Service Providers and FFI/JKPL, G-Star had also to be consulted. A continuation of its relationship with FFI/JKPL was vital to avoid bankruptcy on the part of FFI/JKPL and hence for the success of the mediatory attempt. The Indian Organisations were not present during the first meetings in the Netherlands, but CCC/ICN was encouraged by Mr Lubbers to communicate with them at all times in order to collect their ideas and to gain their commitment to a structural solution, and so they did.

Mr Lubbers examined all reports and publications available on the conflict and he initiated many meetings and consultations with CCC/ICN, FFI/JKPL, G-Star, SAI, the Indian Embassy in the Netherlands, the Ministers involved and their representatives, Indian lawyers and mediation advisors, and ILO representatives. It seemed that none of the disputing parties was prepared to put their campaigning or litigation on hold during the beginning of the mediation process. Mr Lubbers' goals were (i) to avoid that the international arrest warrants would be activated, (ii) to find assurance that the labour conditions at the FFI/JKPL sites conformed to generally acceptable international standards so that he could encourage the (former) customers of FFI/JKPL to place orders, and (iii) to achieve a consensus between the parties about terminating their public campaigning and litigation, while finding a means to re-establish communication where necessary. As a mediator, Mr Lubbers enquired of the parties which solutions they envisaged. By 28 January 2008, Mr Lubbers had issued a press release in which he announced that an agreement had been reached between the parties involved.[74] It reads:

> The Indian clothing producer and the Dutch NGOs have jointly come to the following solution: in consultation with local Indian organisations and unions, an ombudsperson in Bangalore will be appointed. The ombudsperson for future conflicts will be independent and have the full confidence of all parties, local as well as international. Should employees, local organisations or CCC/ICN have any complaints concerning labour conditions at FFI/JKPL, they can submit these to the ombudsperson, who has a mandate to resolve them. This initiative will not hinder the right of any employee to become a member of a union of his choice, which can then directly represent him towards the FFI/JKPL management. CCC/ICN are confident

74. Press release by Mr Lubbers, 28 January 2008; at: http://www.ez.nl/dsresource?objectid=155086&type=PDF, accessed on 14 February 2009.

> that any possible violations of labour rights will be reported in a timely fashion and will be resolved in a correct manner. Should FFI/JKPL or any of their customers have complaints about the remarks or behaviour of NGOs or unions, they can submit these to the ombudsperson, who will independently verify the issues and take binding decisions.
>
> Supported by this solution, parties no longer require the courts to provide judgment on their difference of opinion concerning the allegations put forward by local Indian organisations, and disputed by FFI/JKPL as to events lying in the past (2005/2006). Therefore, the Indian company withdraws all legal proceedings and CCC/ICN bring to an end all campaigns against FFI/JKPL and the Dutch jeans brand G-Star. The NGOs have also withdrawn the complaint about the alleged violation of the OECD Guidelines.
>
> In good consultation with Lubbers, G-Star, the most important former customer of FFI/JKPL, re-establishes its commercial relationship with FI/JKPL, so that the 5,500 Indian employees are not the victim of the conflict. Lubbers has ascertained that with the litigation ending and the appointment of an ombudsperson, there is no reason to consider the labour conditions not in compliance with Indian law and international standards. He has encouraged G-Star to re-establish its commercial relationship with the Indian producer. He has made this request expecting that other customers will follow.[75]

Indeed, as Mr Lubbers indicated almost a month later in a new press release of 21 February 2008, 'no party (FFI/JKPL employees, Bangalore NGOs or unions, or CCC/ICN) has contradicted this positive statement [regarding the labour conditions being in compliance]. This is encouraging.'[76] Fortunately for all parties, following the mediation agreement and the first press release by Mr Lubbers, G-Star re-established its relationship with FFI/JKPL, thereby saving the FFI/JKPL employees' jobs.

In following up the questions raised in the Dutch Parliament (section 10.3), the Dutch Ministers of Economic Affairs and for Foreign Trade informed

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75. The content of the mediation agreement is disclosed in more detail in a joint press release of September 2008, issued by Mr Lubbers and supported by the COM: 'With all parties I reached a mediation agreement consisting basically of: (i) termination of the public campaigns against FFI/JKPL and its customers launched by CCC and ICN; (ii) any and all old electronic information concerning this case would be declared irrelevant and history because not verified (all information is supposed to carry a 'case closed' banner); (iii) termination of the legal claims filed by FFI/JKPL against the NGOs, trade unions and action committee's; and (iv) appointment of a Conciliator-Ombudsman-Mediator (COM) in Bangalore to whom any complaints about labour issues at FFI/JKPL, and complaints about the behaviour of the NGOs, trade unions and action committee's, could be addressed. Parties agreed that it would be best that the COM be the only person entitled to publicly provide information about these matters, especially about the labour conditions at FFI/JKPL (to avoid unsupported information to be spread which could immediately lead to bankruptcy of the factories). […] The COM is presently the only person who has been empowered by the parties to disseminate information about FFI/JKPL, its factories and the mediation process. He informed me that he is communicating with all parties and will issue half-annual public reports on his work.'
76. Press release by Mr Lubbers, 21 February 2008; at: http://www.ez.nl/dsresource?objectid=155526&type=PDF, visited on 21 March 2009.

Parliament of the outcome of the Lubbers Mediation.[77] They emphasised the importance of CSR for the Netherlands, but also for India, and stressed that maintaining a dialogue is essential. They underlined that CSR can only take place by creating a channel of communication between companies and civil society organisations for the exchange of ideas, even when their positions differ greatly; all parties bear responsibility for maintaining such a dialogue.

10.7.2 Appointment of the Conciliator-Ombudsman-Mediator

Since the conflict had emerged and evolved in India, Mr Lubbers felt that the best place to resolve it would be in India. Therefore, he sought the assistance of Mr Ashok Khosla, a former Indian government and UN officer.[78] Mr Lubbers and Mr Khosla are both representatives of the Earth Charter.[79] Among other, Mr Khosla was requested to propose a suitable candidate to act as 'conciliator-ombudsperson-mediator' (COM), an idea suggested by CCC/ICN. It was agreed that the COM would perform its task in accordance with its terms of reference and within the framework of Indian law and international standards including the Earth Charter, so as to provide it with flexibility in reaching wise decisions. CSR conflicts – as this case study illustrates – often transcend borders. Since laws are mainly organised within state-based systems, commonly resulting in different legal standards, it is difficult to solve these conflicts by means of legal standards only.[80] For that reason, the COM was also provided in its terms of reference with the Earth Charter as a tool against which to measure its decisions. As the Earth Charter provides for a common ethical basis against which no one would object, depolarisation would so be fostered.

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77. Letter by the Ministers of Economic Affairs, Ms Van der Hoeven, and for Foreign Trade, Mr Heemskerk, to Parliament of 31 January 2008, reference no. 31 200 XIII 46; at: http://rijksbegroting.minfin.nl/2008/kamerstukken,2008/2/6/kst114958.html, visited on 18 April 2009.
78. Mr Khosla holds the chair of the international NGO International Union for Conservation of Nature, based in Switzerland, and of the Indian NGO Development Alternatives, based in Delhi, and he co-chairs the international NGO Club of Rome.
79. The Earth Charter is an international declaration of fundamental values and principles for building a just, sustainable, and peaceful global society in the 21st century. Created by a global consultation process, and endorsed by many organisations, the Charter 'seeks to inspire in all peoples a new sense of interdependence and shared responsibility for the wellbeing of the human family and the larger living world.', www.earthcharter.org, accessed on 12 July 2009.
80. The choice of the Earth Charter supports the statement by E. van Beukering, 'Over wat advocaten moeten weten en nog veel meer' (What lawyers need to know), *TMD* 2008(12)-2, p. 10; she underlines that mediation does not need to follow traditional legal frameworks and thus can enlarge the scope for possible remedies. A. de Roo, 'Conflictmanagement in de zakelijke sfeer: recente ontwikkelingen' (Conflictmanagement in business: recent developments), *ibid*. p. 3, emphasises that mediation is better equipped to achieve in a short time span a long-term solution; that is certainly the goal sought by the parties in the case at hand. M. Schonewille, 'Geslaagde samensmelting tussen best practices en de nieuwste inzichten →

In addition to appointing the COM, Mr Khosla and Mr Lubbers announced that they – as 'Custodians' of the mediation agreement – remained available to implement the agreement and to act as a 'sounding board' for the COM. The parties also found agreement about the appointment of a third Custodian, based in Bangalore, in the person of Sri. A. P. Venkateswaran.[81]

In consultation with the parties involved, the Custodians requested the Bangalore Mediation Centre (BMC) to act as COM. By the end of February 2008, the BMC had formally accepted the assignment and proposed to appoint Justice Malimath, an independent and wise person, to execute this task.[82] All parties welcomed his appointment and agreed to empower him to evaluate potential complaints from employees, NGOs and other organisations and to solve these in consultation with FFI/JKPL. He was also instructed to safeguard diligent public communications on FFI/JKPL and its customers.[83] Another task was to encourage FFI/JKPL to obtain certification of its operations by a CSR certification institution.[84] Consequently, permanent monitoring was provided for.

In early March 2008, Justice Malimath received a vote of confidence from all parties and – at the Inaugural Meeting of 6 March 2008, in the presence of the Custodians[85] and all the Indian parties[86] – he accepted the mandate to resolve future conflicts and agreed to report publicly on any complaints and on his work on a semi-annual basis.

By the end of March 2008, the Dutch Ministers of Economic Affairs and for Foreign Trade informed Parliament that the Lubbers Mediation had succeeded

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uit de wetenschap' (Successful merger between best practices and the newest scientific developments), *ibid*. p. 17, points at the fact that legal disputes often poorly relate to the factual dispute at hand, and hence that legal remedies cannot contribute to a good solution to the problem. Also that point has been clearly demonstrated in this case study.

81. Sri. A.P. Venkateswaran served the Indian government for a long time. He retired as the Indian Foreign Secretary. Before that, he was Ambassador to, amongst others, China and Russia, and represented India at the UN in Geneva, including the ILO.
82. Mr Justice V.S. Malimath held, amongst other posts, the following positions: Chief Justice of the Karnataka and Kerala High Courts, Member of the Indian National Human Rights Commission, Head of the Fact Finding Mission, appointed by the UN to investigate on the violation of human rights in Nigeria after the execution of the environmentalist, lawyer and writer, Ken Saro Wiwa. Mr Malimath was also chosen as the International Observer to Colombo, Sri Lanka, representing the Human Rights Institute of the International Bar Association (London) and the International Commission of Jurists (Geneva) regarding the trial of cases before the Supreme Court of Sri Lanka. The Indian President conferred the National Citizens Award on him in 1996.
83. In so far as it regards their relationship with FFI/JKPL.
84. Such as SAI or a similar institute.
85. Mr Khosla and Mr Venkateswaran were present; and Ms Lambooy represented Mr Lubbers.
86. Representatives of GATWU, Munnade, Cividep, NTUI and its lawyer, FFI/JKPL and its lawyers, Ms Pramila Nesargi and Ms Geeta Menon, were present. CCC/ICN representatives were not able to come to India because they could not obtain a visa on time, but they had given full power to their Indian affiliate organisations.

in a structural solution to the conflict, thereby indicating that the facilitating role of the Dutch government in offering the Lubbers Mediation had come to an end. The government expressed its hope that besides G-Star also other former and new customers would place orders with FFI/JKPL.[87]

10.7.3 The COM in office

The COM issued its first public report in September 2008.[88] It reported on the meetings held in Bangalore, the finalisation of the terms of reference, the implementation of the Lubbers Mediation agreement, and on the complaints that it had received. The COM confirmed that FFI/JKPL had terminated all litigation against the Indian Organisations as well as against CCC/ICN and the Internet Service Providers and urged all parties 'to enter this information in their respective websites and to give wide publicity to it with utmost expedition.'[89] The report did not record any complaints relating to the labour conditions at the FFI/JKPL factories, but it did register various complaints about errors on CCC's and other websites. The report, furthermore, discussed complaints regarding publications involving CCC/ICN which repeated the 'old' but unsubstantiated allegations of poor labour conditions at FFI/JKPL without providing information on the positive outcome of the Lubbers Mediation. The COM indicated that it had found the grievances about the errors on the CCC/ICN websites to be well founded and it had hence requested that corrections be made. Regarding another complaint concerning an article entitled *Schmutzwäsche* published in the Austrian magazine Profil Extra in May 2008, the COM had convened a meeting. The report stated that '[the article] is unjustifiably negative in character [about FFI/JKPL and G-Star]' and 'the COM having entered office, publication of the Article in PROFIL without first approaching and collecting correct information from him was against the spirit of ToR [Terms of Reference]'. To prevent further damage, the COM agreed with the parties that they would publish on their websites a joint statement to correct the false information contained in the article *Schmutzwäsche*.[90]

87. Letter by the Ministers for Development Cooperation and Foreign Trade to Parliament of 15 April, 2008, reference no. 26 485 (57); http://static.ikregeer.nl/pdf/KST117886.pdf, visited on 18 April 2009.
88. 'Public Report of COM – Mr Justice V.S. Malimath (for the period 6-3-2008 to 5-9-2008), as per Clause 15 of ToR.'
89. Mr Lubbers was also requested by the COM to issue a press statement and to give wide publicity to the withdrawal of all the pending cases.
90. See the documents referred to in references 75 and 88.

10.8 Differences in law and confusing soft law labour standards

Those persons who played a role in this dispute came from countries with distinct legal systems and cultures. Moreover, they worked in dissimilar sectors of society. Business people, NGOs, unions and campaigning organisations aim for divergent goals in life and usually their thought processes are not aligned. Diverse backgrounds imply different practices and traditions. In order to gain a better understanding of the conflict, the complaints filed and the individual party's expectations, it is useful to briefly outline the various perspectives from Indian and Dutch law, as well as those of the ILO standards and the OECD MNE Guidelines. In Annex 10.1, *in fine*, these standards are presented, all centred around the allegations against FFI/JKPL as mentioned in the draft Fact-finding Report. In this section the most disputed standards will be highlighted and contrasted with each other.

The main issues in this case study concern (i) the right to collective bargaining, which FFI/JKPL denied to GATWU and (ii) the freedom of association of FFI/JKPL workers. Regarding the first issue, on the basis of the facts of this case and applicable law, it seems difficult to argue that the FFI/JKPL employees were denied their *right to collective bargaining* as FFI/JKPL complied with the Indian law. Contrary to the detailed set of rules contained in the Trade Unions Act concerning the establishment of unions and the right to collective bargaining, international law and CSR instruments only give general directions. The ILO core principles[91] of freedom of association and collective bargaining apply to India (not directly to companies), but their generality does not add to pertinent Indian law. As India has not ratified other ILO conventions covering this subject, the provisions thereof do not apply to India.[92] The ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (ILO MNE Declaration)[93] and the OECD MNE Guidelines call upon enterprises to 'respect the right of their employees to be represented by trade unions and other *bona fide* representatives of employees, and engage in constructive negotiations (…)', but they do not impose specific conditions.

91. The 1998 ILO Declaration on Fundamental Principles and Rights at Work declares four core principles as laid down in several separate conventions to be applicable to all member states regardless ratification, as these principles are considered to lie at the heart of the ILO's *reason d'être* (article 2). The Conventions relating to the following rights must be respected, promoted and realised: (1) freedom of association and the effective recognition of the right to collective bargaining; (2) the elimination of all forms of forced or compulsory labour; (3) the effective abolition of child labour; and (4) the elimination of discrimination in respect of employment and occupation.
92. India has ratified 41 Conventions; see: http://www.ilo.org/ilolex/english/newcountryframeE.htm, visited on 22 March 2009.
93. The ILO MNE Declaration contains recommendations of the ILO especially targeted at multinational enterprises, which also includes Indian enterprises. Not entirely coincidental, the ILO MNE Declaration dates back to November 1977, and was revised in November →

Consequently, Indian law plays the most dominant role in the determination of what the duties and responsibilities of an Indian employer are regarding collective bargaining. Since this case study occurred in India, a democracy that applies the rule of law, these types of questions shall not be answered differently when viewed from the perspective of CSR.

With regard to the second issue, the *freedom of association*, the question is of a very factual nature: were the FFI/JKPL employees free to organise or to join a union, or did they fear dismissal when doing so? It seems reasonable to consider the outcome of the various SGS/ASK audits and the Labour Department inspection (Table 10.1). The employees interviewed (a 10% sample of the workforce) acknowledged their awareness of their rights and other benefits. They indicated that they were not particularly interested in joining a union as FFI/JKPL was already paying above-average wages and other benefits. In general, though, freedom of association is certainly an issue that should be monitored carefully at textile suppliers based in developing countries (*vide s*ection 10.10 for other case studies). However, in the case at hand, the situation was different. The question could even be posed whether FFI/JKPL would have violated its employees' rights to associate with a union of their choice, if the company had accepted GATWU's demand to represent FFI/JKPL's employees and had entered into collective bargaining with GATWU, since GATWU had no FFI/JKPL members.

Looking from a Dutch perspective at the labour conditions and workers' relations at FFI/JKPL, or any other company with a comparable workforce, one would expect that a works council, union or any other employee representative body exists to balance management's power and to take care of the employees' rights and interests. At FFI/JKPL there are indeed four grievance committees, consisting of elected workers. Yet, their duties are slightly different from works councils' and unions' rights and duties. However – not only by Indian labour law standards – this committee system is quite advanced. SA 8000 also recommend establishing these types of committees.[94] The Lubbers Mediation agreement provided for an intermediary step with the appointment of an

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2000, immediately after the release of the OECD MNE Guidelines in 1976 and their revision in June 2000. Although the OECD Guidelines do not apply to FFI/JKPL directly, it has been successfully argued that – in view of their intensive relationship – G-Star had a duty to promote the OECD MNE Guidelines with its business partner (section 10.6).

94. Article 4.2 of the SA 8000 standard; available at www.sa-intl.org. See also: M. Ma, 'The Story of Ying Xie – Democratic Workers' Representation in China as a Tool for Better Business', in: A. Nadgrodkiewicz (editor), *From Words to Action: A Business Case for Implementing Workplace Standards – Experiences from Key Emerging Markets* (Washington DC/New York, Center for International Private Enterprise and Social Accountability International (SAI), 2009), p. 11. The study by Ma focuses on capacity building, internalisation, and ownership of compliance programmes by workers and managers within a medium-sized garment factory in China producing for the brand Timberland. The same →

ombudsman with the mandate to resolve any labour complaints. So far, the COM has been perfectly capable of 'keeping the peace'. Perhaps, as a more general comment, the presence of an ombudsman could develop into a more permanent communication body for companies' management and employees.

Concluding, as Indian law is well developed, including labour law standards and collective bargaining mechanisms, Western customers who want to purchase 'socially responsible produced' textiles from Indian producers, should – as a first step – convince these producers to comply with domestic laws, if necessary. If the customers want to go beyond local standards, they can require their suppliers to follow social compliance certification standards, such as SA 8000, FLA, FWF, BSCI, and submit them to regular audits carried out by independent agencies. A next step on the CSR ladder would be to impose certain conditions on the local suppliers by means of contractual clauses, *e.g.* by including covenants or representations and warranties in purchase contracts that require the factories to provide additional medical care and educational services for workers or their families. The Indian producer thereby commits itself to follow these higher labour standards and has to provide his employees with the additional benefits which he has agreed upon with his customer. Obviously, he will also have to charge a higher price for his products to such a customer. It would be useful for apparel brands to jointly come to such additional requirements in order to keep them realistic for manufacturers.

10.9 Communication strategies of the parties

During the conflict, each of the Indian Organisations, CCC/ICN, G-Star and FFI/JKPL communicated in their own manner, using different vocabulary based on personal perceptions, which led to misunderstandings of actual situations. In this section several issues that may have aggravated the conflict will be presented.

Impossibility of independent research v. positive outcome of multi-stakeholder audits

The parties, CCC/ICN and the Indian Organisations, on the one hand, and G-Star and FFI/JKPL on the other, kept strictly to their own perception of the factual labour conditions at FFI/JKPL, while denying arguments made or

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volume also contains an interesting case study on the usefulness of SA 8000 in managing contract workers and supply contractors for the steel giant TATA in India, and a case study which analyses the key drivers for and the results of SA 8000 certification for workers, managers, and customers of a textile company in Turkey. Also compare: M.J. Hiscox, C. Schwartz,
M.W. Toffel, Evaluating the Impact of SA 8000 Certification; Boston: Working paper 08-097, May 2008.

materials released by the other party. This may have led to confusion in the outside world. For instance, during the legal proceedings against the Indian Organisations, CCC/ICN always claimed that the FFI/JKPL production units could – by definition – not meet G-Star's code of conduct, let alone the SA 8000 standard, since the involvement of local stakeholders was impossible because of the restraining order. Moreover, CCC/ICN claimed that SGS was a commercial auditing firm and therefore not independent, that SGS was part of the controversy, and that the Delhi-based NGO ASK was not suitable for executing an audit amongst Bangalore employees, as it 'did not understand local culture and custom', as did GATWU. In this way, CCC/ICN downplayed in advance any positive outcome of audits or checks by organisations or authorities other than those affiliated with CCC/ICN. G-Star, on the other hand, denied the allegations of the Indian Organisations, since they could not substantiate these and the SGS/ASK audits did not confirm them, and informed the public that the FFI/JKPL labour conditions were up-to-standard. G-Star pointed to the professional level of the SGS and ASK personnel.

'Gagging order' v. prohibition of the dissemination of untrue statements

When the Bangalore Civil Court issued the restraining order against the Indian Organisations prohibiting them from disseminating false information, CCC/ICN consistently referred to this as a 'gagging order', which allegedly prohibited them from discussing the FFI/JKPL situation in its entirety with their Bangalore affiliates. CCC/ICN in its press statements and on its website even referred to G-Star as 'Gag-Star' and displayed pictures online of activists forming the actual letters.[95] FFI/JKPL and G-Star, however, always stated that the restraining order only prohibited the individual activists from Bangalore from disseminating information which the Bangalore Civil Court considered *prima facie* untrue statements, such as the aforementioned interview on Dutch radio. The activists were thus not restrained from speaking out about FFI/JKPL *in general*. Another aspect is the continuation of the restraining order; if the Bangalore organisations would have presented evidence to the Court to substantiate the allegations against FFI/JKPL, the Court would have immediately withdrawn the restraining order. However, although the organisations sometimes appeared in Court and filed responses, they did not provide a iota of material to substantiate their claim. Hence, the Court prolonged the restraining order on several occasions. In the meantime, CCC/ICN publicly expressed its

95. See the short article 'Gag Star' of 29 November 2007 at: http://www.schonekleren.nl/index.php?option=com_content&task=view&id=133&Itemid=793, visited on 15 February 2009, and also CCC/ICN's press release of 31 August 2006, 'Gag Order Placed on Indian Labour Support Organisations,' in which CCC/ICN furthermore stated that the restraining order prevented the Indian Organisations from circulating *any information* about the labour situation at FFI/JKPL.

anger over the 'threats to freedom of speech' and FFI/JKPL's 'policy of threatening its criticasters' and tried to force FFI/JKPL to withdraw the legal proceedings by intensifying the public campaigns and by putting pressure on FFI/JKPL's customers. CCC/ICN and the Indian Organisations preferred to submit their case to the 'court of public opinion' rather than substantiating their allegations against FFI/JKPL in Court.

Seemingly unbalanced attention to G-Star's role compared to the role of other buyers

Before the conflict between CCC/ICN and FFI/JKPL evolved into large-scale warfare, FFI/JKPL supplied multiple buyers, including G-Star. Interestingly enough, CCC/ICN's campaign was aimed solely at G-Star, whereas there were other apparel brands, even Dutch-based brands, that were originally sourcing from FFI/JKPL in the same period. One of those brands was the Amsterdam-based company Mexx which became an FWF member in November 2006 after CCC/ICN's press release on the 'gagging order'. In an article in the Dutch newspaper *Trouw*, the FWF director explained how FWF and Mexx had jointly engaged in dialogue with the FFI/JKPL management to discuss the issues alleged by FWF's Bangalore partnering organisations.[96] He stressed the need for 'silent diplomacy', a view quite opposite to FWF's initiating member organisation CCC.[97]

Criminal proceedings and arrest warrants v. appearance in person

When the representatives of CCC/ICN and the Internet Service Providers were charged with criminal defamation and – upon their non-appearance in Court – the Magistrate Court subsequently issued arrest warrants, CCC/ICN publicly claimed that the Indian Court qualified them as 'international terrorists' and that this lawsuit was a full-frontal attack against 'international human rights activists.' FFI/JKPL, on the other hand, had initiated the court case as an attempt to stop CCC/ICN from continuing their (internet) campaigns in which they spread information that the Court had found to be *prima facie* untrue. FFI/

96. In August 2007, FWF published a report regarding FFI/JKPL, conducted for FWF member Mexx. It repeated the allegations presented in the draft report of the Fact-finding Committee. Upon its release CCC published it on its website, but it is no longer available online.

97. G. Moes, 'Duurzaam Ondernemen/Foute fabriek mijden werkt niet' [Corporate social responsibility/Avoiding a wrong factory does not work], Dutch newspaper *Trouw*, 22 February 2007; http://www.trouw.nl/nieuws/economie/article1399358.ece, visited on February 2009. In a Memorandum of Understanding between Liz Claiborne, Inc., Mexx, Fair Labor Association (FLA) and the FWF, signed on 6-10 November 2006 by all parties, it was agreed that 'FLA and FWF will observe the confidentiality commitments and transparency that both initiatives have, with regards to information regarding member/participating companies and their supply chains.' This clause may clarify why CCC/ICN was not campaigning against Mexx' business relationship with FFI/JKPL. See: http://www.fairwear.nl/images%20site/File/Deelnemers/Mexx/MoU-Mexx.pdf, accessed on 15 February 2009.

JKPL was rapidly losing business, G-Star was also publicly considering leaving FFI/JKPL, and there was a threat of bankruptcy. The Magistrate Court had issued non-bailable arrest warrants, because the criminal procedure in India requires that the defendants appear in Court. The Court can exempt the appearance of the accused until the trial commences.

Claims of corruption v. a fully functional democracy and judicial system
After the issuance of the restraining order by the Bangalore Civil Court and the criminal charges by the Magistrate Court, CCC/ICN claimed that these Court actions had been 'purchased' by FFI/JKPL. CCC/ICN claimed the same about the positive report of the Labour Department. Basically, any (positive) information on FFI/JKPL that did not come from sources affiliated to the Indian Organisations was regarded as unreliable or suspicious by CCC/ICN.

Concluding, due to the intemperate and strong terminology used by CCC/ICN, and the type of legal claims filed against them by FFI/JKPL, the conflict became interesting for the international media and was easily picked up by politicians (*supra* section 10.3). Both sides were in the process of igniting their differences of opinion. De-escalation was not part of their vocabulary.

10.10 Comparison with other CSR textile conflicts

10.10.1 International campaigns against garment manufacturers

To put the CCC/ICN's campaign against G-Star into perspective, some other international campaigns against garment manufacturers will be compared to the FFI/JKPL case. It is interesting to note that although their outcomes differ, there are also some striking similarities. Conspicuous campaigns were those against the underwear brand Triumph International (Triumph), in which CCC/ICN played a leading role, and against the American sportswear company Gildan Inc. (Gildan), in which CCC/ICN only played an indirect role. In addition, American campaigns against Fruit of the Loom to source college wear from a Honduras factory will be mentioned. Lastly, other CCC/ICN campaigns against Dutch retailers will be examined, revealing as a hidden conflict a clash of CSR codes. A summary of the first three cases is presented below, followed by some brief remarks.

Bras from Burman (i.e. Myanmar)

In June 2000, the ILO Conference adopted a Resolution in which Burma was called upon to take action against the widespread and systemic use of forced labour.[98] In December 2000, an NGO coalition, consisting of CCC/ICN, cooperating with its Swiss branch, Burma Centre Netherlands, the Burma Campaign UK, the Dutch trade union FNV Global, and OxfamNovib contacted the Swiss-based company Triumph International (Triumph) about Triumph's Burmese branch. They wanted Triumph to leave Burma, because Triumph's production facilities were located in government-owned property, therefore contributing financially to the military regime. When Triumph did not respond to the NGOs' call, the NGOs started a public campaign to force Triumph to leave Burma ('support breasts – not dictators'). After one year, Triumph gave in and left Burma. Later on, Triumph revised its code of conduct so as to include ILO and human rights standards.[99]

Textiles from Honduras

In 2001, a Canadian and a Honduran NGO investigated the labour conditions at the production units in Central and South America of Canadian sports apparel brand Gildan Inc. (Gildan).[100] When the findings of the two NGOs – mainly concerning denial of freedom of association – were made public in a documentary shown on nationwide Canadian television, a controversy was born that was to last for five years. Although denying the claims made by the NGOs, Gildan adopted the Worldwide Responsible Production and Certification Programme (WRAP) in 2002.[101] The NGOs were not satisfied with this attempt to address labour rights violations, and continued their campaigning, even involving Gildan's shareholders. In October 2003, Gildan obtained a Fair Labor Association (FLA) accreditation for implementing and verifying fair labour conditions,[102] followed by an environmental certification in early 2004

98. ILO Press release, ref.no. ILO/00/27, www.ilo.org, accessed on 26 March 2008. The Resolution also recommends 'Organisations constituents as a whole – governments, employers and workers – that they review their relations with Myanmar (Burma).'
99. Tulder, Zwart, *supra* note 55, p. 298-303; and see: www.burmacampaign.org.uk, accessed on 24 March 2009.
100. M.-F. B.-Turcotte, S. de Bellefeuille (*Université du Québec à Montréal*) and F. den Hond (VU University, Amsterdam, the Netherlands), Gildan Inc. – Influencing Corporate Governance in the Textile Sector, in *Journal of Corporate Citizenship*, Issue 27, Autumn 2007, p. 23-36.
101. WRAP is an independent, non-profit organisation dedicated to the certification of lawful, humane and ethical manufacturing throughout the world. The organisation is an initiative of the American Apparel Industry. For more information please visit: www.wrapapparel.org, accessed on 12 Julu 2010.
102. The FLA was established in 1999 in the US upon the initiative of the former President Clinton. It involves companies, colleges and universities, and civil society organisations to improve working conditions in factories around the world. See: www.fairlabor.org, accessed on 12 June 2010.

by the Austrian Textile Research Institute (ÖTI).[103] Shortly after obtaining FLA accreditation, the NGOs filed a complaint with the FLA. Gildan was given 45 days to investigate and resolve the issues put forward by the NGOs. A few months later, the FLA – after a joint investigation with the labour monitoring organisation, the Workers Rights Consortium (WRC)[104] – confirmed that the right of freedom of association was being violated at a particular Honduran production facility. After implementing a corrective action plan, which gained the consent of the NGOs, Gildan decided to leave this factory for another Honduran production site in 2005, where they urged the application of a first-hire preference to workers from the former site.

American college apparel

In a report released on 7 November, 2008, WRC announced the closure of Russell Corporation's Honduran textile factory. Russell is a subsidiary company of Fruit of the Loom.[105] A WRC inquiry found substantial credible evidence that animosity against workers exercising their associational rights was a significant factor in Russell's decision to close this 'Jerzees de Honduras' plant. The closure announcement came after a year-long process during which WRC had worked with Russell to remediate particularly severe violations of associational rights at the Jerzees de Honduras plant and a sister facility known as Jerzees Choloma. According to the WRC, during mid-2007, Russell unlawfully dismissed nearly 150 workers from these facilities in retaliation for the workers' decision to form a union. As a result of a WRC investigation (corroborated by an FLA-commissioned report), and the intervention of affiliate universities, Russell was forced to acknowledge the violations, to offer reinstatement to the illegally dismissed workers, and to pay roughly USD 150,000 in back pay. WRC stated that

> if allowed to stand, the closure would not only unlawfully deprive 1,800 workers of their livelihoods; it would also send an unmistakable message to workers in Honduras and elsewhere in Central America that there is no practical point in standing up for their rights under domestic or international law and university codes of conduct and that any effort to do so will result in the loss of one's job.[106]

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103. The *Institut für Ökologie, Techniek und Innovation*, established in 1967, provides services such as research, testing, certification, know-how transfer and equipment manufacturing. See: www.oeti.at, accessed on 12 July 2010.
104. The WRC is an independent labour rights monitoring organisation, conducting investigations into working conditions in factories around the globe. It was created by college and university administrators, students and labour rights expert. See: www.workersrights.org, visited on 9 March 2009.
105. Worker Rights Consortium, Russell Corporation's Rights Violations Threaten 1,800 Jobs in Honduras; www.workersrights.org/russellrightsviolations.asp, visited on 9 March 2009.
106. *Ibid.*

Many universities sourced their college wear from Russell, but terminated the relationship when the reports on Russell Corporation's practice came out.[107]

Comparison

Comparing these three cases, differences and similarities can be observed. Similar to G-Star, Triumph was not prepared for the severe actions by civil society organisations. Differently from G-Star, Triumph gave in to the call of the NGO coalition. The question remains though whether the divestment of Triumph has improved the labour conditions of 850 employees, also noting that the military regime has not lost any of its strength. In the second case, Gildan gave in to the demands of the NGOs: it became an FLA member, and involved them in a dialogue on labour practices. In contrast, as described *supra*, G-Star did not become an FWF member but instead decided to rely on the SA 8000 audit and certification system. Furthermore, the Gildan case resembled the case study at hand in terms of (i) the set-up of the NGOs, one in the home country (Canada-the Netherlands), and one in the country of production (Honduras-India); (ii) the campaigns were supported by an international network of other NGOs; (iii) the complaints were filed at multiple levels; (iv) the 'responsible exit strategy' demand in respect of first-hire preference; and (v) the campaign was characterised by continued efforts to collect information, frequent press releases, media events and requests to consumers to send letters to the management of the Western customers. The Fruit of the Loom case shows that despite ILO and other standards, freedom of association and collective bargaining are still a challenge in some places. To find credible evidence of violations will help employees and civil society organisations to enforce such rights.

10.10.2 A hidden conflict: clash of CSR codes

After the OECD MNE Guidelines and ILO MNE Declaration were released in 2000, several MSIs emerged to translate these recommendations into practical working schemes for the business sector. In the Netherlands, SA 8000, BSCI and FWF are popular MSIs in the retail sector.[108] MSIs are CSR initiatives based upon cooperation with stakeholders, such as the business society, trade

107. S. Greenhouse, 'Michigan Is the Latest University to End a Licensing Deal with an Apparel Maker', in *The New York Times*, 23 February 2009; http://www.nytimes.com/2009/02/24/business/24sweat.html?ref=worldbusiness, accessed on 18 April 2009.

108. SAI and its SA 8000 label was established in 1997, and revised in 2001; at: http://www.sa-intl.org/index.cfm?fuseaction=Page.viewPage&pageId=473, accessed on 12 July 2010. BSCI: the Brussels-based Foreign Trade Association held its first deliberations with the business society on creating a framework for addressing labour conditions, which led to the worldwide implementation of the BSCI in the spring of 2004. See: http://www.bsci-eu.com/index.php?id=2011, accessed on 2 May 2009. FWF (see Box 3) was created in 1999 in →

unions and NGOs. Although some work on a not-for-profit basis, they usually require a fee from participating companies. As demand increased for CSR certification and verification systems (CSR Implementation Systems), competition became inevitable. In short, 'selling' CSR Implementation Systems became business. For various Dutch companies operating on an international level, the internationally operating MSIs – BSCI or SA 8000 – seem more logical to follow than the primarily Dutch FWF.[109]

CCC/ICN's campaign against G-Star was not a one-off event. In the spring of 2007, in the midst of their campaign against G-Star, CCC/ICN also campaigned against the Dutch retailer HEMA concerning the allegedly poor labour conditions under which their apparel supply was produced. CCC/ICN stressed that only the involvement of local organisations can provide a buyer with a good view of the labour conditions at its supplier.[110] HEMA replied that its labour conditions complied with its own code of conduct, and that HEMA had joined BSCI for independent verification. CCC/ICN's response exemplifies the clash between competing CSR Implementation Systems. CCC/ICN asserted that the way BSCI works by no means guarantees fair labour conditions. CCC/ICN expressed its disappointment that HEMA did not make use of FWF's knowledge of the textile sector, and notified HEMA that it would continue its campaigning.[111]

On 27 February 2008, the Dutch Council for the Retail Sector (RND)[112] complained to the Dutch Minister for Foreign Trade about CCC/ICN's campaign against 'a Dutch denim wear producer.' The RND moreover asserted that CCC/ICN, being a campaigning organisation on the one hand, and an initiator of FWF on the other, acts as a 'norm setting, verifying and judging' body. The RND also expressed its discontent with the substantive subsidy which FWF received from the Dutch government, stating that 'apparently without this subsidy FWF does not seem to have a future.' Above all, the RND

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the Netherlands. In 2001, FWF became operational and from 2003 onwards companies were recruited to subscribe to the FWF Code of Labour Practices; http://www.fairwear.nl/index.php?p=25&s=32&t=2, accessed on 2 May 2010. These sites were visited on 18 February 2009.

109. By 2009 FWF has members from Belgium, Denmark, Germany, the Netherlands, Sweden, Switzerland and the UK, but the majority of the members are Dutch. Although FWF's Board and Committee of Experts still consists of only Dutch stakeholders, FWF aims to set an international standard, at: http://www.fairwear.nl/index.php?p=25&s=34&t=2, visited on 18 February 2009.
110. CCC letter to HEMA of 16 April 2007; (in Dutch) http://www.schonekleren.nl/hema/index.php?option=com_content&task=view&id=28&Itemid=38, visited on 18 February 2009.
111. Letters of 27 April and 16 May 2007; (in Dutch) http://www.schonekleren.nl/hema/index.php?option=com_content&task=view&id=28&Itemid=38#_ftn1, visited on 18 February 2009.
112. See www.raadnederlandsedetailhandel.nl.

called upon the Dutch government and civil society organisations to 'focus on a constructive dialogue with the Dutch business society, on the basis of (policy) choices made by the business society.'[113]

While the investigation for this contribution was being conducted, a consecutive development evolved in this 'clash of codes'. On 10 February 2009, CCC published a report blaming large European retailers for violating a whole series of fundamental labour rights.[114] In the Netherlands, only a few days after its publication, the report led to questions by Members of Parliament to the Ministers of Foreign Affairs and for Foreign Trade, asking them to demonstrate that they fully integrate CSR in their Dutch business promotion policies.[115]

The CCC's report also points at alleged flaws by various CSR Implementation Systems, such as the Ethical Trading Initiative (ETI), the Global Social Compliance Program, SA 8000 and BSCI. Many of the retailers targeted in CCC's report, such as Aldi and Lidl, have indeed implemented one of these systems for securing fair labour conditions among their suppliers.[116] CCC's Dutch website subsequently directs one to another report containing a comparison between several CSR Implementation Systems. This report argues that FWF offers the highest standards in implementing and verifying fair labour conditions, whereas other systems are all flawed in some way, especially BSCI.[117]

Concluding, the hidden conflict that the FFI/JKPL case study and the other campaigns reveal is the clash between competing CSR Implementation Systems.

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113. Letters by the *Raad Nederlandse Detailhandel* to the Cabinet and Parliament of 27 February 2008 and 7 April 2009. The last letter led to questions in the Parliament to the Minister for Development Cooperation, Mr Koenders. By 18 April 2009, these questions had not yet been answered. The letters and the MP questions are available (in Dutch) at: www.raadnederlandsedetailhandel.nl, visited on 18 April 2009.
114. M. Hearson, Clean Clothes Campaign, Cashing In – Giant retailers, purchasing practices, and working conditions in the garment industry, 25 February 2009; available at: www.cleanclothes.org, visited on 18 April 2009.
115. Questions by the MPs Voordewind, Ortega-Martijn and Gesthuizen, 18 February 2009, reference no. 2080913970; (in Dutch) http://static.ikregeer.nl/pdf/V080913970.pdf, visited on 26 February 2009.
116. Aldi and Lidl are members of BSCI.
117. K. Hudig, Clean Clothes Campaign, *Van papier naar praktijk – Controle van gedragscodes in de kleding- en sportgoederenindustrie* [From paper to practice – Monitoring compliance with codes of conduct in the textile and apparel industry], February 2007 (in Dutch); at http://www.schonekleren.nl/index.php?option=com_content&task=view&id=103&Itemid=0, visited on 20 February 2009. In this report the following CSR Implementation Systems are compared: FWF, ETI, SAI, FLA, WRC and BSCI. It reads: 'The BSCI was initiated by employer organisations, and currently is a typical example how it should not be done.… Moreover, its standard is below any standard of the other initiatives. Officially the goal of the initiative is studying complaints of abuses in the supply chain. However, it often seems that they (the initiators) sought to develop a means to counter justified critics, without addressing the abuses;' p. 22.

10.11 Concluding remarks

This case study has focussed on the discord between a modern Indian textile company and its Western customers, on the one hand, and two Dutch campaigning organisations liaising with Indian organisations on the other. The dilemmas presented were: (i) whether the filing of lawsuits against civil society organisations is an effective way of countering public campaigns and of avoiding reputation damage; (ii) to which extent civil society organisations should investigate the truthfulness of allegations concerning labour rights abuses; (iii) which role local labour law should play in pursuing a sustainable international supply chain; (iv) whether engaging in a battle concerning CSR standards leads to better CSR practices; and (v) to which extent a government can or should require accountability on the part of civil society organisations. The author will comment briefly on each of these dilemmas:

– The sequence of events in this case clearly demonstrates that the commencing of lawsuits to resolve a CSR dispute resulted in FFI/JKPL falling into a bottomless abyss. Its reputation had already been severely damaged. The fact that the employees were not unionised also raised questions. It has been argued that FFI/JKPL's attempt to litigate appeared to be a so-called 'Strategic Law Suit against Public Participation' – corporate endeavours by economic interests to stifle dissent towards projects by using court procedures[118] – but given the facts of the case this does not seem likely here. The court cases provided the campaigning organisations with new ammunition to gain the sympathy of many consumers, other civil society organisations and politicians. Moreover, it made both sides dig their heels in deeper and deeper. Dialogue became impossible. However, it was also quite understandable that FFI/JKPL wanted the Indian Organisations to substantiate their accusations, as FFI/JKPL suspected the information to be false and only to have been circulated because of other motives (*e.g.* attracting new union members or suggested by competitors). Yet, it would have been better if FFI/JKPL were to have started mediation behind closed doors to solve these issues rather than by litigation. Mediation tends to lead to a more cooperative attitude between the parties and often to a long-term solution;
– Generally, studies show that civil society organisations are publicly perceived as more reliable than politicians and businesses. This perception is based upon the assumption that these organisations are often uniquely well placed to furnish vital grass-roots early warning facilities such as where particular governmental or business measures may inadvertently result in a disturbance or impact in some other unintended negative way to

118. A. Perry-Kessaris, *Global Business, Local Law – the Indian Legal System as a Communal Resource in Foreign Investment Relations* (Ashgate, India, Aldershot, 2008) pp. 67-68.

local communities. Nonetheless, 'facts' publicly presented should truly be *facts.* Allegations based on anonymous hearsay evidence do not suffice to build a media campaign, nor can they constitute a basis for a constructive stakeholder dialogue. In the case at hand, it remained unclear whether the anonymous witness statements were truthful or imaginary. The Dutch and Indian Organisations provided nebulous responses when requested to substantiate their accusations, they could not provide any specific instances, nor were any complaints filed with the local police. Concrete facts need be presented in order to develop a fruitful dialogue. Only then will a company's management board be able to address any misconduct on the factory floor. In this case study the strategy of CCC/ICN was questionable: (new) facts presented by FFI/JKPL, the Indian Labour Inspection Department, and by the independent audit firm SGS and ASK, its NGO partner, were sidetracked as being 'unreliable'. When civil society organisations work on the basis of unfounded charges, they undermine their own reliability and thereby the position of NGOs in general. Even more so, if NGOs support the messages of other civil society organisations as happened in this case; *i.e.* many Dutch and other organisations (MVO Platform, Amnesty, FNV, etc.) publicly expressed their support for the CCC/ICN campaign, without having checked the research carried out by the Indian Organisations. Just as it cannot be tolerated that a government or a company can exclaim statements unsupported by facts or scientific findings, each civil society organisation also has a responsibility in this regard. Still, the CCC/ICN communications snowballed around the world. The campaign resembled a perfect marketing plan rather than a sincere effort to engage in a constructive stakeholder dialogue aimed at improving workers' conditions. Ultimately, the FFI/JKPL employees almost lost their jobs, while actually working in an SA 8000 certified company! At the same time, many other textile workers in the Bangalore area work in far less favourable circumstances and probably would have appreciated more support from civil society organisations;

– An understanding of local labour law systems is imperative for organisations fighting for better labour standards worldwide. The description in section 10.8 of the applicable legal and soft law standards exhibited a major cause of the misery in this case: the Indian Trade Unions Act and the related case law provide for a detailed system regarding trade union representation in collective bargaining. In this case, GATWU did not qualify as such. The accusation against FFI/JKPL that it did not respect employees' rights to collective bargaining was therefore unjustified. Moreover, the Indian legal system offers ample opportunity to execute one's legal rights if GATWU indeed were to have been recognised by FFI/JKPL. In addition to the fact that India is a state in which the rule of law applies, it is also the largest democracy in the world. Any changes desired by civil society with respect to Indian labour laws could probably be more effectively addressed through

political channels than by forcing one company to deviate from local labour law standards. It would be different, though, when examining a CSR case related to *e.g.* factories in a state governed by a dictatorial regime that does not allow for individual political rights, such as the freedom of expression or freedom of association. In that case, it would be difficult for civil society to change the political setting. Salaries and workplace conditions can certainly be improved through good CSR practices, but the establishment of unions will be difficult. Inventive solutions such as establishing workers' committees can improve the situation.[119] Furthermore, in failed states or weak governance zones, imposing CSR standards on local suppliers can indeed improve the local labour situation. It is recommendable to develop best practices – together with the local company and civil society,[120] or simply to avoid countries, such as Myanmar, where companies and civil society are unable to make a difference through CSR given the political situation;

– The harsh campaigns in the G-Star and Gildan cases have seemingly resulted in better CSR practices by the international textile suppliers and purchasers. In spite of this, it poses the question whether these results could not have been achieved in another way, for instance by engaging in a constructive stakeholder dialogue behind closed doors. No one party would then have been pushed into digging in its heels, partly out of loss of face considerations. Moreover, the local employees would have been spared a great deal of misery, such as losing their jobs because of cancelled orders. Hard-hitting campaigns specifically have a severe impact in the fashion industry, a sector that is vulnerable to varying designer trends and where brands can only survive with public support. Such campaigns are more suitable for targeting *e.g.* the oil industry, a sector with everlasting demand, fewer personnel, relatively easy money and large reserves of oil and assets. As a general observation it might be concluded that a public battle concerning CSR standards probably does not encourage companies' enthusiasm to improve their CSR behaviour. In the end, it is a company's management that determines its CSR strategy. Civil society may help companies to become acquainted with issues and solutions, but when it comes to opting for a specific CSR Implementation System, this really is a corporate decision. Campaigning organisations cannot claim a decisive vote therein. Their role as 'CSR aid' or a 'CSR watchdog' is essentially different from that of a company's management which has to balance 'planet people profit' concerns within a long-term perspective; and
– CSR has been developed – and is still developing – based on three pillars: (1) companies try to take business decisions in consideration of social and

119. Ma, *supra* note 94, p. 11.
120. The Kimberley process has found its way in several failed states. See: www.kimberleyprocess.com, accessed on 12 July 2010.

environmental concerns, thereby also trying to promote compliance with CSR standards further on in the international supply chain; (2) civil society tries to alert companies concerning any negative impacts that their activities might have, and – where possible – to cooperate with them in developing 'best practices;' and (3) governments design legislation to support corporate accountability and the development of best practices. Governments support this development by *e.g.* introducing sustainability reporting regulations, building platforms to encourage multi-stakeholder dialogue, and subsidising civil society organisations. As this case study has demonstrated, maybe the time has come for governments to require civil society to practice what they preach: following socially responsible standards as set out in codes of conduct, creating transparency as to their activities, supporting their claims by factual or scientific evidence, and by being willing to be held accountable for their acts. It could be argued that when a local company goes bankrupt due to severe campaigning, the multi-stakeholder dialogue and thus the civil society efforts to improve the local labour conditions have invariably failed. Who can be held responsible for that undesired result? Especially when governments subsidise civil society organisations, they have reasons to impose an 'NGO code of conduct' reflecting the issues raised in this case study, particularly the mindfulness of other (legal) traditions, factual substantiations of public communications, the transparency of activities and financial expenditures, and the acceptance of responsibility for their deeds.

Yet a final important observation is that civil society can profit from mediation and complaint mechanisms which are built into various codes of conduct (*e.g.* the OECD MNE Guidelines provide for mediation through NCPs), and CSR Implementation Systems (*e.g.* FLA, FWF, SA 8000). Legal tools cannot always play an important role in a mediatory setting, as CSR tends to cross state boundaries (whereas law generally does not), and CSR often aims to follow standards which are higher than the applicable local legal standards. Therefore, it might help mediators to use non-legal standards to reach wise decisions. Internationally recognised CSR codes of conduct such as the UN Global Compact Principles or the OECD MNE Guidelines, but also the widely-supported civil society document the Earth Charter may be of assistance. Additionally, searching for innovative solutions like establishing workers' committees as recently shown by SAI, or appointing an ombudsman – as in the conflict at hand – may have a positive effect on engaging in a constructive CSR stakeholder dialogue. Conflicts, like the one presented in this case study and in the other case studies recorded in section 10.10, can be avoided when the parties involved have opted for a constructive dialogue first or, if necessary, mediation at an earlier stage.

Annex 10.1 Applicable legal and soft law standards *re* the allegations

Labour Issue	Indian Law	Dutch Law[121]	ILO	OECD Guidelines[122]
Occupational Health & Safety	Factories Act 1948: - Health (Sec.11-20, Ch.III); - Safety in Factories (Sec.21-41, Ch.IV). Penalty will be levied for contravention. Workmen's Compensation Act: - workers compensation.[123] Karnataka Factory Rules 1969: - Health (Rules 16-56, Ch.III); - Safety applicable to different types of industry (Rules 57, Ch.IV).	Health and Safety Act 2007: - Mandatory risk assessment; - Consultation and information.	ILO Conventions (C),[124] C.155* (art.16.1 relevant for jeans manufacturing), C.161*, C.170*, C.184*: - Safety at workplaces, machinery and equipment; production processes. - Informing, training and consulting of employees; - Emergency management. ILO MNE Decl. §100)	Ch.IV §3, 4(b), V (environment): - 'Within framework of applicable law minimise risks & accidents and raise level of safety; - Duty to inform, communicate and consult employees.

121. The Netherlands has ratified 105 ILO Conventions. As regards industrial relations, the country is well known for its so-called 'polder model.' Although its name refers to the Netherlands' flat, rural landscape, in practice it refers to the traditional social dialogue and policy-making by consensus between the government, employers and trade unions. Dutch labour law is detailed but is found in scattered pieces of legislation. T. Claassens, The Netherlands, in: B.A. Hartstein, in *Labour & Employment in 31 Jurisdictions worldwide*, 2007, p. 122.
122. The OECD MNE Guidelines were inspired by many international conventions and declarations, *e.g.* Chapter IV on Employment and Industrial Relations was based on the ILO Conventions. See OECD Guidelines Commentaries §20-25, §30 and §37. India is not an OECD Member nor an adhering country (Box 4). However, as demonstrated in section 10.6 *supra*, the Guidelines can be of relevance to Indian suppliers.
123. The Workmen's Compensation Act entitles workers to compensation for damage suffered from any occupational hazards contracted during the course of the employment, including any accident happening during the course of employment.
124. Those ILO Conventions marked with * are not applicable to India as this country had not ratified them by February 2009. A UN (and hence ILO) member state is only bound by the ILO Conventions that it has ratified and by the ILO core principles (see: *supra* note 91 and 92).

Labour Issue	Indian Law	Dutch Law	ILO	OECD Guidelines
Working hours and paid leave	Factories Act-1948 and Factories Rules: - Working hours (Sec.51-54, Ch.VI); - Annual leave with wages (Sec.79).	Working Hours Act, Civil Code: - Standard of 40 hrs/wk, optional deviation with consultation; - Minimum number of paid holidays.	C.1, C.4, C.14, C.30*, C.106*, C.132*, C.175*: - 8hrs/day, 48 hrs/wk (40 hrs/wk as reduced later on to 36 hrs); - Minimum of 24 consecutive hrs leave every 7 days; - Annual paid holiday.	Ch.II: - Referral to the laws and regulations applicable in the host country.[125]
Protection against Discrimination	Equal Remuneration Act 1976 prohibits discrimination in payment of salary or recruitment (Ch.II).	General Act on Equal Treatment, Equal Opportunity Act: - Prohibition of discrimination on any ground.	C.100, C.111: - Equal remuneration; - Equal opportunity and treatment re employment and occupation.	Ch.IV: - Precludes any form of discrimination; several types of discrimination are outlined.
Payment of fair wage	Government of Karnataka Notifications under the Minimum Wages Act1958 (Sec.12): - Minimum wages per category of employees in different industries in different local zones are annually set.[126]	Minimum Wage Act 1968.	C.95*, C. 131*, C.100: - Payment of wage in full & timely manner, setting minimum wage; - No clear provision on wage level; - Equal remuneration	Ch.IV: - Observance of local standards in same industry is suggested.

125. OECD MNE Guidelines, Commentary §2: 'Obeying domestic law is the first obligation of business. The Guidelines are not a substitute for nor should they be considered to override local law and regulation. They represent supplementary principles and standards of behaviour of a non-legal character, particularly concerning the international operations of these enterprises. While the Guidelines extend beyond the law in many cases, they should not and are not intended to place an enterprise in a situation where it faces conflicting requirements.'

126. The Payment of Bonus Act, Payment of Gratuity Act, and Payment of Wages Act also relate to wages. With regard to contractual matters, the law under the Contract Act (section 27) clearly bars any agreement in restraint of employment.

Labour Issue	Indian Law	Dutch Law	ILO	OECD Guidelines
Freedom of Association (FoA) and Collective Bargaining (CB)	Trade Unions Act of 1926: - Registration (Sec.4) and recognition of trade unions.[127] - It would be considered Unfair Labour Practice if an employer is showing partiality or granting favour to one of several trade unions attempting to organise his workers or to its members, where such a trade union is not a recognised trade union (Sec.i2(b)). - Dispute settlement procedure for workers provided by Trade Union Act and Industrial Dispute Act (Sec.18).	Constitution (Sec.8), C.87, C.98, Works Council Act, Civil Code, Collective Agreement Act 1927, Extension of Collective Agreement Act 1937;[128] - FoA and protection of employees' representatives; - Right to establish trade unions, works council & European Works Council; - Recognition of CB agreements.	C.87 (art.2), C.98, C.135, C.141* (art.3), C.154: - FoA for workers and employers; - Protection against anti-union activities and protection for representatives; - Right to CB. FoA and CB are declared as 'core principles' in 1998 ILO Declaration on Fundamental Principles and Rights (applicable to all ILO Members).	Ch.IV: - Referral to ILO Conventions on FoA and CB.

127. See also: *supra* note 8.

128. The 1927 Act recognises the binding force of collective agreements over individual contracts. It precludes employers and employees from agreeing contrary to the collective agreement. The 1937 Act vests power in the government to extend the 'binding force of a collective agreement to the personnel of all enterprises in a certain sector of the economy: See *e.g.* Antoine T.J.M. Jacobs, *Labour Law in the Netherlands* (Kluwer, The Hague, 2004), p. 145; and Blanpain (ed.), Collective Bargaining and Wages in Comparative Perspective: Germany, France, The Netherlands, Sweden and The UK, in: Bulletin of Comparative Labour Relations: Kluwer Law International 2005, p. 96. Whether a union can claim a seat at the table for negotiating a collective bargaining agreement is determined by jurisprudence and depends on several factors, such as number of employees it represents also in relation to other unions. See: P.Th. Mantel, 'Recht op toelating tot CAO onderhandelingen: Meer dan representativiteit?' (Right to Collective Bargaining: More than representation?), in *Magazine for Labour Law and Social Affairs*, SMA February 2008-no.2, p. 74-81

Labour Issue	Indian Law	Dutch Law	ILO	OECD Guidelines
Protection against Dismissal	Summary dismissal of any employee is not possible. Disciplinary dismissal actions are governed by Industrial Disputes Act 1947.	Civil Code, Act on Notification on Mass Layoffs: - Mandatory notification with administrative bodies for individual and mass layoffs; - Specified grounds for dismissal; - Protection against unfair dismissal.	C.158*: - Protection against unfair dismissal;[129] - Specified grounds for dismissal; - Mandatory notification with administrative bodies and consultation with workers' representatives in case of (collective) dismissals. - No arbitrary dismissal procedures (ILO MNE Decl. §27)	Ch.IV: - Enterprises should file notice to employees and their representatives re potential mass lay-offs.
Worker Participation/Co-determination		Works Council Act: - Rights to information, consultation and approval.[130]	C.154, C.158*: - Mandatory consultation with workers' representatives in case of (collective) dismissals.	Ch.IV: - Consultation and cooperation on matters of mutual concern is recommended; - Providing information re substantial changes in operations.

129. Non-valid reason are: union membership, illness, injury, pregnancy, participation in legal proceedings against employer.

130. Besides unions, works councils play an important role in the Dutch labour system. The Works Council Act prescribes that any company or business unit employing 50 employees or more is obliged to establish a works council, which consists of elected employees. A works council convenes with the management board at least six times a year. The management must consult the works council on material business decisions that might affect employees, such as reorganisations or the sale of (part of) the company. Moreover, decisions concerning a change in labour conditions or working hours require the works council's consent. The Netherlands is quite advanced in works council legislation and practice. Although it is a common European approach, only in Germany and the Netherlands are works councils taken quite seriously by employers and the courts. Their rights and duties are distinct from those of unions. In other European countries, like the UK and France, unions play the major role in defending labour rights and standards.

Chapter 11.* Corporate social responsibility: sustainable water use

We never know the worth of water till the well is dry.
Thomas Fuller, *Gnomologia*, 1732

11.1 Introduction

11.1.1 Background and objectives

Less than 3 per cent of the world's water is fresh – the rest is seawater and undrinkable. The largest part of this freshwater (83 per cent) is, however, frozen, locked up in Antarctica, the Arctic and glaciers, and is not available to man. Thus, humanity must rely on 0.5 per cent of world's water for all of man's and ecosystem's freshwater needs. Although the world is not 'running out of water', it is not always available when and where people need it. Climate, normal seasonal variations, droughts and floods can all contribute to local extreme conditions (WBCSD, 2005, p. 1). As a matter of fact, water scarcity affects one in three people on every continent (WHO, 2010). Freshwater scarcity is not limited to – stereotypical as this may seem – sub-Saharan developing countries; also in Western society, where potable water seems to come out of the tap endlessly, access to unlimited amounts of freshwater is not assured at all times (EEA, 2009). Water overuse by farmers, governments and industries is damaging the environment in many major basins and, ultimately,

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threatening a reliable supply of water. The situation is getting worse as the need for water rises along with population growth, urbanisation and increases in household and industrial use. Some people in water-stressed areas have the economic resources, skills and opportunities to address their water problems, but many millions, such as small farmers and agricultural labourers in developing countries do not (UNEP, 2006 and 2008).

One quarter of the global population lives in developing countries that lack an adequate infrastructure to provide water from rivers and aquifers (WHO, 2010). In 2000, the UN set the MDGs in order to make development goals more tangible (see section 1.6.2 of this book). MDG 7 (which calls for ensuring environmental sustainability), target 10 aims to halve the number of people without sustainable access to safe drinking water and basic sanitation by 2015. Water scarcity could threaten progress towards this target (Camdessus, 2009). It has also been argued and laid down in many national legal systems, that access to freshwater is a basic human right.[1] In 2008, the Netherlands also announced that it would recognise the right to water as a human right (MinBuza, 2008).

Traditionally, regional water management and the access to and the use of water by individuals and companies are considered public issues, and hence usually administered by local authorities. People and business are competing users of water. Industrial use of water increases with country income, going from 10 per cent of total water use for low-income and middle-income countries to 59 per cent for high-income countries (UNESCO, 2003, p.19). Industry is thus a substantial user of water, and is also regarded as an important contributor to water pollution (Hildering, 2004). The question emerges: what if companies use so much freshwater in a certain area that their consumption threatens to interfere with individuals' access to water (MDG 7)? As part of the answer it has been argued that water management calls for a combined approach by governments and business (WHO, 2010).

The main objective of this chapter is to explore the role of today's companies in relation to freshwater. Because business leaders make decisions every day that can affect water, it is important to identify where such decisions

1. *E.g.* Ethiopia, Gambia, South Africa, Uganda, Zambia, Uruguay and Ecuador have enacted the right to access to drinking water in their constitution or other national legislation. The right to water has been recognised in a number of non-binding UN resolutions and declarations. The most important one is the 2002 General Comment #15 by the UN Committee on Economic, Social and Cultural Rights, which defines the human right to water as "entitl[ing] everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses." However, advocates have highlighted the need for a binding UN convention or treaty on the human right to water that would inscribe this right in international law as both a human right and a public trust (Pacific, 2009, p.15 and World Water Council). A UN General Assembly Resolution No. 10967 dated 28 July 2010 has recognised the right to access to clean water and sanitation as a human right. In 2008, the government of the Netherlands has also announced that it is to recognise the right to water as a human right (MinBuza, 2008).

can also lead to improvements in the water sector (UN WWDR-3, 2009). Companies themselves have started to recognise that they can have a positive impact on preserving water resources and in granting people access to water (WBCSD, 2005). The research addresses the question to what extent and how companies can bear responsibility for their impact on water resources as part of CSR. This question is particularly relevant when their impact influences public access to water in areas with freshwater scarcity and/or weak government. What are companies' main drivers to lower their water use and to offer locals access to water? Which are the best tools to address this issue? And, what can we learn from best practices developed by Dutch companies?

11.1.2 Methodology and study design

Section 11.2 provides general background on public and private responsibilities in regard to water on the basis of literature research. It addresses whether a link can be established between corporate water use and environmental changes, such as water scarcity or surplus. Links to European and Dutch law have here and there been included as example in order to make theoretical concepts more tangible. A few cases concerning corporate mismanagement of water resources will be discussed with a view to drawing attention to the current discussion concerning the use of water by corporations. Section 11.3 elaborates on water as a CSR-theme. On the basis of desk research study, it explores what companies' main drivers are to lower their water use. It also focuses on tools developed by the international community aimed at the reduction of corporate freshwater use, including CSR policy guidelines, water use calculation methods and annual reporting tools. This section will also reflect on a recent study on *corporate reporting* by 100 of the world's largest companies on water use and their dependency on water.

In section 11.4, the discussion part, the results of an explorative study searching for *best practices* and the extent to which companies indicate that they bear responsibility for their impact on water resources are evaluated. The purpose of the study was to gain tangible information on the subject of sustainable water use. As a Dutch researcher, the author has elected a group of multinational companies with global operations, the parent company of which is registered in the Netherlands.[2] Firstly, their activities were analysed in

2. *I.e.* ABN AMRO, Aegon, Ahold, Akzo Nobel, ASML, Corio, DSM, Fortis, FrieslandFoods, Heineken, ING Group, KPN, Randstad, Philips, Reed Elsevier, Royal Dutch Shell, SBM Offshore, TomTom, TNT and Unilever. At the time of the study, all of them were publicly traded on the Euronext Amsterdam Stock Exchange and listed in the AEX Index, except for one (Friesland Foods). The research focuses on Dutch companies for several reasons. Due to the fact that the Netherlands basically constitutes of low lying lands, for years water has been of big relevance for policy and decision makers; a continuous fear of floods exists and, due to land drainage, even the level of the groundwater has to be controlled on a permanent basis. Furthermore, although the Netherlands is a small country, its total water footprint is →

regard to water use and pollution in order to understand the relationship between each of these companies and water. Subsequently, it was examined in which way these companies are addressing the sustainability issue of water. The research made use of publicly available information, including press releases, annual reports and sustainability reports, corporate codes of conduct, and other information. As the purpose of the explorative research was to provide concrete information on corporate water policies and examples of best practices to illustrate the theoretical part of the study, the research did not comprise testing any corporate disclosures against possible other information available from (NGO) sources. An overview of the results is included in Annex 11.1. This article ends with a conclusion in section 11.5.

11.2 Corporate impact on water; public and private responsibilities

11.2.1 The difficulty of directly linking corporate water use to environmental changes

11.2.1.1 Waste water management

Virtually all developed countries, but also emerging economies, have regulations that seek to manage hazardous waste, including waste water. Although not all waste water constitutes hazardous waste, in the Netherlands strict environmental regulations have been implemented in the *Wet Milieubeheer* (Environmental Management Act), partly derived from European Directives. Companies are required to obtain a licence for their operations, which licence generally addresses all issues related to water, *i.e.* extracting water from aquifers or rivers, as well as the manner, the amount, the quality and the temperature of waste water (see also Krozer, 2009). Compliance is monitored by regulatory agencies. The emission of polluted water without a licence is prohibited, and can result in criminal sanctions. Typically, such regulations are designed to prevent direct damage to the environment. The effects of the unregulated dumping of hazardous waste water are generally tangible on a short term basis. When dumped in a river, the waste can impact a large area as for instance the degradation of the well-known Yangtze River in China has proven (Young, 2002). Also, the causal link between environmental damage and a company

quite high (estimated at 2300 m^3). Because of the worldwide business operations of its multinationals and its substantial international trade, about 89 per cent of this footprint is outside of the Netherlands (Water Footprint Network, 2010). Since multinationals have a lot of influence on the Dutch water footprint it is interesting to study Dutch corporate behaviour when it comes to water use (Van Oel *et al*, 2009). Besides, given that sustainable corporate water use can be considered part of CSR, it is interesting to examine Dutch companies' practices as a number of them have good rankings on the Dow Jones Sustainability Index.

dumping hazardous waste can be determined relatively easily. Therefore, governments have laid down standards for waste water with maximum levels of toxic contents to prevent damage to human, animal and plant life and health.

11.2.1.2 Management of freshwater consumption

When it comes to the use of freshwater, however, the direct impact on the environment is not as easy to determine as was the case with the dumping of hazardous waste water. Nor is water usage by one company within a region easy to relate to certain changes to the environment. This is due to several regional and seasonal characteristics of water consumption and its impact on the environment, such as the source of water used for consumption, the level of consumption, and the general availability of natural freshwater, which greatly depends on a region's climate, the type of soil, the groundwater level, the density of the population, etc. Therefore, it would be extremely difficult to address corporate freshwater consumption and potential limitations on the use of freshwater in general legislation. Nonetheless, there are some examples of government action in protecting the environment by (temporarily) limiting corporate freshwater consumption. For instance, during the summer of 2003 in the Netherlands, electricity plants were forced to temporarily halt their production, as groundwater was otherwise used for cooling down their production systems. Due to continuous high temperatures and no rainfall, groundwater levels had fallen low and water used by power plants would – when discharged to open surface waters – heat up the general water temperature (which was then already high) to a potentially dangerous level (UNEP, 2004). Likewise, the French government was forced to ration water use as a precautionary measure facing one of its severest droughts ever recorded after consecutive periods of high temperatures and no precipitation (Boselli, 2006). Generally, however, it will be difficult to attribute environmental changes in one watershed to the freshwater consumption of a specific enterprise.[3]

11.2.1.3 Groundwater control management

Water 'stress' can vary greatly per region. Where some regions are hampered by drought, others suffer from a surplus of groundwater. Corporate extraction of groundwater affects the groundwater level. However, sometimes a company's decision not to extract water also impacts groundwater levels. In the Netherlands, due to land drainage, water management also involves controlling the surplus of groundwater. Interestingly in this light, there is a legal case concerning the responsibility of a Dutch multinational chemical company, DSM, to resume

3. A watershed is the divide separating one 'drainage basin' *or* 'catchment area' from another (Reference Library).

pumping groundwater. Because of new technologies, the company did not need to use its licence to extract groundwater anymore and had communicated its intention to stop the process to the local authorities. In response, the Province of Zuid-Holland ordered DSM to continue pumping groundwater to avoid flooding in the region. The Province invoked the company's social responsibility in this respect and the fact that permission for pumping had been granted to the company for more than 90 years. The company challenged the order. In June 2007, the Civil Court held that the legal permission to pump water does not imply a legal obligation to pump, but that DSM could be held liable for any damages caused by stopping the pumping. The Court added that groundwater control is primarily the responsibility of government. The authorities appealed the verdict. Meanwhile DSM was still obliged to continue pumping groundwater at its own expense (DSM, 2007). By mid 2009, an amicable agreement was reached by DSM and the authorities to jointly solve the groundwater problem (Delft, 2009; Hoogheemraadschap, 2009).

11.2.2 Responsibility of governments and enterprises; a thin line?

11.2.2.1 Government procedures for project approval in EU

The previous paragraph gives rise to the question whether water management is to be considered a purely governmental task or perhaps a shared responsibility of government authorities and business society. In the EU, the Water Framework Directive establishes a framework for the protection of inland surface waters, transitional waters, coastal waters and groundwater (EU Water Framework Directive, 2000). In addition, before companies can start a new project, such as a production plant or building a dam, they mustapply for consent and permits through governmental approval procedures. Such procedures deal with many aspects of a project, amongst which its environmental impact. Environmental impact has by law to be assessed, *i.e.* the so-called 'environmental impact assessment' (EIA; EC EIA Directive). Article 3 of this Directive stipulates that an EIA should identify, describe and assess the direct and indirect effects of a project on *inter alia* ground water. Once a project has been formally approved and once the enterprise is up and running, it pays for its water consumption, alongside other municipal or national taxes. In the Netherlands, water supply and management, including the regulation of groundwater and river levels and the maintenance of dikes, dams and (canal) locks, are considered to be government tasks (VROM). Consequently, the supervision of the overall situation and any decision concerning precautionary measures, such as water rationing, are taken by the State. There is no defined role for enterprises therein other than adapting to given situations. At the same time, however, the European water industry also feels a responsibility.

The European water industry has also realised that water scarcity can generate (business) risks. Its representatives, Eureau, have indicated that they do not believe the present use of water to be sustainable. In a drive to reconcile the EU agricultural policy with the Water Framework Directive and hoping to pave the way for policies on sustainable use of water, Eureau urged farmers to record their exact water consumption and to opt for more efficient irrigation methods (EurActiv, 2009).

11.2.2.2 Weak governance zones: CSR and Ruggie Report

There is a difference between properly regulated countries and so-called 'weak governance zones' (OECD, 2006).[4] In the latter case, an enterprise enters the field of corporate responsibility. A report by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Professor John Ruggie, provides a solid basis for determining what can reasonably be expected of companies in respect of environmental and social responsibilities (Ruggie, 2008; see chapter 7 of this book, in particular section 7.5). It distinguishes between a government's duty to protect its citizens against human rights violations and the companies' duty to respect the human rights within their sphere of influence. Applying this framework to the issue of freshwater means that it is first of all a government's duty to provide its people with access to freshwater and to manage its open and underground waters. Protection against overconsumption by industry or pollution of water resources is part of that duty. Many countries have legislation in place dealing with this duty. Companies, on the other hand, have the duty to respect human rights. Respecting also entails corporate due diligence to prevent activities with an adverse human rights impact (Ruggie, 2008, p. 17). In practice, this means that a company´s freshwater consumption pattern that deprives people of access to freshwater would lead to a human rights' violation, which could be grounds for corporate liability. As mentioned before, it can be difficult to attribute the deprivation of access to water to one cause. However, in the case of a company polluting freshwater sources, human rights violations would probably be easier to demonstrate, *e.g.* right to life, access to water and food. A well published case concerned the Shell operations in the Ogoni Delta in Nigeria which were claimed to have polluted freshwater sources and damaged food supply (Lambooy and Rancourt, 2008 and *Wiwa v. Shell*). See the case study in chapter 9. Nigeria could be qualified as a weak governance zone at the time. Two other cases in which companies were accused of mismanaging water resources are set out below, concerning, respectively, a water stressed region in India and a weak governance zone in the Ivory Coast.

4. Term used by the OECD, defined as an investment environment in which governments are unable or unwilling to assume their responsibilities.

11.2.2.3 Coca-Cola in India

In 2003, Coca-Cola and its subsidiaries operating in India were accused of extracting groundwater causing severe water shortages for the local community and putting thousands of farmers out of work. Coca-Cola was also accused of illegally discharging its waste water, thereby polluting groundwater and soil (Indian Resource Center, 2004). In addition to calling for the permanent closure of the Coca-Cola bottling plant and compensation for damages, the campaign also demanded that the Coca-Cola company be held criminally liable for its actions in Plachimada (Indian Resource Center 2008). Various cases were brought to trial in a number of districts in India. In particular, the decision of a municipality not to renew Coca-Cola's licence to operate was challenged before the High Court of Kerala State in December 2003 (*Permatty Grama Panchayat v State of Kerala)*.[5] The Court found that the answer to the over-exploitation of groundwater and the possible justification for the decision of the municipality to revoke the licence, should be based on public interest (Right to Water, 2008). The Court recognised that the State as a trustee is under a legal duty to protect natural resources, which cannot be converted into private ownership. In addition, the Court added that the government had a duty to "protect against excessive groundwater exploitation and the inaction of the State in this regard was tantamount to infringement of the right to life of the people guaranteed under article 21 of the Constitution of India". In its ruling, the Court ordered Coca-Cola's plant to stop drawing upon groundwater within a month, ruling that the amount of water extracted by the plant was illegal. At the same time however, it ordered the municipality to renew the licence and not to interfere with the functioning the company as long as it was not extracting the prohibited ground water. In an appeal lodged by Coca-Cola, the divisional bench of the High Court granted permission for the company to extract 500,000 litres of groundwater a day in 2005-2006. The Court also affirmed that the municipality was not justified in cancelling Coca-Cola's licence to operate until a full scientific assessment had been made of the facts (Right to Water, 2008). In October 2008, it was reported that the Kerala Minister of Water Resources had agreed to set up a committee to look into the claims by the community affected

5. It was also reported that the bottling plant in Plachimada, Palakkad district, was shut for over a year (2004-2005) after protests against the company. Rival beverages company PepsiCo had also come under fire in Kerala State over water consumption by its plant in the same district. In 2010, a Kerala assembly panel said that PepsiCo should cut down the use of water by 60 per cent at its bottling plant at Puducheri (The Economic Times, 2010; Global Exchange Newsletter, 2006). The Kerala ban was the harshest across India, where six other states had also called for partial or complete bans on Coca-Cola and Pepsi products. The NGO, The Energy and Resources Institute, based in India, was to conduct an independent assessment of its water management practices in India (The Energy and Resources Institute, 2008).

by Coca-Cola's operations (India Resource Center, 2008). By March 2010, the committee recommended that Coca-Cola be held liable for USD 48 million for damages caused as a result of the company's bottling operations in Plachimada (India Resource Center, 2010). There are many sides and aspects regarding the Coca-Cola saga in India. An interesting overview has been published in CSREM (Hills and Welford (2005); Burnett and Welford (2007)).

By 2010, the various parties were still fighting each other in court. At the same time however, the problems in India had ignited the start of a worldwide collaborative partnership between Coca-Cola and the World Wide Fund for Nature (WWF) aimed at understanding watersheds and the complexity of water as an ecosystem service, sharing information on the water usage of Coca-Cola, working with local communities, and developing a common framework to preserve water sources (Senge, 2008).

In its 2006 Sustainability Review, Coca-Cola indicated that its consumption of water in India had been reduced by 35 per cent from 1999 to 2006. In its 2007-2008 Sustainability Review, Coca-Cola reported that it had established a foundation in India focusing on "water stewardship". And in its 2008-2009 Sustainability Review, the company stated: "In India, our goal is to be a "net zero" user of groundwater by the end of 2009 by recharging the amount of groundwater used in our operations through supporting hundreds of rainwater harvesting projects. We also support drip irrigation and other initiatives like this step well in Jaipur". Coca-Cola is also one of the partners of the 'CEO Water Mandate' (section 11.3.4). It appears, the complainants have succeeded in gaining the company's attention.

11.2.2.4 Trafigura in Ivory Coast

Another infamous incident is the 2006 Ivory Coast scandal following the illegal dumping of 400 tonnes of toxic waste by a UK-based multinational company, Trafigura. The toxic waste was dispersed at different dump sites around Abidjan, in and near water streams and fields growing food. The Ivory Coast government reported that 15 people had died because of the pollution and 100,000 had to seek medical treatment. In February 2007, the Ivory Coast government signed an agreement with Trafigura, thereby releasing the Trafigura's directors from legal liability, in exchange for a sum of around £100 million "for damages sustained and the repayment of pollution cleaning costs." In addition, a group action by African victims was filed before the UK High Court. Their claims alleged negligence by Trafigura and that the nuisance resulting from its actions had caused the injuries. On 23 October 2008, Trafigura agreed to an order of the UK High Court that it would no longer defend its actions of having the toxic waste dumped in water ways and fields (Leigh Day & Co., 2008). A settlement was reached in September 2009 with a group of approximatly 30,000 Ivorian victims: Trafigura agreed to pay them

EUR 33 million as compensation (NOS, 2009). In the meantime, an Ivory Coast court has ordered two Ivorian men to be jailed for their roles in this scandal (October 2008), and a UN Report had confirmed that the dumping had caused 108,000 people in the Ivory Coast to seek medical attention and that the Dutch authorities had not acted properly by allowing the ship to set sail with the toxic load. The report stated: "that there is strong *prima facie* evidence that human rights violations occurred as a result of this incident. Indeed, there is a strong basis to conclude that the deaths and illnesses were directly and indirectly linked to the dumping of the waste" and "at the very least, due diligence should have triggered additional inquiries into Tommy Ltd.'s [*i.e.* the Ivorian partner who took care of discharging the waste] capacity to treat waste in an environmentally sound manner (UN Expert Report, 2009, p. 18). By July 2010, criminal law proceedings in the Netherlands resulted in a sentence in which severe penalties were given (case Probo Koala (Broom II)).[6]

11.3 CSR: sustainable water policies and tools

11.3.1 CSR

Section 11.2 has demonstrated that it is quite difficult to determine fixed boundaries as to where public responsibilities end and corporate responsibilities commence in regard of corporate water use: (i) legislation and policies on how water is managed vary from country to country; (ii) different types of industries impact water in different ways; (iii) it is difficult to link environmental change in any direct way to the water consumption of any one enterprise; (iv) complications arise when multinationals operate in weak governance zones. Studies indicate that while a variety of factors positively influence voluntary environmental management, regulatory pressures are among the most important in achieving this (Jones, 2010). It could be argued that companies bear a limited legal responsibility for the environmental consequences of their water consumption in countries with effective management authorities. They do of course bear a moral responsibility. The moral responsibility seems to increase in weak governance zones or where the water supply is limited: CSR then tends to become more important for sustainable water management.

6. The Court fined Trafigura one million euro for exporting dangerous chemical waste. The captain of the Probo Koala, the ship that delivered the toxic waste in Ivory Coast, and a key employee of Trafigura were sentenced suspended jail terms of five months; in addition, the latter was fined 25,000 euro. See the sentence by the Amsterdam criminal law court at http://www.rechtspraak.nl/Actualiteiten/Uitspraak+in+zaak+Probo+Koala+%28Broom+II%29.htm and http://jure.nl/bn2149, both sites visited on 27 July 2010.

CSR is often viewed as the 'missing link' in resolving the disconnect between economic growth under market economics and its negative consequences. Where too much emphasis is placed on economic development based on growth in material consumption, not enough attention is given to ecological limits and social constraints. There are many understandings of what 'CSR' means: from sound environmental practices to community based business approaches (Kumudini *et al*, 2007). In this chapter, the term CSR is used to indicate the intention of a company to take ecological and social aspects in consideration when doing business and to strive for an increase in value in all three dimensions: Planet, People and Profit (SER, 2000, pp. 17-18). CSR aims at facilitating the move towards a socially and ecologically sustainable future. Furthermore, in this chapter, all private business entities are referred to as 'companies', noting that these include an array of different legal and operating structures.

As water stress is increasingly viewed as a potential threat and constraint to economic growth, healthy ecosystems and social justice, sustainable water policies (*i.e.* in which companies use water with regard to the environment and local communities), can be considered part of CSR. In addition, the world leaders' concern with access to water and sanitation also requires a significant investment in water systems, and the private sector has been called to participate therein. This offers business opportunities as well as challenges: "Corporate leaders who prepare careful water strategies for managing medium-term business risks and opportunities will not only be prepared to meet the future – gaining advantage in some of the key, and most water-constrained, global markets – but can also help shape it" (UN WWDR-3 2009, p. 36).

11.3.2 Corporate water use: why reduce it?

Generally, one can discern various drivers for companies to reduce their freshwater consumption and to develop policies on sustainable use of water.

Firstly, self-interest: as freshwater is becoming increasingly scarce, prices are going up. How companies pay for their water consumption differs *per* country, *i.e. per* m3 or according to a fixed price system (Bates *et al*, 2008). In many places, artificially low water prices are rising as subsidies are phased out. Water prices are increasing to cover the full cost of operating and maintaining water delivery systems such as storage and treatment (CERES, 2009, p. 16; EurActiv, 2009, EEA, 2009, p. 46). Freshwater constitutes a cost and therefore any reduction is simply beneficial to a company's bottom line (see Gege, 2004, for a review of over 1,000 examples of cost reductions achieved through environmental management).

A *second* driver is that many sectors need (fresh)water for the production of goods or in their industrial processes. They are dependent on the continuous availability of water. Declines or disruptions in water supply can undermine

industrial and manufacturing operations where water is needed for production, irrigation, material processing, cooling and/or washing and cleaning. The semiconductor industry, for example, uses vast amounts of purified water in fabrication plants for washing the silicon wafers at several different stages in the fabrication process and for cooling various tools; a brief water-related shutdown at a manufacturing plant could compromise all material in production for an entire quarter (CERES, 2009, p. 11). Furthermore, traditional estimates often fail to address water risks embedded in the supply chain: the risks are often hidden in raw material inputs or intermediate suppliers. Another factor that is often overlooked is water quality. As the quality is critical in many production systems, contaminated water supply will require additional operational costs for pre-treatment. When treatment options or alternative sources water are not feasible options, the operations will be disrupted or require relocation. In addition, water shortages can curtail hydro-based power production, and by extension, businesses that rely on those power sources. Other power plants, operating steam turbines fired by coal, natural gas, or nuclear energy, depend on the supply of cooling water (CERES, 2009, p. 12). Consequently, it is in companies' own interest to be aware and alert of pending water shortages and to act proactively to prevent them and to reduce related risks. Obviously, dependencies differ *per* region and *per* line of business.

An important *third* driver is a company's wish to maintain a good reputation. As with pollution, freshwater scarcity caused by over-extraction of groundwater (Hildering, 2004) and global warming (Bates *et al*, 2008) are generally perceived as being caused for a large part by the industrial sector. Companies are increasingly being called upon by civil society to reduce their impact on water and the environment (see the case studies in Tulder and Van der Zwart, 2006). In addition, the competition for clean water increases due to declining water availability and quality. Hence, tensions can arise between businesses and local communities, particularly in developing countries where local populations often lack access to safe and reliable drinking water. Local conflicts can damage brand image, lead to obligations to pay compensation to local communities for polluting the water or causing water shortages, or even result in the loss of licenses to operate as was demonstrated in the Coca-Cola case in section 11.2.2. As public interest grows, companies' water practices are subjected to greater scrutiny. For instance, public criticism was directed at Starbucks when the news came out that its 10,000 coffee shops 'wasted' 23.4 million litres of water daily due to the 'open tap' or 'dipper well' policy. Despite the company's claim that this method reduces bacteria growth in the taps making the water safer, there was ample negative media coverage on the issue (CERES, 2009, p 14; BBC News 2008, James 2008).

A *fourth* driver to accelerate the implementation of sustainable water practices is the risk that – due to increased awareness and concern around the ecological impacts of water withdrawal and discharge – communities will

put pressure on local authorities to reapportion water allotments to support ecosystem functions, to consider new regulations, and to develop water markets that cap usage, suspend permits to draw water and lead to stricter water quality standards. Complying with new requirements may lead to additional production cost. Moreover, large-scale users face the risk that their historical access to water can be altered by policy shifts and legal rulings.[7]

A *last* driver could be the following. To address global water issues and to achieve MDG 7(10), large investments need to be made in water management. Presently, these are covered for about 95 per cent by public capital, but are still insufficient. Private capital is hardly used despite international policies that call for more private funding (Krozer *et al*, 2010). A study into the existing institutional arrangements in developing Asian countries concluded that they have not adequately facilitated the technologies or social behaviours needed for adequate sanitation (Kumudini *et al*, 2007). The authors of this study argued that businesses can play a key role, and that there are opportunities for diverse businesses to leap frogg this emergent stage. Consequently, these appeals present an additional challenge to the companies worldwide to contribute their resources and capacities to solving global water issues.

11.3.3 General CSR guidelines and water management standards

In today's world there are many general guidelines setting forth how companies should behave in order to be good, socially responsible corporate citizens. When it comes to the technical management of the environmental impact of business operations, a widely followed standard is the 'ISO 14001' certification (Marinova *et al*, 2006; Fresner, 1999).[8] One of the environmental factors taken into account is water. In the field of CSR standards, the most commonly used are the OECD MNE Guidelines (OECD MNE Guidelines; Chapter V concerns Environment) and the UN Global Compact Principles (UN Global Compact Principles; Principles 7-9 concernr environmental challenges). The Global Compact started the so-called 'CEO Water Mandate' (see section 11.3.4).[9] Companies also draft their own codes or guidelines. Furthermore, the 'ISO

7. For instance, China's Five-Year Plan for 2006–2010 requires that the total volume of certain pollutants be decreased by ten per cent, and water usage by industry be decreased by 30 per cent by 2010 (USDOC).
8. ISO 14001 Environmental Aspects Management System is a management tool for controlling and reducing the environmental effects of a company's operations. For more information please visit: www.iso.org, accessed on 10 July 2010.
9. The GC was an initiative of the former Secretary-General Kofi Annan to globally promote corporate social responsibility. It consists of ten principles of which three relate to the environment. Although neither water nor any other specific environmental issue is mentioned in the text, the commentaries do refer to the preservation of aquatic ecosystems and waste management as environmental challenges (UN Global Compact, 2008).

26000 Guideline' will offer a comprehensive set of practical guidelines on social responsibility for both public and private organisations. The current working document refers to waste water management as well as water conservation.[10] The levels of detail and commitment differ per guideline – obviously ISO 14001 certification requires more commitment than meeting the Global Compact requirements. However, all mention water management, comprising of water waste management and freshwater consumption, as a key action for reducing a company's impact on the environment.

11.3.4 Corporate initiatives for a shared water managment

Recent business initiatives have been developed to support sustainable water management. For example, public-private initiative the '*CEO Water Mandate*' launched at the 2007 UN Global Leadership Forum. Some of the world's largest companies urged their business peers everywhere to take immediate action to address the emerging global water crisis. The project is designed to help companies better manage water use in their direct operations and throughout their supply chains. It asks companies to make progress in six areas: direct operations, supply chain and watershed management, collective action, public policy, community engagement, and transparency. More specifically, endorsers of the initiative (50 by mid 2010) pledge to set water-use targets, assist suppliers with water-efficiency practices and partner with governments, policy makers and community groups to address water shortages and sanitation, and to share experiences with the ultimate aim of advancing best practices in the field of water management (UN Global Compact, 2008).[11] A 'Transparency Framework' is being developed that will provide endorsers with a compilation and analysis of innovative practices and common approaches for reporting on water management and performance.

Another initiative is the 'Water Initiative' launched in 2003 by the World Economic Forum, in association with UNEP. It is a programme intended to promote public-private partnerships on water projects and responsible management of watersheds. The aim is to create multi-stakeholder networks, comprised of businesses, NGOs, international organisations, and governments, that facilitate cooperation on water projects that are well-developed, bankable, with appropriate

10. The ISO 26000 Guideline (not a certifiable standard) is set to be released by 10 October 2010 (*re* water, see pp. 42-46). See: http://www.iso.org/iso/socialresponsibility.pdf, visited on 27 July 2010.
11. The CEO Water Mandate was developed in partnership with the UN GC and the Government of Sweden. The six endorsing CEOs were: E. Neville Isdell (The Coca-Cola Company); John Anderson (Levi Strauss & Co.); Martin Hagbyhn, (Läckeby Water Group); Peter Brabeck-Letmathe (Nestlé S.A.); Graham Mackay (SAB Miller); and Gérard Mestrallet (Suez).

leadership and financing plans. To date, the initiative has focused on creating water partnerships in India and South Africa (CERES, 2009, p. 50).

Besides the previous two initiatives, in 2007 the World Business Council on Sustainable Development (WBCSD) also announced that it was concerned about water issues (WBCSD, 2005 and 2007). As a result, tt introduced the 'Global Water Tool', the emphasis of which is on reporting and risk assessment. This tool will be discussed in section 11.3.5.

11.3.5 Corporate reporting requirements and water use reporting tools

In line with civil society's call for responsible business conduct, commencing 2005, large companies in the EU are obliged to report in their annual report on their environmental impact (and employee matters) relating to their global business activities (EU Modernisation Directive, 2003; Lambooy and Van Vliet, 2008).[12] The obligation includes providing 'quantitative data, in absolute terms, for emissions and consumption of (…) water (…) for the reporting period together with comparative data for the previous reporting period. These figures should preferably be expressed in physical units rather than in monetary terms' (EU Commission Recommendation, article 1/Annex 4.2(d)). Although reference is made to the 'business operations of the company', and to costs of steps related to the 'avoidance of waste, the protection of soil and of surface water and groundwater (…) and the protection of biodiversity and landscape', the EU legislation does, however, not provide technical tools on how to measure impact on water.

Guidelines on environmental reporting are offered among others by the GRI, which has pioneered the development of the world's most widely used sustainability reporting framework. This framework sets out the principles and performance indicators that organisations can use to measure and report on their economic, environmental, and social performance (GRI, 2008). The current third generation reporting guidelines, the GRI G3, provide for an extensive chapter on environmental performance reporting. Freshwater use is one of the key issues. GRI advises companies to report on (i) their direct water withdrawal from all available sources such as surface, ground and rain water, waste water from other organisations and freshwater supplies from municipalities, which can all be measured from water bills and meters and calculations derived from other available water data (Environment Indicator Protocol, EN8);

12. The EU Modernisation Directive prescribes that companies annually report on "non-financial key performance indicators, amongst others environmental and employee matters" relating to their global business activities. Member States can exempt small and medium-sized companies from this obligation (*i.e.* companies not exceeding two of the following criteria: a balance sheet total of 17,5 million euro, a net turnover of 35 million euro and an average of 250 personnel during the book year; see article 1.14(b) of the Directive. These figures will be amended from time to time).

and (ii) water sources significantly affected by the withdrawal of water, and the percentage and total volume of water recycled and reused respectively (EN9 and EN10). However, reporting on water use is not mandatory if a company applies the G3 GRI application level of C.[13] Moreover, companies normally only report on their own, annual, direct water use and do not take into account indirect water use, *i.e.* water used in supply chain.

The Global Water Tool introduced by WBCSD also includes supply chain concerns. It is a web-based software water diagnostic tool to map water use and to assess the risks associated with water availability relative to global operations and extended supply chains. The six main questions are: how many of your sites are in extremely water-scarce areas? Which sites are at greatest risk? How will that look in the future? How many of your employees live in countries that lack access to improved water and sanitation? How many of your suppliers are in water scarce areas now? And lastly, how many will be so in 2025? The answers need to include staff presence, industrial use of water, and the supply chain. The answers are compared with validated water and sanitation availability information – on a country and watershed basis, by allowing the calculation of water consumption and efficiency and establishing relative water risks in a company's portfolio to prioritise action – including more detailed assessment. The Global Water Tool calculates water withdrawal from fresh and non-freshwater sources (m3/year), fresh and non-freshwater discharge by receiving bodies (m3/year), and the total water consumption of a company calculated as the sum of withdrawals minus discharges. Based on these figures, the tool provides GRI water indicators, inventories, risk and performance metrics and geographic mapping and enables effective communication with internal and external stakeholders on a company's water issues (WBCSD, 2007).

Another tool concerns the 'Business Water Footprint' which enables a company to calculate its total water consumption per year and/or per product. In 2002, this concept was developed for calculating corporate freshwater consumption (Hoekstra, 2003). It was further developed in 2008 for individual and national consumption comparisons (Gerbens-Leenes and Hoekstra, 2008). Similar to the carbon footprint, the business unit water footprint (BWF) is defined as the total volume of freshwater that is used, directly and indirectly, per year to produce the goods and services delivered by a specific unit (WBCSD, 2007). The water footprint *per* product can be derived from this, and shows water use from the consumer's perspective. It reveals how much water is

13. In case of a C rating, a company must report on a minimum of 10 Performance Indicators, including at least one from each of: social, economic, and environment. A company can thus decide not to report on water. See: http://www.globalreporting.org/NR/rdonlyres/FB8CB16A-789B-454A-BA52-993C9B755704/0/ApplicationLevels.pdf, accessed on 21 August 2010.

needed to produce *e.g.* a cup of coffee or a T-shirt. The water footprint also shows how dependent many countries and businesses are on the water resources in other countries for the production of raw materials or end products (Hoekstra and Chapagain, 2008). As indicated, the BWF takes the supply chain into consideration. The BWF consists of the operational and the supply-chain water footprint. The first is the amount of freshwater used at a specific business unit. The latter is the amount of freshwater used to produce all the goods and services that form the input of production at the specific business unit, *i.e.* the indirect use. The water footprint concept distinguishes between three different kinds of freshwater footprints: *blue* water concerns freshwater that evaporated from surface water and groundwater; *green* water relates to evaporated rainwater stored in the soil as soil moisture; and *grey* water is polluted water (WBCSD, 2007). The BWF is calculated in six consecutive steps. In particular, this process shows the production step in which the most water is used. This makes it easier to adequately address freshwater consumption (Gerbens-Leenes and Hoekstra, 2008). Water footprinting is geographically explicit, indicating the location of water withdrawal or discharge and it can also provide a standard for comparing and benchmarking water use with industry peers. By way of illustration, Table 11.1 provides a comparison between various industry sectors of the water footprint of their value chain. The water footprinting methodology is continually being developed, disseminated, and supported by the Water Footprint Network, a nascent non-profit entity working to promote water stewardship through the advancement of the concept and methodology of water footprinting (Water Footprint, 2008, p. 80-81).

Table 11.1 Relative water footprint (source: CERES, 2009, p. 20)

	Raw material production	**Suppliers**	**Direct operations**	**Product use/ end of life**
Apparel	Blue green grey	Grey		Blue
High-Tech/Electronics	Grey	Grey		Grey
Beverage	Blue green	Blue	Blue	
Food/	Blue green grey		Blue grey	
Biotech/Pharma			Grey	
Forest Products	Green		Blue grey	
Metals/Mining	Blue grey		Blue grey	
Electric Power/Energy	Blue grey		Blue grey	

11.3.6 Disclosures on CSR policies concerning water

Despite the urgency of good water governance and the existing tools for water use management and reporting, the vast majority of leading companies in water-intensive industries still have weak management and disclosure of water-related risks and opportunities, according to a report issued by the CERES investor coalition (CERES, 2010). The report was prepared with analytical support of the investment bank UBS (SRI and Sustainability Research department) and on the basis of data provided by the financial data and analytics service company Bloomberg (Environmental, Social and Governance (ESG) department). The report evaluated the quality, depth and clarity of water risk disclosure of 100 publicly traded companies over the fiscal year 2008 and ranks their water disclosure practices. Mandatory financial disclosures,[14] voluntary disclosures such as sustainability reports, and company websites were reviewed. The companies included in the study were firms with global operations, mostly the largest in their sector on the basis of their 2008 annual revenues and market capitalization. Geographic exposure was also considered. The companies were from eight key sectors that were considered to have water security concerns, *i.e.* beverage, chemicals, electric power, food, homebuilding, mining[15], oil and gas and semiconductors. The companies were scored, based on five disclosure categories: water accounting, risk assessment, direct operations, supply chain and stakeholder engagement. The data on corporate water performance included metrics on water use, and wastewater discharge volume and contaminant load. The results of the study revealed that:

– Corporate-wide data on direct water use was disclosed by 63 per cent; data on total wastewater discharge was disclosed by 40 per cent.
– Few companies provided local-level data: only 14 per cent provided data on water withdrawals broken down to the site or regional levels. Because water risk is geographically dependent, this absence of context makes it nearly impossible for investors and analysts to assess corporate exposure to water scarcity, or to understand if corporate actions to mitigate risk are either appropriate or effective.

14. *E.g.* according to SEC requirements, the 10-K filings for U.S. companies and the 20-F, or 40-F filings in the case of non-U.S. companies. In cases where there was no 20-F or 40-F filing for a non-U.S. company, the company's annual report was reviewed.
15. One of the sectors is the Mining industry. Another study on the requirements in moving toward a more sustainable mining industry provides an explanation on best practices for water and energy management in mining (Gunsona, 2010).

- As regards direct operations, *i.e.* where the companies have full control and can reap the benefits of water efficiency and wastewater management, most companies disclosed having environmental policies or management systems. However, only 24 per cent detailed water-specific policies, standards, plans, or management systems.
- Limited information on water policies and management systems was provided: only 21 per cent had set quantified goals to reduce water use. Of these, only three per cent had reduction targets that were differentiated by the level of water stress facing specific facilities.
- Just 15 per cent disclosed goals to reduce wastewater discharge.
- Regarding the supply chain, no companies provided comprehensive data on their suppliers' water performance, although a few did provide estimates of the water use embedded in their supply chains. For many large companies, water use embedded in the supply chain accounts for the largest portion of their total water footprint. It was noted that information on supply chain management is essential because investors increasingly seek to understand a company's full life-cycle exposure to water risk.
- For sectors where a significant portion of the corporate water footprint is found in the supply chain – food, beverage, electric power, and oil and gas – the report noted that there was very little discussion on working with suppliers to manage water risk. In general, very few companies, only 12 per cent, disclosed working with their suppliers to help them reduce water use or wastewater discharge.
- Of these, many anecdotally disclosed examples of partnerships or capacity building with specific suppliers, but only a few evidenced comprehensive programs to systematically improve the water performance of their supply chains.

Summarising, the outcomes of the CERES study showed that even for companies operating in sectors and regions of the world facing significant water risk, disclosure of risk and corporate water performance was surprisingly weak.

Another study on corporate environmental information disclosures stressed that emerging economies in developing countries still seem to face a formidable task for promoting such disclosures. Based on data of 871 listed manufacturing companies in China, the study explored the level and quality of environmental information disclosure, thereby considering the industrial sector, company size, and company ownership. The result revealed an inverse relationship between the level of marketisation and the corporate disclosures on environmental impacts (Zeng *et al*, 2010).

11.4 Results of a 'quick scan' analysis of water impact by Dutch companies; and discussion

11.4.1 Background information on the research project

To obtain tangible information on the water use and best practices by 20 listed Dutch companies, their public disclosures were analysed in the course of a 'quick scan research project.' The results are summarised in this section and an overview is included in Annex 11.1 *in fine*.

The selected companies operate in various business sectors, ranging from oil and gas industry suppliers and producers (*e.g.* Shell), supermarkets (Ahold), breweries (Heineken) to human resources services (Randstad). Most of them are 'world leading companies' that – by the size of their operations and revenues – can have significant impacts on economic, natural and human resources.

The research addressed the types of water use *per* company, thereby collecting information on the different pressures exercised by companies on water resources. The focus was on five categories of water use: (1) domestic use; (2) groundwater use; (3) industrial use (*e.g.* raw materials, manufactured products, cooling system); (4) emissions into water (the discharge of waste-water); and (5) consumer use (*i.e.* the volume of water needed when using the products).

Additionally, three elements were added to the research: (6) has a dialogue on environmental policies/sustainable water policies been established at the supply chain level? (7) have tangible targets been set to reduce water use or emissions into water? and (8) does the company participate in programmes aimed at contributing to MDG 7 on safe drinking water?

11.4.2 Types of water use per company

The type of water use visibly depends on the business sector. However, as appears from the collected data, the reviewed companies are generally aware of the environmental impacts of their business activities, including those related to freshwater scarcity. Companies involved in sectors where water consumption is not considered high – such as banking or publishing – indicated that freshwater scarcity is a concern. This type of 'low user' company mentions, for instance, that water use is monitored at its premises. Nonetheless, companies using more significant quantities of water in their operations are mostly the ones setting tangible targets for water reduction or emissions into water and taking concrete steps.

In addition, it was noted that multinational companies that are not considered to be 'big water users' can actually consume large quantities of freshwater as a result of the size of their operations. For example, although Shell said that its industry is not a big water user, the company reported using

574 million m3 of freshwater in 2007, approximately 0.01 per cent of the world's total (Shell, 2007). Multinational companies can therefore be considered important players in terms of reducing freshwater use, regardless of the sector in which they operate.

11.4.3 Reporting on corporate measures

Generally, most companies expressed their commitment to sustainable development, including the environment. Some described their commitment to sustainable development as a company strategy. They stated that environmentally sound behaviour contributes to sustained profitable growth and value creation because it makes them more competitive, it reduces operating and financial risk, promotes efficiency improvements and creates profitable new business opportunities.

For most of the selected companies, the environmental component is strongly – and often primarily – linked to reducing energy consumption as a measure against climate change. This could be explained when considering the increasing public awareness with respect to climate change. Furthermore, using less energy directly reduces the cost of electricity and oil.

Compared to the oil price, the price of water in most countries has not yet dramatically increased. Nevertheless, several companies report that they have taken steps to minimise water consumption by monitoring, and are seeking ways to save and recycle water.

Indeed, reporting on water consumption in annual sustainability reports seems to be becoming a trend among Dutch multinational companies. Since this development only started recently, data on water use are, however, only available for a period of a few years (on average: about three years). Thus, it is difficult to assess whether a company has taken actual steps to reduce its water use. Furthermore, such an analysis is complicated by the fact that data tend to fluctuate following new acquisitions of new subsidiary companies, sales or mergers of business units.

Some companies, such as Royal Philips Electronics of the Netherlands (Philips), provide data on water use *per* sector of activity. This division offers the advantage of focusing on the operations of the company that use the most water. For Philips, the lighting sector accounts for 80 per cent of its total water use. However, most of the companies examined provide only the global annual amount of water use, *i.e.* for the entire group, Philips is also one of the few that started to report on water intake more than five years ago.

For some companies in the service sector, domestic water use is reported. For example, in its 2007 annual report, Randstad, a provider of flexible staffing and human resources services, reported on water use at its headquarters (in m3) in 2007 and 2006. It is interesting to note, once again, that a multinational company that has no direct water-related activities mentions its water use.

Some companies – when relevant – also report on emissions into water (in tons). For example, the chemical company DSM reported the information included in figure 11.1 (DSM, 2007).

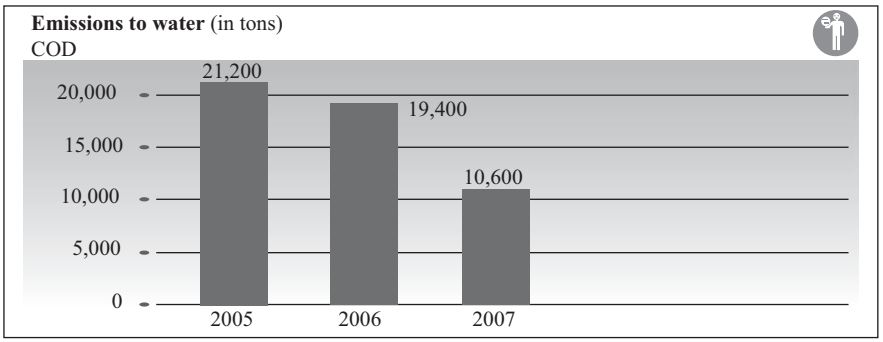


Figure 11.1 DSM emissions into water

The 2006 sustainability report by Friesland Foods (Friesland Foods, 2006),[16] a producer of dairy products and fruit-based drinks, contains data on waste water before in-house purification and discharged waste water, as shown in figure 11.2.

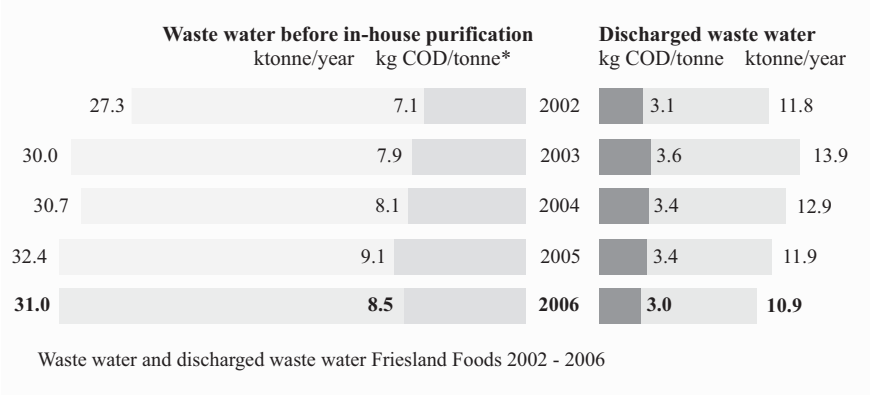


Figure 11.2 Friesland Foods waste water

16. At the time of the quick scan, the most recent sustainability report was from 2006; the information presented above has been verified with the company's Corporate Communication department on 17 October 2008.

11.4.4 Concrete targets for water reduction or emissions

The research project highlighted that only seven companies out of the 20 have reported setting concrete targets for reducing water use or emissions into water. Among those, the brewer Heineken has set clear targets. As clean water is essential to brewing and packaging beer (including the cleaning of the returned bottles), Heineken aims to decrease the amount of water needed to brew and to limit the potential negative environmental effects of discharging waste water (cleaning waste water coming from its breweries). Toward these goals, targets have been set (Heineken, 2007):

– All breweries to use a maximum of 7 hectolitre (hl) of water for 1 hl of beer brewed;
– By the end of 2010, the average water consumption should be below 4.6 hl for 1 hl of beer;
– By 2012, to complete the installation of 16 waste-water treatment plants in Africa and the Middle East.

11.4.5 Supply chain management policies

The research results showed that almost all companies have 'supply chain policies' concerning the environment. However, only a few companies have indicated that particular measures have been taken regarding water use. Among those, Heineken represents a pertinent example, stating that it has implemented a common core programme which runs throughout its Supply Chain 'Aware of Water'. The programme focuses on all aspects of water consumption, management and treatment and requires all breweries and production units to set local targets for water consumption. These targets must reflect their efforts in the gradual reduction of water consumption with a three-year horizon (Heineken, 2007). In addition, throughout the supply chain, Heineken has put in place a dedicated knowledge management system, which facilitates the exchange of best practices (Heineken, 2007). Heineken's Sustainability Reports are compiled using information generated through its environmental and social data systems.

11.4.6 CSR policies and monitoring tools

In defining CSR policies, the surveyed companies commonly referred to their own code of conduct and/or international standards, namely the UDHR, the OECD MNE Guidelines, the Global Compact Principles and the MDGs. The Global Compact CEO Water Mandate has been endorsed by Akzo Nobel,

DSM, Shell and Heineken.[17] Furthermore, most companies reported that they are listed on the FTSE4 Good Index 2007 or the DJSI.

Different monitoring tools and instruments are used by companies to assess environmental issues. Regarding water use, the companies generally emphasised their compliance with local environmental law (mainly concerning waste water) and compliance with the company's own procedures on the safe handling, storage and disposal of hazardous waste. In addition, the compliance with the requirements of ISO 14001 or ISO 9001 was often mentioned as ensuring high standard Environmental Management Systems.

Another useful monitoring tool is to report on annual environmental complaints, non-compliances and penalties, and environmental incidents. These are data that can be easily monitored, verified and compared with previous years or similar types of companies.

Interestingly, the company Friesland Foods reported that it has developed a toolkit to calculate the environmental impact of new products and to identify the impact of planning on the number of purification treatment plants (Friesland Foods, 2006).

Akzo Nobel, one of the world's largest producers of chemicals, indicated that its ambition is to achieve sustainable freshwater management at all of its sites by 2015. Besides the intake of freshwater, the emission of contaminated water from its sites to surface waters may negatively impact freshwater resources and ecosystems. For this reason, the company measures quantities of freshwater consumption and the emission of Chemical Oxygen Demand in its effluent to surface water, and has – if appropriate – programmes in place to reduce its impact. In 2007, Akzo Nobel mapped all of its sites to determine if they are located in water sensitive areas (figure 11.3). The company stated that it is important to set priorities in the risk assessments of its sustainable water management at its sites. It reported that in the sustainable water pilot, 19 sites out of 31 investigated have been determined as having sustainable water use (Akzo Nobel, 2007; Pacific Institute, 2009, p.31; Smakhtin, 2004, pp. 10-16).

17. GC, 2010.

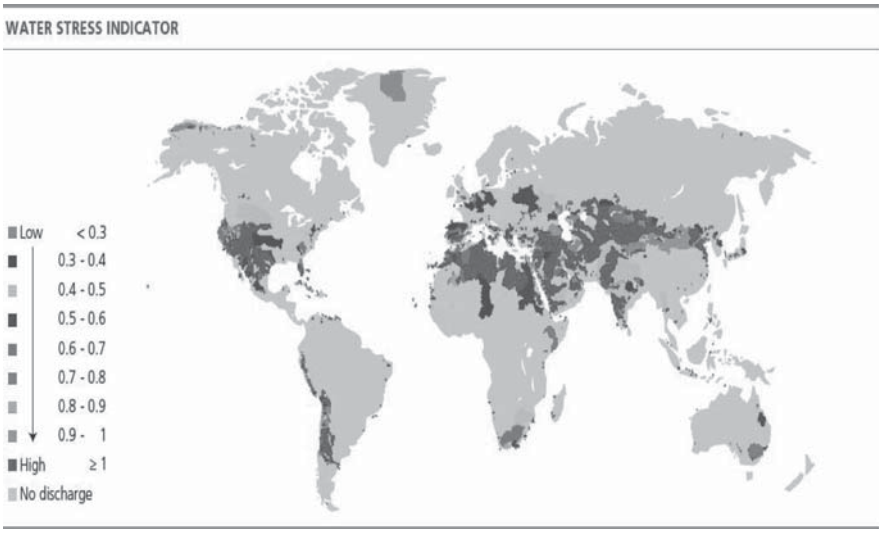


Figure 11.3 Akzo Nobel sites and water stress

Heineken took a different approach. In 2007, it commissioned a study by Leiden University – focusing on its own production sites and selecting water management as a key parameter. Using a range of analytical tools, including the World Database on Protected Areas (WDPA), the study established the precise locations of Heineken's 154 production sites and matched them to protected areas listed by WDPA. Advanced software was used to combine these two pieces of information, producing a definitive map of sites relative to WDPA areas. Because water management is Heineken's primary biodiversity impact, the map was refined to plot all sites inside or up to 50 km from a recognised Ramsar wetland area (1971 Ramsar Convention on Wetlands). This exercise produced a definitive list of 108 sites located in or near WDPA areas. Of these, 14 did not have a waste-water treatment plant. The study has allowed Heineken to match both GRI indicators concerning biodiversity and to prioritise its waste-water management programme. The company is conducting feasibility studies into the construction of water treatment plants at all 14 production sites (Heineken, 2007).

11.4.7 Research and development in sustainable water use

Interestingly, the quick scan also highlighted the current development in the field of research and development related to the sustainable use of water. An interesting trend is to develop greener products or greener ways of production. In particular, Philips has taken the lead. Its employees are designing eco-friendly products designed to outperform their competitors in terms of their

ecological footprint (Philips, 2008). To do that, Philips is committed to doubling its investments to EUR 1 billion in 'Green Innovations' in the next five years.

In terms of water management, Shell has indicated that at Pearl GTL (Qatar) – the world's largest Gas to Liquids plant – careful management of water was part of the design from the start. As a result, the plant will be taking zero freshwater from this arid region, and ensuring that there is no discharge of contaminated water (Shell, 2007). Technology will help, according to Shell, to mitigate environmental impact.

11.4.8 Dilemmas and challenges

One dilemma which companies face is the fact that sustainable water use can conflict with other environmental targets. For example, the green strategy of DSM – a chemical industry – is to reduce its fossil fuel consumption and greenhouse gas emissions by the deployment of white biotechnology (*i.e.* using agricultural products instead of fossil oil and gas to make chemicals). This presents the company with a serious dilemma; biomass-based energy requires the production of crops in the first instance. Then, growing the increased biomass necessary for industrial usage and biofuel production will require the use of additional land and water. This could bring nature, food, industry and biofuels into competition with each other. Manufacturing one litre of bio-ethanol requires four litres of process water, for instance, but growing the necessary sugar cane calls for approximately 1,000 litres. Therefore, DSM indicated that special attention needs to be paid to the potential impact of the availability of water for industrial white biotechnology. It commissioned an extensive study which examines the threats and opportunities for DSM in this area. And it will engage in further stakeholder dialogue to ensure that it puts in place the requirements for the responsible sourcing of agro feedstocks (DSM, 2007). Interesting studies about trade-offs in CSR are published in a special issue of the journal Business Strategy and the Environment (Bus. Stat. Env., 2010).

Obviously, some sectors are more challenging in terms of CSR and water. This is the case for the exploitation of oil sands, an extraction which necessitates using enormous quantities of water. Oil sands are a mixture of heavy oil and sand. If they are near the surface, they are dug up in open-pit mines. The oil is separated by using warm water. If they are deeper under-ground, the oil is made to flow to the surface through conventional wells, often by heating the mixture '*in situ*' to make it flow (Moorehouse, 2010). Considering the rising oil price, this type of exploration is becoming profitable despite the high cost of exploitation in terms of energy and water. It is then interesting to observe how (and if) a company explains this 'challenge' in its sustainability reporting.

In its Sustainability Report 2007, Shell did mention the fact that extracting and refining oil sands into transport fuel requires a lot of water and more energy than conventional oil. For such operation, Shell said that it performed a critical assessment of the sustainability of oil sands projects, including collaboration with NGOs (Shell, 2007).

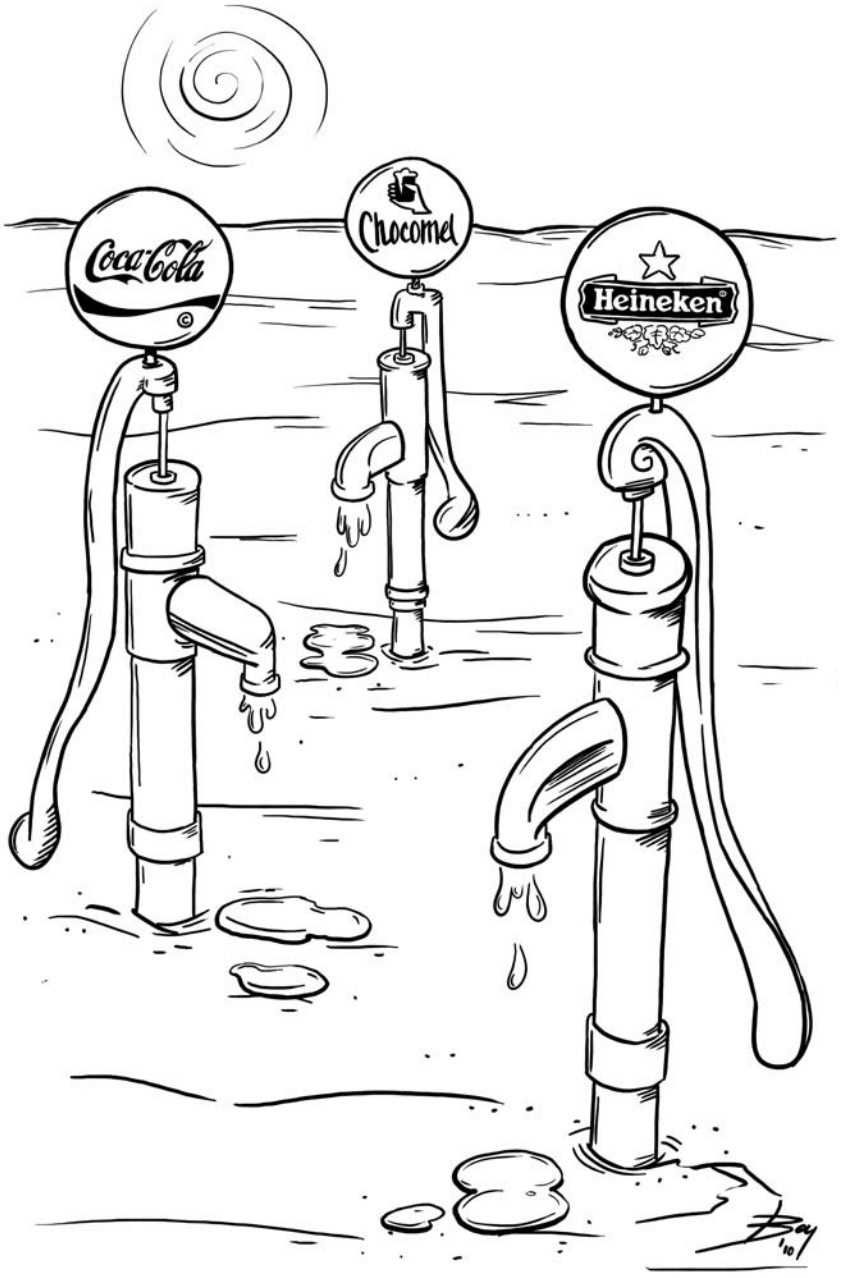
11.4.9 Human right to water and companies: what to expect?

The research also focused on the implementation of MDG 7 on safe drinking water and basic sanitation. Ten companies indicated that they were taking action in this regard. For instance, *via* humanitarian projects or partnerships with international organisations or NGOs.

Friesland Foods for example supports the development of local water supplies in the areas where it has production locations and markets its products. Since water is essential for both the consumption of dried dairy products and for the production of dairy products, it is imperative that good quality drinking water is available where Friesland Foods operates. In Africa for example, the company contributes to programmes for clean drinking water by digging wells and installing water pumps. More than 20 wells have been dug, providing nearly four million people with access to clean drinking water (Friesland Foods, 2006).

Ahold indicated discussing similar projects, including water systems in Ghana (Ahold, 2007). Heineken's 2007 strategy on water also included a programme for the construction of waste-water treatment plants at its breweries in Africa where no municipal facilities for cleaning waste water exist (Heineken, 2007).

To finish on a positive note, companies can also play a direct role in the right to clean water. This is actually the case for the bottled water company Earth Water International (not included in the quick scan). The company was created by a young university graduate student with a progressive vision: if people are going to consume bottled water, why not use these proceeds to help provide clean drinking water for those who do not have access to it. The company donates all of its net profits from the sale of Earth Water to the Office of the United Nations High Commissioner for Refugees (UNHCR), and these profits will fund projects related to "acquisition, transport, storage, and distribution of fresh clean water, focusing on both emergency provision and developing sustainable water sources for people living in poverty." Furthermore, the company is concerned with the environmental impacts of bottled water; the water and packaging are always sourced locally, *i.e.* the bottles are never shipped overseas. Moreover, the bottles manufactured in Canada are from biodegradable corn instead of plastic (Earth Water International, 2008).


Coca-Cola
Chocomel
Heineken

11.5 Conclusion

This chapter has addressed the role of companies today in relation to freshwater. The research on responsibilities demonstrated that it is quite difficult to determine fixed boundaries as to where public responsibilities end and corporate responsibilities commence in respect of corporate impact on water. Firstly, legislation and policies on how water is managed vary from country to country, thereby distinguishing between the management of waste water, freshwater consumption and ground water control. Secondly, different types of industries have different impacts on water. Thirdly, it is often difficult to directly link changes in the environment to the water consumption of any one enterprise. Additionally, complications arise when multinational companies operate in weak governance zones. It could be argued that in countries with effective water management authorities, like the Netherlands, companies do not bear a legal responsibility for the environmental consequences of their water consumption. They do owe a moral responsibility. This responsibility seems to grow in weak governance zones or where the access to freshwater is under pressure due to water scarcity, as has been argued by the UN Special Representative John Ruggie. Notwithstanding, it could be argued that moral responsibility in all situations goes further than legislation.

Society has a growing expectation that the private sector, often perceived as complicit in global water threats, should do its part, regionally and internationally, to address these challenges. In response, business leaders' initiatives show that certain leading companies generally accept responsibility for their water use and for public access to water within their sphere of influence, parallel to Ruggie's philosophy. Furthermore, there is a growing recognition that businesses are well positioned to play a role in achieving MDG 7, and that contributing to the realisation thereof can bring about new business opportunities.

From the literature research it also became apparent that companies have begun to appreciate that, besides concerns of CSR and reputation, they also have to pay attention to sustainable water use because the business case will increasingly demand this. *I.e.* they will need to adapt to, or as the case may be, help to prevent (i) water availability concerns, including water stress and flooding; (ii) water quality concerns, including increasingly contaminated surface and groundwater supplies; (iii) water access concerns, specifically competition with other water users such as local communities; (iv) increased regulation regarding water use; and (v) increasing water prices.

To assist companies, certain tools to attend to the necessity to reduce their freshwater use have been developed. The UN Global Compact Principles, OECD MNE Guidelines and the GRI G3 have a general outlook, but include

the corporate water perspective. On a water-specific level, the CEO Water Mandate initiative offers a corporate policy framework which is linked to the UN Global Compact Principles. Additionally, the WBCSD Global Water Tool and the Business unit Water Footprint have produced methods for calculating the water use in the value chain of corporate operations, and for prioritising measures aimed at implementing a sustainable water use. Another approach is followed by the Water Initiative*, i.e.* a programme intended to promote public-private partnerships on water projects and responsible management of watersheds. These initiatives evidence a clear message from business leaders that companies need to take action in the field of sustainable global water management.

Nonetheless, a study conducted by the investors coalition CERES revealed that even for companies operating in sectors and regions of the world facing significant water risk, disclosure of risk and corporate water performance was surprisingly weak. The CERES study reported on the level and quality of disclosures by 100 large global companies.

As regards Dutch companies, a 'quick scan' research project was conducted. The analysis of the business activities of 20 publicly traded Dutch companies in relation to water demonstrated that most have measures in place to monitor and to control their use of freshwater, groundwater and emissions into water. Some – but not all – have gone one step further by setting clear targets to reduce water use or emissions to water. Few companies have indicated that particular measures have been taken regarding water use in the supply chain. Finally, some companies directly contribute to the development of local water supplies in the areas where they operate.

In sum, this chapter argued that companies are expected to bear responsibility for their impact on water resources, in particular when their impact influences public access to water in areas with freshwater scarcity and/or weak government. Notwithstanding the critical conclusions of the CERES report, it is interesting to see an evolution in corporate research concerning sustainable water use and the development of greener products and greener ways of production, thanks to CSR.

Annex 11.1 Research project: water use by Dutch companies	Company activity *per* type of water use					CSR aspects Re. water		
Company	**Domestic use tap water**	**Ground water (high impact)**	**Industrial use raw materials**	**Emissions into water**	**Consumer use**	**Supply-chain policy**	**Target to reduce water use or emissions**	**MDG 7: Safe drinking water**
PHILIPS	✓		✓		✓	✓	✓	✓
Reed Elsev	✓		✓			✓	✓	✓
Shell	✓	✓	✓	✓		✓		✓
TNT	✓					✓		
Unilever	✓		✓	✓	✓	✓	✓	✓
kpn	✓					✓		
randstad	✓					✓		
SBM OFFSHORE	✓			✓				
TOMTOM	✓					✓		
AEGON	✓					✓		✓
Ahold	✓		✓			✓		✓
AKZO NOBEL	✓		✓	✓		✓	✓	✓
ASML	✓		✓	✓		✓		
CÓRIO	✓							
DSM	✓	✓	✓	✓		✓	✓	✓

Company	Domes-tic use tap water	Ground water (high impact)	Indus trial use raw materi–als	Emis-sions into water	Consu-mer use	Supply-chain policy	Target to reduce water use or emis-sions	MDG 7: Safe drinking water
FORTIS	✓					✓		
Heineken	✓	✓	✓	✓		✓	✓	✓
frieslandfoods	✓		✓	✓		✓	✓	✓
ING	✓					✓		
ABN·AMI	✓					✓		

Information obtained from the mentioned companies' annual reports, sustainability reports and websites, and from press releases. See the Bibliography at the end of this book under 'Corporate Reports' and see further the Chapter 11 Internet Reference List below for details. Research period of the quick scan: 4th Q 2008 - 1st Q 2009.

Chapter 11 Internet Reference List
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Chapter 12.* Integrating companies' impact and dependence on biodiversity and ecosystem services in investment decisions

"The awareness that your business is fundamentally dependent on the ecosystems around it for its livelihood is crucial for starting to address these issues. Without that, you are really only scratching on the surface."
Edmund Blamey, Interface Europe[1]

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* The research ended on 28 April 2010. The 'in-text' references included in this chapter have been included in the Bibliography at the end of this book. This chapter elaborates on a paper prepared by Irene Jonkers and the author, which was presented at the 2010 PRI Academic Conference, 5-7 May 2010, Copenhagen. The paper was included in the conference proceedings and is accessible at 'PRI Academic Conference 2010: Mainstreaming responsible investment. Agenda'; see: http://www.unpri.org/academic10/Paper_13_Tineke_Lambooy_Integrating%20companies%20impact%20and%20dependence%20on%20biodiversity%20and%20ecosystem%20services%20in%20investment%20decisions.pdf, accessed on 16 April 2010. A shorter version of this chapter has been submitted in 2010 as an article for publication to the international multi-disciplinary *Journal of Sustainable Finance & Investment* and is under peer review. For technical reasons, the journal publication had to be split into two parts. Part I qualifies as a 'Research Article'. It is based on the sections 12.1 and 12.2 of this chapter, and records the results of a market analysis. Part II qualifies as a 'Research Note'. It is based on section 12.3 of this chapter, and elaborates on the collaborative action approach initiated by the research team, thereby concentrating on action research techniques. The theoretical part of Part II (*i.e.* section 12.3) can be ascribed to a large extent to Irene Jonkers. Special thanks are extended to the author's colleague Ard Hordijk who contributed substantively with regard to the integral system approach, and to the Dutch Ministry of Housing, Spatial Planning and the Environment for making the research project financially possible. The author further thanks her former colleagues Marie-Ève Rancourt and Tabe van Hoolwerff, and the other members of the 'sustainability rating agencies research team' for cooperating in the research and contributing to the analysis presented in this chapter, *i.e.* Sjef Gussenhoven and Henk Simons of IUCN-Netherlands Committee and Annelisa Grigg of Fauna & Flora International.

1. See: http://www.interfaceurope.eu/pages/interface_europe_network, accessed on 25 June 2010.

CHAPTER 12

12.1 Introduction: link between business and biodiversity

12.1.1 Business risks & related investment risks

Pension funds and asset management companies increasingly seek to incorporate sustainability issues in their investment decisions.[2] The link between a company and biodiversity and ecosystem services (BES) is an important issue to be taken into consideration when taking investment decisions. Biodiversity is a good indicator for the health of the planet: it refers to the variability among living organisms and the entire ecological complexes of which they are a part. Biodiversity is crucial for the functioning of ecosystems. Most businesses depend on nature for the delivery of 'ecosystem services'. Four categories of ecosystem services provided by nature can be distinguished:

1. **provisioning services**: nature produces harvestable goods such as fish, other food products, water, timber and fibre;
2. **regulating services**: coral reefs and forests prevent floods, nature regulates climate and water quality, sufficient levels of genetic diversity decrease vulnerability to diseases;
3. **cultural services**: nature offers an environment for recreation, aesthetic enjoyment and spiritual fulfilment; and
4. **supporting services**: soil formation, pollination by bees and other insects, nutrient cycling, water cycling and photosynthesis are all ecosystem services.

Business relates to BES in two ways. Firstly, economic activities affect BES, *e.g.* through land conversion and coral reef destruction, overexploitation of natural resources, contributions to climate change, pollution and the introduction of invasive species. These negative impacts threaten the ease of use of BES in the long-term. Secondly, companies depend on BES, *e.g.* on the existence of healthy forests and seas for the provision of commodities such as fish and timber, on bees and butterflies for the pollination of flowers (*e.g.* of agricultural crops and fruit

2. *E.g.* as demonstrated by research carried out by Nyenrode Business Universiteit and IUCN-NL in 2007 (research project: "Bedrijfsleven en biodiversiteit", Lambooy & Hordijk, 2007). See also: the 'UN Principles for Responsible Investments' which are endorsed by most of the world players (together representing USD 18,087 trillion assets under management by May 2009). See further: Annual Report of the PRI Initiative 2009, available at www.unpri.org/files/PRI%20Annual%20Report%2009.pdf; UNEP FI (2005), available at: www.unepfi.org/fileadmin/documents/freshfields_legal_resp_2005.pdf; the follow-up report to the UNEP FI 2005 publication (July 2009), available at: www.unepfi.org/fileadmin/documents/fiduciaryII.pdf; Eumedion, 'Position paper on engaged shareholdership' (adopted on 12 March 2010), available at: www.eumedion.nl/page/downloads/Position_Paper_Engaged_shareholdership_DEF.pdf, websites accessed on 2 April 2010.

trees), and on freshwater sources for the provision of water. Consequently, the deterioration or loss of BES generates risks for business. For example, the security of supply of raw materials, agricultural products and clean water will decrease, and access to land will become more problematic when the quantity and quality of land declines. In addition, it is expected that due to (imminent) scarcities, stricter laws concerning BES will be put in place regarding the use of water, land, forests, emissions into the air and so on. The competition to obtain licences will become fiercer. New rules will burden companies with compliance measures and liabilities; access to capital can become more difficult when financiers demand that companies perform their activities in a way that is sustainable to BES. More pressure can also be anticipated from increased societal attention for BES. Hence, companies will have to improve their methods and best practices in order to maintain a good reputation.

Because of the corporate risks involved with BES loss, investors also run the risk of lower and a less secure return on investment in the longer term. Furthermore, there will be an increase of new regulatory prescriptions that require an institutional investor to disclose to what extent it takes extra-financial corporate information into account in its decision-making process, *e.g.* regarding environmental and societal aspects of a company's activities.[3] It is also anticipated that private and public regulation will demand investors to integrate Environmental, Social and Governance (ESG) issues into their investment decisions.[4] For example, the UN Principles for Responsible Investments (UN PRI) encourage investors to integrate ESG into mainstream investment.[5] Non-compliance will raise questions on the prudency of the policies and the

3. The first jurisdiction to establish a formal obligation for pension fund ESG disclosure was the United Kingdom; see: The Occupational Pension Schemes (Investment and Assignment, Forfeiture, Bankruptcy, etc.); Amendment Regulations 1999; SI 1999 No. 1849 and Regulation 11A. Beginning in 2000, most pension funds there have been required 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. Over the ensuing seven years, Austria, Australia, Belgium, France, Germany, Italy and Sweden have put similar rules in place. See about this subject: L. O'Neill (Shareholder Association for Research and Education), 'Regulating pension fund disclosure of environmental, social and governance practices. Submission to the Ontario Expert Commission on Pensions', at: http://www.tuac.org/en/public/e-docs/00/00/01/A8/document_doc.phtml, accessed on 12 July 2010. See also: the research report of the 'Commissie Burgmans', which contained a recommendation on this point for the new Dutch corporate governance code, which was however not followed (Dutch Ministry for Economic Affairs, 2008), at: www.ez.nl/Actueel/Kamerbrieven/Kamerbrieven_2008/November_2008/Maatschappelijk_Verantwoord_Ondernemen/Brief_advies_commissie_Burgmans/Advies_Commissie_Burgmans, accessed on 17 April 2010.
4. Mulder (2007); UNEP FI (2008); see also: Nyenrode 2007 study *supra* note 2.
5. The UN PRI is an investors' initiative, in cooperation with UNEP FI and the UN Global Compact, and was initiated in 2005. The principles for investment provide a framework for investors to give appropriate consideration to ESG issues. See: www.unpri.org, accessed on 17 April 2010.

practices of the institutional investor. Finally, investors have to be aware of an increased reputational risk if they do not pay sufficient attention to corporate social responsibility issues.

Concluding, the rapid decline in and the loss of biodiversity has, and will in the future have, a great impact on the private sector and its profitability. The links between corporate activities and BES are visualised in Figure 12.1: dependency relationships are positioned on the left and impact relationships on the right side.

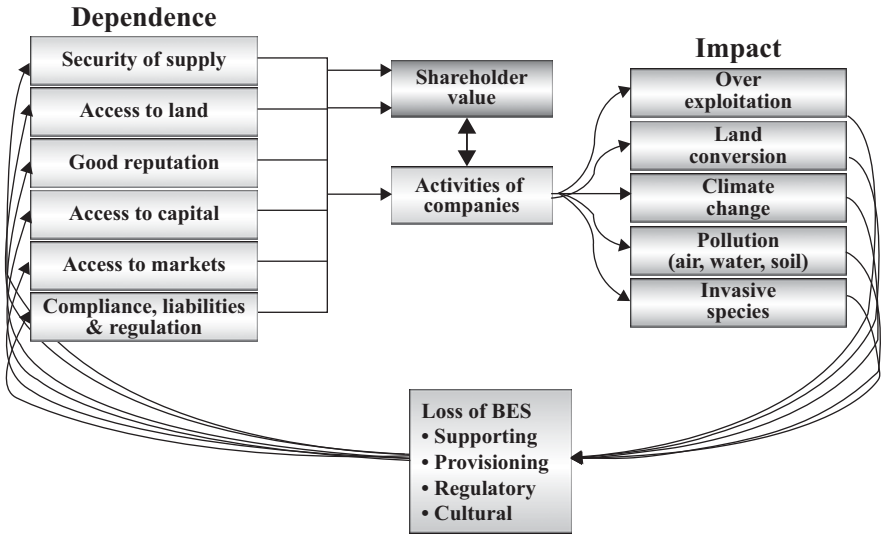

Figure 12.1 Overview of relationships between corporate activities and BES[6]

12.1.2 Problem statement: investors' lack of information re links between companies and BES

In order to project a return on investment, an investor needs to assess the business risks and opportunities of the 'investment target'. Investors require information concerning the individual company as well as predictions for the industry as a whole. As regards listed companies, financial performance information may be purchased from credit rating agencies such as Moody's and Standard & Poor's. Non-financial information, related to the ESG performance of a company can be obtained from sustainability rating agencies such as Innovest-Riskmetrics, EIRIS and Vigeo (hereinafter: ESG Agencies).

6. This figure was developed by Ard Hordijk to serve as a communication tool for the research project.

Research carried out by the Center for Sustainability at Nyenrode Business Universiteit (Nyenrode CfS) and the International Union for the Conservation of Nature – Netherlands Committee (IUCN-NL) in 2007[7] revealed that institutional investors saw room for improvement in the quality and quantity of information on BES provided by ESG Agencies. In particular, several pension funds indicated that they would be interested in such information. They also suggested that the products offered to institutional investors by ESG Agencies should include more detailed information on biodiversity. At the same time, initial talks with ESG Agencies indicated that these agencies were waiting for a clear demand from investors for such information. Consequently, this situation could be considered as a typical example of market failure, since demand and supply did not match. In the 'real world' many markets are imperfect. Factors such as a lack of perfect and full information for all actors, divergent regulation in the various jurisdictions where the actors are operating, or the fact that certain costs are not included in transactions and are passed on to society as a whole, obstruct the coming into existence of a proper market.

12.1.3 Research goals: (i) identification of barriers and (ii) catalysing development of the market

The observed mismatch described in section 12.1.2 triggered the wish of the researchers of Nyenrode CfS to investigate this imperfect market situation. This was the starting point for the research project conducted in partnership with the nature conservation organisations IUCN-NL and the UK based NGO Fauna & Flora International. Their expertise in BES solidly anchored this information in the project. The project was executed between December 2008 and February 2010. This chapter records the results of the research project. The study explored the question to what extent and how institutional investors – in their investment decision-process – (can) pay attention to a company's performance in relation to BES. Access to information (products) is a necessary condition. The focus of the study was on the market for 'information services' or 'information products', to the extent that such products relate to companies and BES.

The first research goal was to find out whether the lack of products that provide information on companies and BES is a consequence of barriers that can be remedied. Obviously, when economic impacts – positive or negative – on BES are under-valuated, institutional and policy failures are also relevant. Governments could improve the regulatory framework in which companies and investors operate. However, it was decided to direct the research predominantly

7. Nyenrode 2007 *supra* note 2.

towards the role of private actors, and to assess whether they can improve the market on BES information. The financial sector was selected as an entry point and, more specifically, ESG Agencies as they play an important role. They provide investors with information on company behaviour. If they offer information on BES to investors, the latter can include BES effects in their investment decisions.

The second research goal was to suggest solutions and to initiate a change – together with the stakeholders. *I.e.* to catalyse the market for BES information products in order to enable investors to include BES considerations in their investment decisions. In order to learn about how changes occur, and which effects take place, these changes need to be initiated. Furthermore, a change can only be effected if the relevant actors participate in the processes. The author considered her role to be a researcher and facilitating agent of the change process. A motivation for writing this chapter was to share her experience in order to contribute to scientific knowledge in this field.

The research project was based on the assumption that a market in which companies' links with BES would be fully transparent would facilitate investors to include biodiversity concerns in investment decisions. Hence, this will drive companies to adopt better practices, which in turn will contribute to nature conservation and the sustainable use of ecosystem services. Both a transparent market and biodiversity conservation would ultimately serve the interests of companies, investors and other stakeholders. This assumption was an important predisposition for the research undertaking. More traditional, positivistic scientific research methods strongly merit 'value-free research'. However, according to the author, the value-free traditional approach to research is (often) not appropriate for this type of research that aims to assist companies, governments and NGOs to find out how changes in markets and corporate behaviour can lead to a more sustainable world for the benefit of all, including companies. In that light, the research results were meant to be useful for the actors involved in this market so that they can contribute to value creation in three dimensions: Planet, People and Profit, *i.e.* the fusion of interests. Furthermore, as mentioned above, the acquired knowledge was meant to be disseminated to assist other professionals in this field.

12.1.4 Research method

The study employed traditional research methods such as desk study and interviews, combined with action research to gain insights into the dynamics between different stakeholder groups. Action research comprises a broad array of different methods, used in various settings and with different aims. In section 12.3.1 the concepts on which this research project was based will be explained in more detail. The research project consisted of three stages.

Stage 1 – Assessment of the current state of the market
The project commenced with an assessment of the current state of the information market on BES and of its potential for growth. This was conducted through:

– *desk research.* The desk research phase was scheduled from December 2008 to May 2009. The policies and the products of 27 ESG Agencies and 18 financial institutions were examined. In addition, documents and websites regarding business and biodiversity theories were studied. The desk research served three aims: (1) to gain an insight into the market; (2) to select the interviewees[8]; and (3) to develop formats for the interviews; and
– *in-depth interviews.* Between February 2009 and May 2009, a total of 18 semi-structured interviews were conducted with representatives of ESG Agencies (n=8), NGOs (n=3) and asset management companies (n=6). In addition, VBDO (the Dutch Association of Investors for Sustainable Development) was interviewed. Generally, the interviews commenced with questions on the 'everyday reality' and working procedures of the interviewee. The second part focused specifically on biodiversity-related services and the possibilities to integrate these in the work flow. Ideas and suggestions communicated during interviews became part of the discussions in the subsequent interviews.

Important questions guiding the research in the stages (i) and (ii) were: what information on corporate links with biodiversity and related concepts is currently available? How is the information gathered and verified? In what way is the information assessed and used by ESG Agencies? After processing, how is it incorporated in the products that they sell to institutional investors? Is there a mismatch between the information offered by ESG Agencies and that requested by institutional investors? If so, what are the underlying causes? The

8. The selection criteria for the ESG Agencies were: (1) their impact (the number of clients, or whether they provide information for stock exchange sustainability indices) – focusing on players that have an impact; (2) biodiversity – the frontrunners concerning the theme of biodiversity were selected; and (3) their background – diversification in their geographic location and basic approach ('ethical versus financial approach', also referred to as 'values versus value approach'). The selection criteria for the financials were: (1) their impact (their size, global coverage and the amount of assets under management) – focusing on the mainstream financial institutions rather than niche institutions; (2) their attitude towards sustainability issues at large – their cooperative attitude; (3) biodiversity – awareness of biodiversity-related issues; (4) the type of organisation – their coverage of different parts of the field. The selection criteria for NGOs were: whether they were working with private and financial sector partners to attain biodiversity enhancement goals (based on the track records of cooperation projects, research capacity, participation in networks).

potential for growth was assessed by posing questions such as: what are the main themes and strategic priorities of ESG Agencies and institutional investors? What is the level of awareness of biodiversity and related concepts? Do any demands exist that are not met? Which initiatives concerning information on BES for investors are currently 'in progress'? What are the opportunities and obstacles in realisation of these initiatives? Which requirements should new tools and services meet? What would be the best approach to realise the creation of BES information services? And: which barriers are expected to obstruct the realisation thereof?

Stage 2 – Identification of barriers
As indicated, the first research goal was to find out whether the lack of BES information products was the consequence of barriers that could be remedied. This question was addressed in the second stage of the project through:

– an *analysis of the data* collected during phases (i) and (ii). Throughout the research project, regular project-team meetings were held to compare and discuss the findings. In addition to the interviewees, other financial sector experts, conservation NGO representatives, ESG Agencies and the financier of the project, *i.e.* the Dutch Ministry of Housing, Spatial Planning and the Environment, were consulted. In the analysis, certain characteristics of the BES information market were identified, also referred to as 'barriers' which explain why the market is not functioning at its full potential. Applying an integral research perspective to the market and the actors, cause-and-effect relationships between the actors and the interrelationships between certain market characteristics could be discerned; and
– the *formulation of suggestions* for improvement of the market. Since the integral analysis demonstrated that the market barriers and opportunities were interrelated, it was estimated that only collaborative action by the stakeholders could cause a further development of the market. A few suggestions based on this finding were defined.

Stage 3 – To catalyse the market
In the last stage, the second research goal (section 12.1.3.) was pursued, *i.e.* to initiate change – together with the stakeholders. The goal was to catalyse the market for BES information products in order to enable investors to include BES considerations in their investment decisions. The research method comprised of action research techniques:

(v) a *workshop* was organised for stakeholders to generate ideas, assess the potential for collaborative action and test concrete suggestions thereto, as developed in phase (iv); and

– *evaluation*. The project was evaluated with each of the workshop participants approximately half a year after the workshop in order to gain insights into the level of actions undertaken by the participants.

The final research report was presented to the Ministry of Housing, Spatial Planning and the Environment in February 2010, and in addition thereto was made available to all interviewees and workshop participants.

12.1.5 Outline of the remainder of the chapter

Section 12.2 will address the first research goal. It will provide an overview of the current market for BES information products by ESG Agencies. Despite observing some movement in this field, the market can be qualified as an immature market. Nine characteristics of the market will be discussed, each of which appears to slow down positive developments in this market. The exposé will point out that these barriers could also be qualified as 'opportunities' for ESG Agencies because they reveal the 'opportunity gap' for new activities and products. Section 12.2 will explore in which way this potential could be realised and will elaborate on two suggestions for collaborative action.

Section 12.3 will concentrate on the second research goal, *i.e.* the question of how to stimulate collaborative action. The focal point in this section is the workshop organised for the different stakeholders. Firstly, theories and insights from action research science, systems thinking, and change management will be presented in order to sketch the background against which the workshop was designed. Secondly, an impression of the actual workshop will be recorded as well as the concrete output of the workshop. Thirdly, based on the theories, light will be shed on the process that took place. Section 12.3 will address the question of whether the intervention in the market of BES information products can be considered successful and which lessons can be learned for future interventions. Section 12.4 contains an evaluation and some concluding remarks.

12.2 The market for BES information products

12.2.1 Current state of the market: the actors

In this section, the current state of the market for BES information products and the potential for growth will be analysed. Firstly, an explanation will be provided for the selection of the parties included in the research. Figure 12.2 shows the value chain of financial market parties.

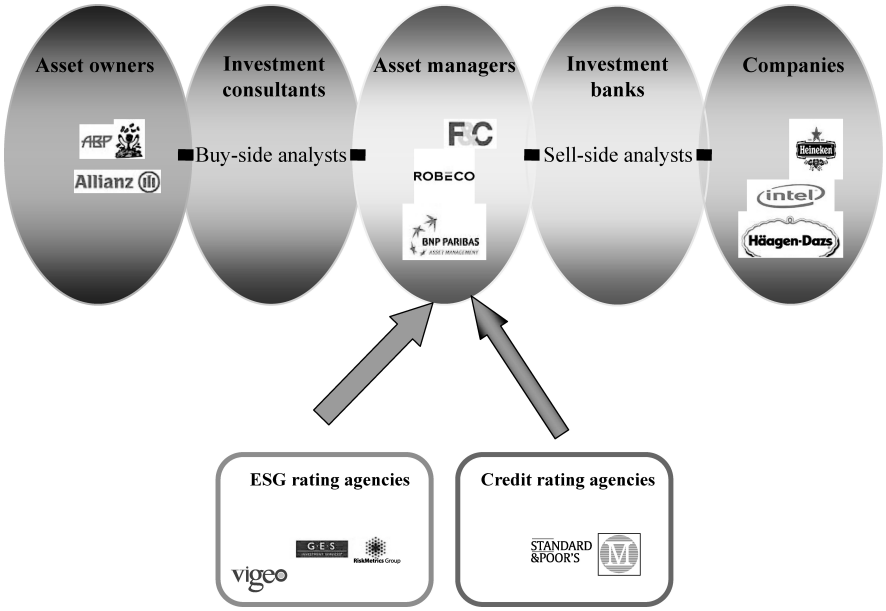

Figure 12.2 Value chain of financial market actors[9]

Based on preliminary findings from the desk research and a few consultation interviews with experts in the field, the following three stakeholder groups became the focal point of the research: (i) ESG Agencies; (ii) asset management companies; and (iii) NGOs. The motivation is the following: ESG Agencies play a crucial role in the market for BES information services. Asset management companies are the intermediary party in the value chain, connecting companies and asset owners. Asset managers assess company behaviour, risks and opportunities, and engage with companies to stimulate the improvement of corporate behaviour. Asset managers rely on information purchased from credit rating agencies and ESG Agencies. NGOs play a very important role in raising awareness and generating knowledge on the 'new' and complex issues relating to BES. All three groups are considered to have levering power in the field of information services on BES impacts and dependencies. The results of the desk research and the interviews will be presented below. Per stakeholder group, a perspective will be offered on the current state of the market for BES information products and the potential for growth.

9. Based on: World Economic Forum & AccountAbility (2005).

12.2.1.1 ESG Agencies

One of the preliminary research findings was that the quantity and quality of information concerning the relation between corporate activities and BES collected by ESG Agencies, is still very limited. A study of the websites of 27 ESG Agencies worldwide revealed that only eight indicate that they consider 'biodiversity' to be a separate indicator for their research and that they include this subject in their ratings. Four other agencies explicitly take biodiversity into consideration when producing position papers or sector briefs. Subsequently, eight of these 12 ESG Agencies were interviewed. Five of them indicated that they indeed use one or more indicators on biodiversity in their company assessments. Often, the assessment of BES factors consists of checking policies and management control systems of a company, according to a 'check-the-box' approach. Information disclosed by companies is the main source of information. Some ESG Agencies also take independent news sources into account in order to evaluate (perceived) company behaviour, or to assess whether companies comply with international conventions (*e.g.* the Convention on Biological Diversity – CBD). One ESG Agency takes an 'issue management approach', *i.e.* it focuses on a company's ability to manage potential impacts, thereby investigating and evaluating the company's responses to breaches of the CBD. None of the ESG Agencies monitor any metrics or actual proof of performance of companies in relation to BES impacts. In their assessments, all ESG Agencies interviewed include information on issues that are closely related to, or can be considered part of, the BES concept, such as the impact on freshwater resources and habitat destruction.

Another important observation is that the interviewed ESG Agencies focus first and foremost on the impact of companies on biodiversity in general. Only one ESG Agency currently takes into consideration the dependence of companies on BES and the future risks connected with the destruction of ecosystems, but only with regard to the food and beverage sector. Two ESG Agencies have taken initial steps to include the dependency perspective in their products. In both cases, plans are still at a conceptual stage.

Just one of the ESG Agencies indicated that it had received a specific request for biodiversity information from its clients. Some of the interviewees noticed some movement in the market. So far however, the requests have come from niche 'sophisticated' investors.[10] As yet, there is relatively little mainstream investor knowledge of BES.

10. There is a (small) number of investors, serving groups of ethically oriented clients, that have sufficient knowledge of and experience in BES-related issues so that it is able to evaluate the merits of an investment.

12.2.1.2 Asset management companies

The choice to involve asset management companies rather than asset owners was based on the fact that the latter commonly delegate the management of large parts of their assets to asset managers (see Figure 2). Asset managers have substantial amounts 'under management' which they invest in companies' listed and unlisted stock, debt instruments, real estate and other types of assets. Asset managers follow the wishes of their clients, the asset owners. Interviewees from the asset managers group indicated that they receive few instructions from their clients regarding ESG factors. If any, the instructions often only address two or three exclusionary principles. Institutional investors are, as yet, not very interested in the BES performance of the invested assets. However, as explained above, ignoring BES performance poses a risk to the continuity of financial returns. Since risk estimation is the task of the asset managers, it was interesting to exchange views about dependency relationships between BES performance and the return on investments.

Most of the asset managers interviewed are familiar with the concept of 'biodiversity' but, at the same time they indicated that they consider the concept to be very complex. Most of them have also heard of the concept of 'ecosystem services', but few have a perspective on how biodiversity loss can affect companies' business.[11] None of the asset managers interviewed specifically assesses biodiversity in their investment decision-making process. However, they do deliberate on possible controversies regarding companies and biodiversity issues with high public visibility. Also, certain sub-themes, such as water[12] or habitat destruction, have been pinpointed as elements to be considered in taking investment decisions. One of the interviewees is aware that biodiversity information is included in the ESG data which they buy, but did not see any merit in immediate use in the investment decision-making process. Furthermore, there is generally little awareness concerning current initiatives by NGOs or ESG Agencies which are developing tools in this area. Some of the ESG Agencies however noted that a growing number of the signatories to the UN PRI indicate that they (wish to) pay attention to biodiversity as an ESG issue.

11. Very few can cite examples of where biodiversity loss has had significant commercial and financial implications for a company.
12. *E.g.* Robeco has commissioned the World Resources Institute to research a specific subject in this area.

12.2.1.3 NGOs

NGOs can contribute to developing a market for BES information services in several ways, including by:

- raising awareness, either by developing and distributing knowledge on the concept of biodiversity, or by means of affirmative action;
- contributing to the development and application of tools; and
- providing information on the biodiversity performance of companies.

The first role of NGOs is well established. Most interviewees (asset managers and ESG Agencies) indicated that they use NGO publications as part of their analyses. As regards their second role, it is worth noting that several NGOs have already delivered valuable contributions. Tools have been developed which can assist companies in analysing BES risks. Guiding documents have been prepared to inform the assessment of corporate BES risks within financial institutions. And recently, a new and investor aimed tool has been launched, which allows a systematic evaluation of corporate BES impact and dependencies.[13] However, the familiarity of the financial and corporate sector with this work is still very limited. A major part of the developed products has a limited connection to the reality of the financial sector. Based on the recognition that the effectiveness of tools depends mainly on the quality of cooperation with corporate partners at the time of their design, NGOs are increasingly seeking collaboration with financial institutions.[14]

The third role of NGOs – as providers of information on company performance – is the least acknowledged. Most ESG Agencies check publicly available information from NGOs for hints of controversies, either per company or per sector. However, this information is always considered additional to the information obtained from the companies, or as a starting point for research. This approach by ESG Agencies will be discussed in further detail below.

12.2.2 Barriers in the market

Based on our research, the conclusion was reached that a market for BES-related services is slowly starting to emerge, but that is still immature. Especially regarding the dependency aspect, awareness, tools and services are still in their infancy. Interviewees from all stakeholder groups indicated that they recognise the importance of the issue and see a potential for the market to develop. The question emerges why this market is not functioning properly?

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13. The Natural Value Initiative developed the Ecosystem Services Benchmark. For more information, see: www.naturalvalueinitiative.org, accessed on 3 July 2010.
14. *E.g.* Fauna & Flora International and the World Resources Institute.

This was a strong focal point in the interviews. To overcome the malfunctioning of the market, the interviewees suggested several changes. The information collected during the desk research and the interviews, and the exchange of views with the various stakeholder groups, provided the foundation for the analysis of this specific market. In this section 12.2.2., nine 'characteristics' or 'impediments' will be defined and explained.

12.2.2.1 A shift towards a mid-term and long-term perspective

The short-term focus is still dominant within the financial world. This regards both the valuation of investments as well as the sell and buy decisions. This short-term tendency was mentioned as a barrier to the inclusion of ESG criteria in investment decisions in all interviews. Institutional investors are expected to invest money with a long-term horizon, thereby paying attention to 'People' and 'Planet' aspects, but at the same time pension fund managers have to meet financial targets and to publish their financial results on a regular basis. They expect from their asset managers the highest possible financial returns. Asset management companies use quarterly benchmarks to evaluate fund managers' performance, often with consequences for their remuneration. The current system does not cater for incentives to make investments with sustainable long-term profits in terms of 'Triple P' performance. It is tempting for business leaders to focus on short-term performance goals, at the expense of the long-term sustainability and prosperity of their businesses.[15] From an investment perspective there is, for example, no compelling reason not to invest in the soy and palm oil industry, even though it is well known that the Amazon and Indonesian natural forests are heavily damaged by the activities in this sector, and that current business practices are not sustainable in the long term. Biodiversity loss has clearly long-term implications.

More specifically, this 'short-term' tendency results in a lack of demand for BES information, as was mentioned by several of the interviewees of all three

15. See *e.g.* World Economic Forum & AccountAbility (2005); Centre for Financial Market Integrity & Business Roundtable Institute for Corporate Ethics (2006); Guyatt (2008); BSR (2008). Also Grant Kirkpatrick, in a OECD-rapport (2009): "that the financial crisis can be to an important extent attributed to failures and weaknesses in corporate governance arrangements.(…) remuneration systems have in a number of cases not been closely related to the strategy and risk appetite of the company and its longer term interests." (p. 1 and 2), see: www.oecd.org/dataoecd/32/1/42229620.pdf, accessed on 5 July 2010. See also: the Report of The High-Level Group on Financial Supervision in the EU, chaired by de Larosière (2009): "[Corporate Governance] is one of the most important failures of the present crisis (…) the financial system at large did not carry out its tasks with enough consideration for the long-term interest of its stakeholders. Most of the incentives (…) encouraged financial institutions to act in a short-term perspective and to make as much profit as possible (…) the new accounting rules were systematically biased towards short-term performance"; p. 29, 30 at: http://ec.europa.eu/internal_market/finances/docs/de_larosiere_report_en.pdf, accessed on 7 April 2010.

focus groups. The few organisations that do purchase BES information are mainly ethically-oriented investment groups. Mainstream demand is lacking. With one exception,[16] none of the asset managers received specific enquiries for biodiversity-friendly investments from institutional investors. One of the interviewed ESG Agencies excluded the biodiversity indicators from its database, because they were hardly ever used.[17] Another ESG Agency explicitly stated that it needs market demand in order to develop new tools and services. The resources for proactive product development are limited.

Due to the financial crisis, the short-term versus long-term issue is receiving a great deal of attention. It will be interesting to see what changes the current economic situation will bring about in respect of the short-term focus of the financial world. There seems to be a growing momentum to incorporate longer-term considerations into investment decisions. The development of biodiversity information services could simultaneously profit from and add to the developments in this field.

12.2.2.2 Integrated legislation and private regulation

All interviewees seemed to be in favour of more concerted governmental action vis-à-vis biodiversity.[18] Both mandatory disclosure by companies and mandatory biodiversity policies were frequently mentioned.[19] Not everybody seems

16. One of the French pension funds is considering investments in 'biodiversity-friendly' products.
17. The interviewee more specifically mentioned that it was not able to provide a type of information on biodiversity that was useable for investors and asset managers.
18. It is the understanding that the ongoing review of 'The Economics of Ecosystems and Biodiversity' (TEEB) will make policy recommendations that may go some way to addressing the existing regulatory gap. The final results of the TEEB study will be presented during the CBD Conference of the Parties in 2010 (CBD COP-10). The TEEB study was initiated by the European Commission and the German Federal Ministry for the Environment in 2007. The study evaluates the costs of the loss of biodiversity and the associated decline in ecosystem services worldwide, and comparing them with the costs of effective conservation and sustainable use. It is intended that it will sharpen awareness as to the value of biodiversity and ecosystem services and facilitate the development of cost-effective policy responses. See: http://ec.europa.eu/environment/nature/biodiversity/economics, accessed on 17 September 2009.
19. This could for instance be realised by requiring companies to report on the GRI G3 standards (including the biodiversity theme indicators), *e.g.* on a 'comply or explain' basis. In the Netherlands this could for example be realised through Article 2:391(1), by requiring to report in conformity with the GRI G3 as part of the annual report (or by a reference in a separate sustainability report). Another option would be through Article 2:391(5): to designate the GRI G3 as a code of conduct that has to be applied or explained. Danish and Swedish legislation can be consulted as a reference, as can Norwegian and Canadian policy documents. The French NRE (*Nouvelles Regulations Economiques*) also includes the mandatory disclosure of biodiversity impacts (section 116).

to be in favour of mandatory disclosure, because it would take the focus away from the business case. The argument is that eventually the investors should be the ones to reward the leaders and punish the laggards.

Other types of legislation mentioned concern the protection of BES, effectively enforced through penalties for non-compliance and related damages, and enhanced by introducing biodiversity-offset compensation schemes or credit systems. A valuation of biodiversity would be required to create an offset market.[20] The majority of the interviewees were in favour of international regulation on compensation and biodiversity credits. Another idea came from one of the interviewed asset managers, suggesting that stock exchanges could require listed companies to provide more information on biodiversity impacts.[21]

12.2.2.3 Consolidation of services provided by ESG Agencies

It was noted by various interviewees that mergers of ESG Agencies with financial sector parties could stimulate the integration of ESG aspects into mainstream investment decision-making. For example, this could be achieved by mergers between ESG Agencies and credit rating agencies, or by establishing closer links between asset management companies and ESG Agencies.[22] Several asset managers stated that they would be interested in purchasing combined ratings on financial and ESG issues. Firstly, because it would be more practical and cheaper if they could purchase all information required from one source, and secondly, because the financial implications of ESG issues would become clearer.

One of the asset managers stated that he would be in favour of further consolidation between ESG Agencies, as occurred earlier with credit rating agencies. The consolidation of ESG Agencies could contribute to the development of clearer and completer information about ESG issues as well as uniform standards. Clearer and more standardised measuring methods could result in more complete and consistent analyses, and would also reduce 'the questionnaire

20. Although voluntary systems that sell biodiversity credits are growing in volume, they are generally not yet considered to be eligible by asset managers. The reasons for this are the perceived high risks of maintaining their value. Furthermore, these systems are mainly local. For example, New Forests, a Sydney-based firm, has established the 'Malua Wildlife Habitat Conservation Bank' in Malaysia as an attempt to raise funds for rainforest conservation. They market 'Biodiversity Conservation Certificates' to interested parties. Organisations can be interested in these certificates because investing in biodiversity offsets can help to support their brand image, and at the same time provide a way to engage in an innovative rainforest conservation project. See: www.maluabiobank.com, accessed on 17 September 2009.
21. A parallel can be drawn with the US Securities and Exchange Commission (SEC) discussions that are currently ongoing concerning greater disclosures of carbon exposure.
22. *E.g.* Robeco owns the majority of the issued shares in SAM.

burden' on companies.[23] Common standards would also allow asset managers to communicate a more uniform message in engagement activities with companies.

One of the ESG Agencies interviewed noted a tendency towards mergers and close partnerships between ESG Agencies.[24] As maintaining and updating databases is expensive, it would make sense for ESG Agencies to share this burden. A number of the interviewed ESG Agencies expressed an interest in this. Some of the agencies already purchase information from their competitors to reduce costs.[25] Standardisation of information would also be welcomed because it could enhance the compatibility of the ratings.

On the other hand, there appears to be a good deal of competition between ESG Agencies. The approaches used by ESG Agencies vary widely as do their products. The comparability of information is limited. Most asset managers buy information from more than one ESG Agency so as to get a more complete overview. Different approaches taken by ESG Agencies also serve different types of clients. Cooperation is not always sustainable, as became apparent from the discontinuation of the SiRi network in the autumn of 2008.[26] Likewise, with regard to the merger potential between ESG Agencies and credit rating agencies, an NGO noted that there is still a great 'mental distance' between the two. Although the lack of standards and uniformity is confirmed by all of the interviewees, there are different perspectives on whether or not this barrier should be 'tackled' by a consolidation of ESG Agencies.

12.2.2.4 Deconstructing the concept of biodiversity into sub-themes (the 'matrix')

Biodiversity is a complex concept. Asset managers find it difficult to 'translate' BES issues into business risks. For some sectors, the link with biodiversity is obvious, for example mining and forestry. These sectors have extensive impacts on nature. For most sectors, however, the relationship between biodiversity loss and individual companies is less straightforward.[27] The type of impacts and relationships are highly variable between sectors. A possible overlap with other

23. Many companies indicate that they have been overloaded with different kinds of questionnaires on their ESG performance. Questionnaires are submitted by ESG Agencies and other external parties such as NGOs.
24. *E.g.* note the recent merger between Riskmetrics and Innovest.
25. The ESG information provider 'Asset4' seems to be an important provider of 'raw data' for ESG Agencies.
26. The SiRi Group was started in 2000 as a not-for-profit entity. The Group members founded SiRi Company as a profit entity in 2003. The Group consisted of ten ESG Agencies. Quoting from their 2004 brochure: "SiRi Company Network Partners provide SRI research on corporations based in their respective home markets, in a harmonized format, and with strict quality standards set by SiRi Company. This gives clients the benefits of global coverage based on local knowledge", p. 2.
27. One of the interviewees pointed to the chip producer Intel, which needs large amounts of clean water of very high quality for its production process.

environmental themes, such as water and CO_2 emissions, are also considered to be confusing by some of the interviewees. In general, asset managers have very limited time for an assessment per company, and are thus in need of 'quick answers'. Not only are these 'quick answers' currently unavailable, most mainstream asset managers do not know which questions to ask. ESG Agencies struggle with similar constraints in trying to develop biodiversity information products for asset managers on a company-specific level. There is a trade-off between the efficiency of the process and the level of detail and specificity of the information. The right balance is still to be discovered. Some work has been done to make corporate risks related to BES loss transparent per sector.[28] The existing matrices, however, are still quite abstract in nature with limited use for data collection and decision-making at company level.

Some of the interviewees even argue that the best way forward would be to proceed on some of the most material and most readily applicable sub-themes, like water, instead of pursuing the general concept of BES. The BES concept might currently prove to be too big to handle for the financial community. Others suggest linking up to the climate change debate, because climate change is high on the agenda, and it obviously has an extensive impact on BES. However, one ESG Agency pointed out that the term 'biodiversity' has a valuable symbolic meaning and should thus not be deleted when deconstructing the concept.

12.2.2.5 Establishing a causal relationship between BES loss and financial performance

Financial and economic models on the relationship between loss of biodiversity and the return on investment in relation to an individual company are still scarce. For mainstream asset managers – *i.e.* managers other than those of specific ethical sustainability or ESG responsible funds – proof of the materiality of biodiversity risks would be a motivation to assess corporate behaviour towards this issue, as happened with climate change. Some interviewees ascertained that there is little proof showing that private equity funds perform better when applying ESG criteria, compared to funds with conventional investment strategies. In part, this is caused by the fact that the costs of poor ESG performance by companies are currently for a large part externalised. Negative corporate impacts on nature and ecosystem services are borne by society as a whole and not necessarily directly by the company responsible for the impact.

Presently, around the world, researchers are assessing the correlations between a good ESG performance and the financial performance of companies. In 2008, a review of 34 scientific studies showed that in 68 per cent of the

28. Overviews are provided by F&C (2004), Mulder (2007), UNEP FI (2008) and Eurosif & oekom research (2009).

studies a positive link existed between corporate social performance and corporate financial performance. Only 6 per cent of the studies showed a negative link.[29] Another study illustrates that in the context of the financial crisis, companies which have sustainability considerations firmly anchored in their business model outperformed peers in 16 out of 18 sectors assessed.[30] More research would be needed, though, to provide a solid evidence base to correlate company BES performance with company financial performance, and ultimately with investment fund performance. A shifting focus from the impact that companies may have on biodiversity towards the dependence of companies on BES could be an important step forward. This would enhance establishing tangible links between a company's core business and BES. For example, resource constraints is a recognised issue which is quantifiable. It was contended that more research is needed to provide evidence of causal relationships in specific sectors. ESG Agencies, institutional investors and scientific institutions could combine their efforts in this respect.

12.2.2.6 Educational groundwork throughout the value chain of the financial market

Most asset managers have a sustainability department that fulfils several or all of the following tasks: in-house background research on ESG factors, advising other departments, raising awareness, company-wide policy development, engagement with business partners, and the management of specific ESG funds. The sustainability departments generally also manage the asset manager's relationships with ESG Agencies. Within these departments, valuable expertise and knowledge is being built up. One of the ESG Agencies interviewed has noticed that clients ask more specific and thorough questions. Another agency has seen its number of clients increase over the course of the current financial crisis. At the same time, however, during the interviews several ESG specialists within asset management companies mentioned that they are facing an 'uphill struggle' within their companies to raise awareness on BES dimensions in company and sector assessments.

The actual mainstream investment decisions are the full responsibility of the fund managers, who are advised by their research analysts. As the analysts have little time available for a 'per-company assessment', this does not allow them to assess ESG matters extensively. More importantly, the career path within asset management organisations drives professionals towards generalisation, instead of specialisation.[31] Good analysts are soon promoted to more general fund-management positions. Hence, little expertise is built up amongst the analysts

29. Van Beurden & Gossling (2008).
30. Mahler *et al* (2009).
31. World Economic Forum & AccountAbility (2005).

and fund managers, which in turn makes it difficult to assess less straightforward ESG information.

NGOs could play an important role in raising general awareness and understanding within the financial world. To increase resonance with the receivers, several financial sector interviewees mentioned the importance of using the vocabulary of the financial world, *e.g.* by using terms like 'risk management' and 'sustainability'. A more direct way of increasing capacity within asset management companies to deal with the theme of BES would be to develop specialised courses that could contribute educational credits and professional credibility to asset managers.[32]

12.2.2.7 Development of new tools

Good tools and assessment methodologies for the analysis of biodiversity impacts and dependency per company in a systemic and comparative way are not yet available.[33] This holds true for both the tools which ESG Agencies can use to include biodiversity information in their databases and the tools for asset managers to include biodiversity impacts and dependence in their investment decision-making processes.[34] Our research has revealed that the actors in this market make little capacity and time available for developing new tools. ESG Agencies have limited resources and indicate that they first need to have demand. Within asset management companies a sense of urgency is lacking regarding this issue, possibly related to a low level of awareness and knowledge on the subject. NGOs and knowledge institutions could play a role when commissioned to 'translate' the concepts into concrete tools. Some tools are 'in progress', as mentioned before.

12.2.2.8 A more continuous flow of relevant and compatible information

The availability of relevant and compatible information on corporate BES impact and dependence is limited. ESG Agencies need information on a company level in order to evaluate the actual risks for a specific company. Furthermore, they should be able to provide regular updates to their customers.

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32. This could possibly be achieved by an expansion of the syllabus of the Chartered Financial Analysts (CFA) Institute – the global, professional association that administers the CFA curriculum and examination programme. Corporate governance has already been included in the syllabus. See: www.cfainstitute.org/index.htm, accessed on 15 March 2010.
33. A popular selection method for the inclusion of companies in a sustainability index, such as the Dow Jones Sustainability Index, is the 'best-in-class' approach, which is based on a comparison of companies within a sector. Many sustainability issues are weighted in a 'basket'. The outcome does not give an indication on corporate performance relating to BES.
34. Most asset managers use their own ratings, based on specific valuation techniques. The information they buy from ESG Agencies is used as (one of the) inputs for these methodologies.

Asset managers prefer to receive a continuous flow of information. This implies that the ESG Agencies in turn also need frequent and up-to-date information on companies. An annual sustainability report containing information on a company's activities in the previous fiscal year does not suffice. Fresh information can sometimes be found in the media and NGO publications, although this usually focuses on controversies.[35] It appears difficult to collect in a systematic way 'BES information' on 'good' companies, and even more so on 'mediocre' companies. Also, BES information regarding the BES performance of mid-caps[36] is difficult to acquire, because NGOs tend to focus on 'the big players' and mid-cap companies are pressured less to disclose information. Furthermore, information on BES impacts in less populated and less developed countries is extremely scarce, due to the fact that information is published in local languages and due to the fact that such information has limited access to the internet. And, finally, information about BES impacts in the supply chain is also scarcely available.

The disclosure of biodiversity impacts by companies themselves is thus limited, whilst the quality thereof is often questionable. The GRI indicators on biodiversity[37] are not commonly used by companies. The majority of the interviewees asserted that the biodiversity indicators do not provide investors with useful information which can be used in their investment decision-making process.[38]

ESG Agencies circumvent this lack of concrete information on companies' conduct in relation to BES by applying 'a process-based approach'. They assess company policies and management systems, hence judging the ability of companies to manage possible impacts. This information is considered to be a proxy for the quality of the actual company performance. Other approaches used are providing sector-level instead of company-level reports, or assessing the reputation of companies, based on media coverage. A number of the interviewees stated that they would be in favour of a 'Biodiversity Disclosure Project', like the Carbon Disclosure Project. The Forest Footprint Disclosure Project (FFD)[39] was

35. *E.g.* Shell explorations in Sakhalin with a negative impact on the habitat of the endangered western grey whale were heavily covered by the media. Other examples are Monsanto and the 'Roundup Ready Controversy', and other controversies regarding genetically modified crops.
36. The term 'mid-caps' is generally used to refer to companies with a market capitalization within the range of 2 billion dollars to 10 billion dollars.
37. Biodiversity is addressed in indicators EN11, EN12, EN14 and EN25. See: www.globalreporting.org, accessed on 25 June 2010.
38. The GRI has indicated ecosystem services to be one of the focus areas for the coming years. See: http://www.globalreporting.org/NewsEventsPress/LatestNews/2009/NewsJuly09-NewG3Projects.htm, accessed on 17 September 2009. They are in the start-up phase of a new project to investigate the possibilities of effectively incorporating ecosystem services within the reporting framework.
39. See: www.forestdisclosure.com, accessed on 12 June 2010.

also enthusiastically welcomed by several of them. Others, however, were afraid that the impact of 'yet another disclosure project' might be disappointing, and could even be counter-productive to the success of information-disclosure projects in general.

12.2.2.9 More cooperation between NGOs and financial market actors

As mentioned earlier, NGOs can contribute to developing a market for BES information products in several ways. Their potential roles are not (completely) fulfilled and linkages between NGOs and ESG Agencies are limited. The interviewees from the asset management industry and the ESG Agencies are mostly interested in the contribution of NGOs to the development of knowledge, the development of frameworks and the development of tools. This has been outlined in section 12.2.1.6. Another role for NGOs, *i.e.* as a source of information on company behaviour, is less acknowledged. Several potential roadblocks were mentioned:

- most NGOs are 'single issue' entities with their own agenda;
- NGOs do not collect information in a structural and transparent way;
- they tend to focus on controversies instead of undertaking an overall screening, which makes the information anecdotal; and
- the websites and search engines are often not considered to be 'user friendly' by the interviewed ESG Agencies; *i.e.* if NGOs would send a weekly or monthly newsletter on companies and BES to ESG Agencies, it would be easier for the latter to use the information.

Currently, the information provided by NGOs is free of charge. Payments might be an incentive for NGOs to deliver more targeted and useable information. Most interviewees have indicated, however, that they are reluctant to enter into a contractual relationship with NGOs. The fear of association is their main argument, because this might be a potential threat to the objectivity that is essential for ESG Agencies. A few of the interviewed agencies contended that they are indeed willing to pay for information from NGOs, subject to the traceability of information. Two others would at least be willing to consider payments, although there is currently no necessity to do so.[40] On some rare occasions, independent consultants or reputable NGOs are commissioned to perform research assignments on specific BES issues (*e.g.* water scarcity).

Regarding awareness raising, also a role ascribed to NGOs, it was mentioned that the lack of a critical NGO in the field of BES is one of the reasons why BES is not on the agenda of financial institutions.

40. Because they can freely obtain ample NGO information from publicly available sources, or just because they use other sources of information.

The general picture as sketched by the interviewed NGOs is that they are not really focused on cooperation with specialised agencies in the financial sector as far as biodiversity is concerned.[41] Although the importance of the financial sector in the 'value chains' is well understood, limited (human) resources are otherwise directed. NGO strategies to influence investment decisions in view of protecting environmental interests typically encompass organising public awareness campaigns, direct engagement with company management, mobilising support from local stakeholders, and research on impacts. Knowledge and data available within NGOs are mostly not targeted at, nor formatted for use by financial market actors.

12.2.3 An integral perspective[42]

The analysis of the market for BES information products revealed a number of hurdles that must be overcome to allow the market to realise its full potential. There were indications that a number of these barriers are interrelated. For that reason, it is important to apply an integral research perspective to the market, the actors and their interests. In order to visualise the interdependencies, a system diagram[43] will be presented to illustrate the cause-and-effect relationships. This can be used to anticipate developments and the effects of interventions.

Figure 12.3 includes two types of effects and an indication of whether effects reinforce each other:

- an **S**-effect means: *same way*, *i.e.* more of one will lead to more of the other;
- an **O**-effect means: *other way*, *i.e.* more of one will lead to less of the other; and
- an **R** means: *reinforcing loop*, *i.e.* if a set of effects continues to reinforce each other. The loop works in two directions and strengthens the effects, unless the effects are balanced by factors from outside the loop.

41. There are some exceptions. *E.g.* Fauna & Flora International and World Resources Institute are more connected to the financial sector.
42. In addition to our own research, information from two specific publications was used to build the system diagram: World Economic Forum and AccountAbility (2005) & BSR (2008).
43. For more information on systems thinking see § 12.3.1 of this chapter.

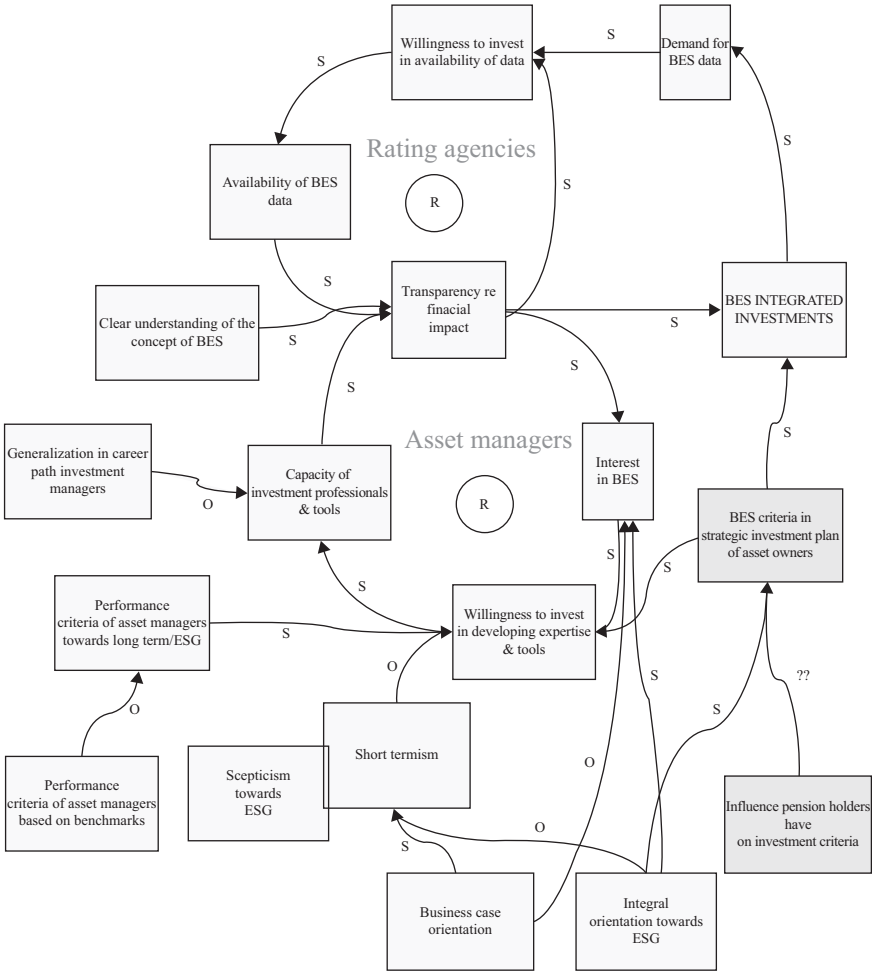


Figure 12.3 System diagram – cause-and-effect relationships[44]

The following summary will explain the information and arrows in the system diagram.

Firstly, the concept of BES should be understood before it can be assessed what its financial impact is on business organisations and investments. The clearer the understanding, the more transparent the financial impact of BES on companies can be made. More transparency will cause more investors to integrate BES factors in their consideration and valuation.

44. This figure was developed by Ard Hordijk to serve as a communication tool for the research project.

Secondly, data are needed to assess the financial impacts. The more BES data are available, the easier it will be to uncover the financial impact of BES factors. More transparency on the level of financial impact will in turn contribute to the willingness of organisations to invest in the collection of BES data. This will result in more BES data being available, which in turn will result in increased transparency as regards financial impact.

The availability of BES data alone is not enough. The information needs to be understood and interpreted by investment professionals. The financial impact transparency level therefore depends on (i) the expertise of investment professionals and (ii) the availability of adequate tools to use the BES information. However, there will only be such capacity if organisations allow their professionals to be trained in this field. The more transparent the financial impact of BES factors is, the more interest there will be in BES, and subsequently increased willingness to invest in capacity and tools.

The willingness to invest in the development of expertise and tools also depends on the general orientation of the asset managers and asset owners concerning the relationship between business and sustainability. A profit-driven, short-term business case orientation will generally lead to scepticism towards the relevance of ESG aspects (with less interest in BES specifically), and this will decrease the willingness to invest in capacity and tools. A more integral orientation towards ESG by asset managers (and asset owners), in which a sustainable future for society and business success are seen as two sides of the same coin, will lead to a stronger interest in BES. A similar effect can be expected with regard to the willingness to invest in the collection of data.

The internal organisation of asset management firms has two characteristics that hinder the development of expertise on the part of professionals to understand the BES aspects of investments: (i) generalisation is required for career promotion, *i.e.* specialised knowledge is easily forfeited, and (ii) the performance criteria for asset managers are based on short-term benchmarks, which discourage them from shifting towards a more long-term perspective and taking risks with 'unfamiliar' criteria. Judging these professionals on performance criteria with a stronger orientation towards long-term profits and ESG factors would increase the willingness to invest in capacity development.

Last but not least, if only a few asset owners include BES criteria in their strategic investment plans, few BES-integrated investments are likely to be made. In turn, this will lead to a lack of willingness by asset managers to invest in building up expertise. However, if more asset owners would include BES criteria in their valuation models, the more asset managers would be interested in developing those capacities.

Some experts argue that if pension holders were to have more influence on the investment criteria of pension funds, they would urge pension funds to integrate ESG criteria (and BES criteria) in their strategic investment plans. This argumentation assumes that a substantial group of pension holders would

prioritise sustainable investment, thereby willing to accept the *risk* of receiving a smaller pension (which they can enjoy in a more sustainable world), and hoping for higher pensions based on the view that taking ESG issues into account evidences sound investment strategy leading to higher returns. However, various pension fund managers argue that a voluntary application of ESG considerations on investment-selection would reduce their investment universe, which might result in higher risks.

It becomes clear from the diagram that addressing one of the impediments could solve part of the market-failure, but could easily lead to another barrier. More interventions are needed to change the entire system. The diagram shows that two main routes towards the integration of BES into investment decision-making could be taken: (i) by demonstrating the financial impact or materiality of BES (left part of the diagram); and (ii) by stimulating a more integral orientation towards ESG and by directly stimulating demand through institutional investors (right part). This could be reinforced if pension holders place demands pertaining to integrating BES criteria in investment decision-making. Although for many people the loss of biodiversity as such should arguably be sufficient to tap into an intrinsic motivation of all actors, proof of materiality and an investment case would be needed for the mainstream investment community to integrate the information into decision-making. However, an exclusive focus on the latter route might not enable an adequate and material shift from niche to mainstream. A combination of the two perspectives would probably lead to the best results.

12.2.4 Suggestions for collaborative actions

The desk research and the interviews shed some light on the current state of affairs in biodiversity information services, showing many opportunities and challenges. The study also revealed ambitions and initiatives aimed at further development in the field. However, many initiatives act in isolation. Connecting initiatives and instigating collaboration between the stakeholders in the field would probably be the best way to achieve a changed business attitude.

According to Chris Huxham, 'collaboration' in its most general sense of the word implies 'a positive form of working in association with others for some form of mutual benefit'.[45] To explain why collaboration can be beneficial to organisations, Huxham has introduced the notion of collaborative advantage, meaning that a partnership can produce things that no organisation could have produced on its own, and that each organisation is able to achieve its own objectives better than it could have done alone. In some cases, it should also be possible to achieve some higher-level objectives for society as a whole.[46] In

45. Huxham (1996), p. 1.
46. Huxham (1993), p. 603.

certain situations, a collaborative advantage can be stronger than a competitive advantage. Considering the complexity of the issue of BES and the many barriers that need to be overcome in order to efficiently integrate BES considerations in investment decisions, it appears that this situation calls for some form of collaborative action between the stakeholders involved. Collaboration can take place in many different forms and can be the result of different motivations. It can range from two individuals from different organisations working together, to a complete synchronisation of the activities of such organisations. The intensity of the collaboration can be somewhere between an exchange of information and concrete, binding agreements.

As regards the case study at hand, the creation of a shared vision would be a good way to create alignment between initiatives and to target the different initiatives, without losing autonomy or competitive edges. *E.g.* if multiple stakeholders jointly formulate a long-term strategy for overcoming the barriers in order to realise the integration of BES information into mainstream investment decision-making. Although this may sound simple in theory, in reality it will be a complex undertaking. As an illustration, two suggestions for concerted action developed by the research team will be presented.

12.2.4.1 Breaking down the BES concept: a 'materiality matrix'

Breaking down the concept of biodiversity into sub-themes is a first step to making it a subject for business-performance rating. Applying a sector-specific approach, in which the most relevant impacts and risks per sector are identified, would be desirable. The research results evidenced that it is considered material to formulate the business case for asset managers in order to assist them in incorporating the constituent parts of biodiversity into their analysis. Linking other environmental issues to BES-related issues will also be helpful to increase understanding by asset managers. Both environmental NGOs and asset management companies have a role to play in this process. The outcome of the process could be a concise and useful guide that provides a sector-specific analysis of materiality, and flags key issues or ecosystem services, that should be investigated by an investor in respect of any company within a specific (sub) sector. However, having a clear understanding of the concept and an overview of the relevant themes per sector alone will not suffice. The translation from 'sector-specific' to 'company-level' analysis requires the involvement of ESG Agencies.

In order to create a solid effect on investment practices, all actors need to be involved in the process of 'breaking down the issue', preferably starting in the early stages. In this way, knowledge-based institutions, *i.e.* certain NGOs as well as scientific institutions, can benefit from the experience and capacity of asset managers and ESG Agencies, and *vice versa*. The process stays as close to practice as possible. Asset managers will be educated and could potentially be

rewarded with learning credits. ESG Agencies can develop new products and find an already informed group of asset managers that might be willing to purchase their new BES information products. The newly developed products will meet the practices of asset managers. Furthermore, this type of collaboration could provide a framework that will facilitate the communication between the different stakeholders on BES performance. Figure 4 shows the potential for interaction between knowledge-based institutions, asset managers and ESG Agencies. Additionally, it will be vital for the progress to make use of, and to integrate, relevant, existing initiatives.[47]

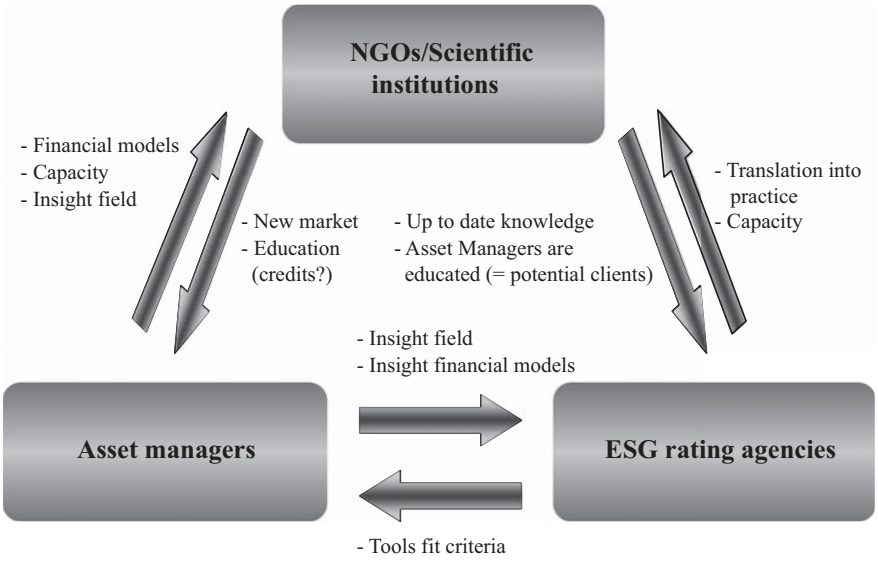


Figure 12.4 Breaking down the issue

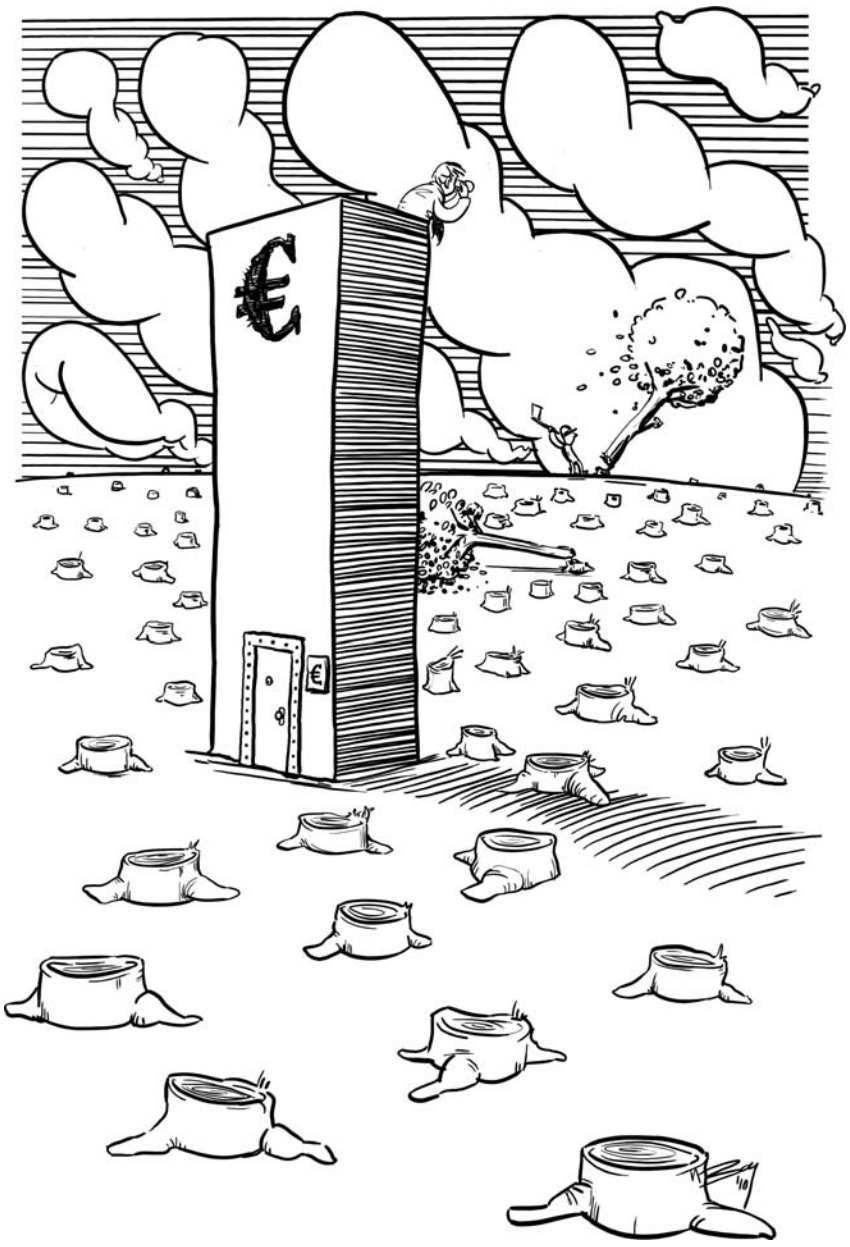
47. *E.g.* World Resources Institute recently started a project in which they address a number of BES issues; these issues are divided into physical, regulatory and reputational components for a number of sub-themes, thereby targeting financial models of asset management companies, to increase the transparency of financial impacts. Another example is a project by the ESG Agency GES, which has developed a concept for a research project aimed at the operationalisation of the ecosystems concept for the financial world. GES collaborates with World Resources Institute and Umea Business School. Other initiatives are the Natural Value Initiative, see: www.naturalvalueinitiative.org, accessed on 21 July 2010. The Forest Footprint Disclosure project, at: www.forestdisclosure.com, accessed on 21 July 2010. The Water Footprint, at: www.waterfootprint.org, accessed on 21 July. See also: A study carried out by asset manager F&C in 2004, at: http://www.globalnature.org/bausteine.net/file/showfile.aspx?downdaid=6645&sp=E&domid=1011&fd=2, accessed on 21 July 2010.

12.2.4.2 A clearing-house for information on biodiversity

Parallel to the all-inclusive approach of raising awareness and educating the financial market actors, a clearing-house could be set up in which these parties can exchange general information regarding business and biodiversity as well as concrete information on companies' impacts on BES. It was indicated by several interviewees that such a clearing-house could be built making use of existing platforms, such as UN PRI, UNEP FI or the London Accord clearing houses.[48] NGOs and scientific institutions can contribute sector and company-specific information to the clearing-house. The information can then serve as input for the company assessment by ESG Agencies as well as for their sector analyses. Asset managers and individual investors can use the information in their investment decision-making. Given the limited resources of most NGOs, commercially exploiting their knowledge may even expand their abilities to conduct more research, and at the same time to enhance their nature conservation activities. Due to the number of parties involved, the risk of association or bias is eliminated.

The information that is currently being used by ESG Agencies concerns the impact of companies on biodiversity. A clearing-house could first 'channel' this kind of NGO information, by bundling it and making it accessible for ESG Agencies and research analysts. At a later stage, the results from a study as proposed in the previous paragraph 12.2.4.1 regarding the 'materiality matrix' could be inserted to further develop the corporate BES dependence insights. As with the previous proposal, it will be important to consider linking existing initiatives in the development of such a clearing-house.[49]

48. The London Accord allows access free of charge to a compendium of reports, written by a range of financial services firms, providing insights into issues ranging from renewable energy to the price of carbon. See: www.london-accord.co.uk, accessed on 15 March 2010.
49. See also: The 'one-stop-service' of IBAT Business; at: www.ibatforbusiness.org, accessed on 15 March 2010.



12.3 Catalysing change in the market – an action research approach

12.3.1 Theoretical considerations that influenced the workshop design

12.3.1.1 Introduction

The second goal of the research project was to ignite movement in the market for BES information products, in order to allow investors to incorporate BES considerations into their investment decision-making process. In section 12.2.4 two suggestions for collaborative action were presented. However, a group of researchers making a plan is not sufficient to cause change. This section will focus on the question how such action could be induced. An action research setting was elected to investigate this question. The research team convened a one day workshop in Amsterdam, the Netherlands, in October 2009, with representatives from the different stakeholder groups, in order to learn about the interactions taking place and the resulting developments. The purposes on the practical level was to collectively develop new perspectives, investigate the possibilities for collaborative action, and to discover the role each participant would be willing to take on. These insights were intended to be of use for the participating stakeholders.

Action research comprises a broad array of different methods, used in various settings and with different aims. This section will commence with a short discussion of a few specific theoretical considerations, originating from action science in the field of organisational learning and change processes, that influenced the workshop design.

In many instances action research methods are employed to generate knowledge for a specific company. However, the aim of the study at hand was to make the research conclusions available to multiple actors and applicable to other situations. When publishing results, it is important for a researcher to be clear and transparent concerning the research design and the processes that have taken place. This allows others to form an opinion about the validity of the researchers' conclusions. In this respect, action research is not different from 'traditional' scientific research.[50] Paragraph 12.3.2 will therefore reflect on the workshop design, including (i) the selection of the workshop participants; (ii) the agenda stating the subjects of discussion and the anticipated discussion technique during the workshop; and (iii) the role of the researchers. Paragraph 12.3.3 will discuss the process during the workshop and the outcome. In paragraph 12.3.4 the success of the intervention is evaluated.

50. Another way of validating the results of action research is through validation by the stakeholders involved, preferable in iterative cycles. Throughout the design of the entire research project, the research team tested its conclusions with different actors.

12.3.1.2 Integral theory & systems thinking

As change processes are difficult, interventions need to be carefully designed. The status quo of a market will not change if all actors continue doing what they are doing. Behavioural change is therefore necessary. One of the major challenges for the development of a more sustainable society is the point of 'perceived responsibilities'. When it comes to the state of the environment, everyone is responsible, which, unfortunately, often seems to boil down to the fact that nobody takes responsibility. In a traditional way of doing business, negative impacts on the environment are externalised, *i.e.* the costs are not reflected in the financial returns. In a traditional view, financial returns are the only thing that count. In order to preserve the planet's biodiversity and ecosystems through the creation of a sustainable economy, it is necessary that everybody, including businesses and financial institutions, extends perceived responsibilities. Even though this concept is often enthusiastically accepted in theory, in reality many expect others to act first. By bringing different stakeholders together to consider the issue as a system in which they all take part, pointing fingers at others without taking action oneself becomes more difficult.

Bringing the stakeholders together is a necessary but in itself insufficient intervention, as the outcome of a multi-stakeholder meeting depends on the process which takes place in interaction. As integral theories on sustainable development demonstrate,[51] changes at a system level can only be effected subject to simultaneous changes at a personal level, *i.e.* an individual is the real change agent. Behavioural changes result from internal changes owing to new perspectives or priorities. How this can be realised will be addressed below.

The integral approach matches the systems thinking, which formed the base for the integral system diagram as presented in Figure 3. Systems thinking[52] focuses on the interaction between different constituents of a system. Examining these interactions as part of a larger system can result in very different conclusions when compared to examining the different parts in isolation. Especially for complex issues which involve many different actors, a system approach with attention for each actors' role within the bigger picture, can provide valuable information.

51. Brown (2005). Integral theory offers a holistic framework, which brings together knowledge from different research disciplines. It is strongly inspired by the philosopher Ken Wilber. The theory is applied to numerous domains, amongst which is sustainable development.
52. Peter Senge can be considered a leading writer regarding systems thinking, in the context of learning organisations. *E.g.* see Senge (1990).

12.3.1.3 Individual and collective learning

Human beings are complex creatures, hence change at a personal level cannot mechanically be induced. Studies investigating what causes change at an individual level (usually referred to as 'learning') have to cope with the dilemma that people do not always 'practice what they preach'. In this context, Argyris and Schön[53] discern two kinds of theories as a basis for human action: (i) espoused theories, *i.e.* based on people's own report explaining the foundations for their action, and (ii) theories in use, *i.e.* inferred from visible behaviour. Behavioural studies seem to detect discrepancies between these two types of theories. Consequently, people may assert that a certain theory influences their behaviour, but studies reveal that in reality their behaviour is to be ascribed to another theory. If people are not aware of which assumptions drive their behaviour, they are unlikely to change these assumptions Either inconsistencies in behaviour are blamed on external factors, or the behaviour is superficially changed to satisfy others In neither case does this result in structurally new behaviour. This is referred to as 'single loop learning', as opposed to 'double loop learning, where a fundamental change is enacted by changing underlying patterns.

Elaborating on the insights of Argyris and Schön, Swieringa and Wierdsma[54] distinguish between three different cycles of collective learning (within organisations):

- *improvement* of existing practices, by discussing how things are currently done and to decide on adjustment where needed;
- *renovation* of the practices, by questioning why things are done in a certain way. This method can result in a deeper and systemic change (beyond the group of participants); and
- *development*, which can happen when basic organisation principles (*e.g.* visions, strategies and organisation culture) are accepted as a subject of discussion. This can lead to completely new situations.

How can learning be enacted at a fundamental level, *i.e.* how can a situation be created that allows for discussion on the basic underlying assumptions and orientations? Argyris stresses that for a fundamental change in behaviour, it is necessary to create a space where people feel free to question their own behaviour, *e.g.* where there is 'no major maldistribution of power weight, influence, competence, information, or analytical resources' and with 'time for adequate debate and exchange of ideas'.[55] At the same time, studies show that

53. Argyris & Schön (1974).
54. Swieringa & Wierdsma (1992).
55. Argyris (1976), p. 372.

people more easily detect the inconsistencies in the behaviour of *others* than in their *own* behaviour. Wierdsma[56] also argues that for organisational learning processes it is important that a group of participants reflect the diversity of the organisation as much as possible. If only the 'usual suspects' participate in the process, it is less likely that new perspectives can be developed and implemented. Furthermore a good and varied level of representation serves the credibility of the outcome of the process.

12.3.1.4 Theory U

The theory of the 'U-Process', describes what a change process from old to fundamentally new thinking within existing systems can look like. This theory was developed by Scharmer, Jaworski and Senge,[57] and is represented in Figure 12.5. It explains that a common reaction is to apply or 'download' traditional patterns to find solutions for new problems. However, more complex issues require innovative thinking. The U-process describes four different levels of dealing with a concrete problem:

- the first is that of reacting and creating 'quick fixes'. The actors involved are focused on a quick solution and avoid fundamental discussion. The type of conversations on this *level can be referred to as 'talking nice';*
- for a more fundamental change, a 'free mind' is needed to consider the issue at hand more carefully. The actors involved engage in serious debate;
- to achieve an even deeper change, an 'open mind' is required to include in the considerations the positions of other actors in the system and their views on the problem. It is essential that the participants identify with the system, instead of putting themselves outside (as observers). This necessitates an intense dialogue between people and allows for the development of (common) new values and beliefs; and
- to accomplish a change at the most fundamental level, the actors ought to reach a stage of 'presencing',[58] *i.e.* from where deeper inner forces are directed, in order to release new sources of energy, inspiration and a willingness to make the change happen.

56. Wierdsma (2006).
57. Scharmer (2008). Hordijk (2008) discussed this theory in the specific context of changes towards a more sustainable economy.
58. 'Presencing' is a conjunction of the words 'presence' and 'sensing' and refers to a higher state of awareness, in which individuals and groups are allowed to connect to the 'hidden source' from which future developments will enfold.

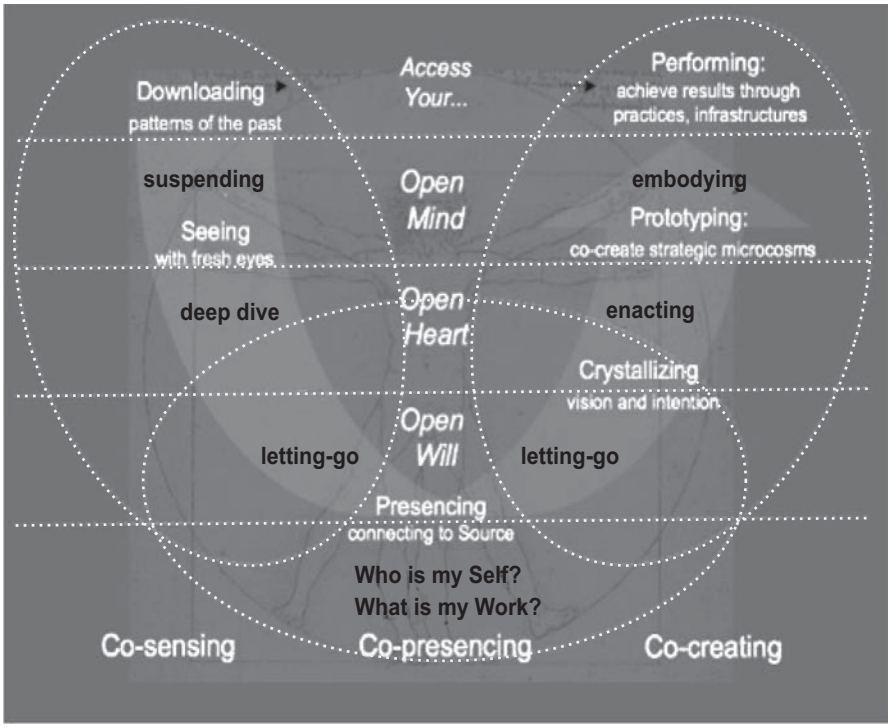


Figure 12.5 The U-process (Source: Scharmer)[59]

For a complete U-process to take place, a group of people progress down the U on the left side, at each level gaining a deeper understanding of the issue at hand. At the bottom point they sense the entire system from their inner sources. From there, they progress up the U on the right side, developing solutions which become more and more concrete.

It is important to notice, however, that the U-theory describes a change process which could take place, but is not the ultimate recipe or tool to enforce change. Furthermore, not all change processes require or allow all phases to be experienced. As with the initiation of fundamental changes as discussed by Argyris and Schön, the U-theory can assist in designing a change process, *e.g.* in formulating the right questions to be posed to the actors. The theory points out that these actors need to be addressed as individuals, rather than as representatives of an organisation. Each of them will then be challenged to reconsider his thinking, and from there his actions. Both the U-theory and Argyris' studies stress the importance of creating a space where the participants feel free to explore their views, and are allowed to make mistakes without

59. See: www.presencing.com, accessed on 15 March 2010.

others judging them. It also asks for careful facilitation of the process, with the facilitator deciding on the right timing to proceed to a next step.

12.3.2 The design of the workshop

12.3.2.1 Participants

The interviews with the various market parties formed an important basis for the selection of the workshop participants, *i.e.* about how interviewees see their position in the field, their willingness to contribute to the further development of the market, and their interest in participating in the workshop. The interviews were in fact the first step in the intervention process: the issues were addressed, the findings of the desk research were tested, and ideas gathered in previous interviews were communicated. For the selection of the workshop participants, the following criteria were applied:

- the group had to reflect reality, *i.e.* the most pertinent stakeholder groups had to be represented, *i.e.* asset managers, ESG Agencies, NGOs, the Dutch government, relevant international organisations and network organisations;
- the group should share a basic level of understanding of the issues at hand, allowing the members to engage in a deeper level of discussion and exploration; and
- a certain level of willingness to engage in a change process, based on an understanding of the urgency of the issue and a basic recognition of the possible role an individual or organisation can play within the system. Frontrunners were the preferred participants.

The interviews revealed a good level of competition, especially between ESG Agencies. Even though the potential for collaborative advantage was recognised, these mutual relations were taken into account in the selection of ESG Agencies. Furthermore, the study and the interviews had an international focus. Due to practical reasons however, most parties who accepted the workshop invitation were based in the Netherlands (financial institutions, network organisations and NGOs) or in Europe (ESG Agencies and international institutions). Unfortunately, some ESG Agencies' representatives could not come due to financial restraints. The original composition of the group also suffered from some last minute changes, due to planning issues. Through phone calls with those persons and written commentaries, these representatives nevertheless contributed to the workshop discussion. This resulted in a situation where, apart from the project team, only six participants in the workshop programme had been involved in the first phase of the research. Two of the new participants replaced a colleague who was one of the interviewees. Consequently, for the majority of the participants, the workshop would be the first

intervention. In order to prepare for the workshop, all participants had received a preliminary research report on the status quo of the market, including the analysis of the nine characteristics and a number of suggestions for further development of the market.

Due to said cancellations, the first selection criterion was not fully met. The ESG Agencies were somewhat underrepresented. During the workshop, it became apparent that also the second criterion was not completely satisfied, because some of the new participants had just recently started ambitions in this field. This resulted in a slight imbalance in knowledge levels and experience. The third criterion, showing a cooperative attitude towards the development of this field, was satisfied. The final group consisted of 17 participants, excluding two members of the research group. Table 1 shows the number of representatives per stakeholder group. The group was international, with an overrepresentation of Dutch and British participants. Other nationalities were: Swedish, Swiss and French.

Table 12.1 Representation of different organisations at the workshop

Representing	**Number of participants**
The Dutch government	1
Asset managers/commercial banks (hereafter: asset managers)	5
Sector organisations with a focus on sustainability (investment & corporate)	2
ESG Agencies	3
Nature conservation organisations/international organisations	4
Business university	2
Total	17
Facilitation & presentation (see below 'role of researchers')	2

12.3.2.2 The agenda and the anticipated discussion technique

The workshop was designed in a certain way with the purpose of creating an open space which would allow the following processes to take place:

– the participants were to have the opportunity to: (i) assess their own blueprint patterns of thinking; (ii) discover their own place in the system; (iii) detect their relation to the position of others. The meeting had to offer an 'open space' where they would not feel hampered by the presence of competitors. Therefore, each participant would be addressed as an individual and as a representative of a stakeholder group rather than as a representatives of his or her organisation. It was communicated that strong commitments at the end of the day were not necessarily expected;

– in brainstorming sessions it should be explored in which ways the efforts of the individual parties could be mutually reinforcing for the development of the field in general, *i.e.* investigate possible forms of collaborative action; and
– stakeholders were to have the possibility of establishing new links between themselves. Although the workshop was primarily aimed at providing new perspectives to all participants and identifying joint courses of action, it could also pave the way for concrete individual or bilateral action after the workshop. The workshop was therefore also set up as a network event.

On a practical level the research team was constrained to a one-day workshop. Ideally, the workshop would have covered a longer period, but that did not seem realistic. The main challenge was to direct the participants to investigate their own ideas and views, to establish a common perspective on the system as a whole, and to brainstorm on concrete follow-up activities. The programme design was inspired by the stages of the U-theory. In view of the limited time available and since the participants did not know each other, nor were they related apart from 'being part of the same system', it would have been impossible to go through the deepest stage of 'presencing'. Indeed, the workshop ambition was not to cover the whole U-process, however it was considered desirable to reach the second or third level.

In order to go deeper than the first level and thus to avoid 'instant responses' from the participants on the issues at hand, the agenda of the first part of the day focused on explaining the integral system of the interrelated barriers and the role of relevant actors in the system, as had been developed in the second stage of the research project. Furthermore, a presentation was given on concrete initiatives and developments in the field. The second agenda item was to challenge the participants to define – in sub-groups with a mix of stakeholders – which developments they expected to occur in the future that would influence the materiality and visibility of BES issues. This brainstorm-session was set up to stimulate an open mind approach.

To make the participants more aware of their position within the system, they were challenged to engage in 'role thinking'. Again in sub-groups, this time per stakeholder base, the participants were encouraged to define possible steps for other stakeholders to improve the BES-market. In this way, the theory depicted by Argyris and Schön could be employed,[60] assuming that people more easily detect 'real' patterns in the behaviour of others than in their own behaviour. Also they were asked to brainstorm on collaborative action, together with the other stakeholder groups.

After each assignment, the outcomes were discussed in a plenary setting, to combine the specific insights and recommendations, and to formulate additional

60. See: Eden (1996), p. 53. For a similar consideration in action research workshop design.

ideas. The last part of the workshop was meant to reflect on what steps the participants could take within their own organisation.

12.3.2.3 The role of the researchers

At the workshop, four people from the Nyenrode academic research team were present to guide the process and to fulfil two roles: (i) to facilitate the process (both plenary and in sub-groups); and (ii) to provide input at certain moments in the process, based on the insights gained in the desk research phase. Furthermore, the team considered itself a relevant party, because of its position to oversee the market and to identify opportunities. Moreover, the team could be of assistance to market actors in respect of developing tools which are necessary for further market development, or further align actors in multi-stakeholder processes.

The multiple roles that were to be fulfilled by the team deserved some specific considerations beforehand. Typically, a facilitator is neutral and solely focused on the process. In this case, however, the researchers had also developed a perspective on the field, and had generated knowledge on the system which they felt necessary to share with the participants. This dilemma was dealt with by appointing one researcher as the 'facilitator' of the workshop. Another role was attributed to the author: to present the team's research results and to share its views and ideas with the participants. Finally, the two other researchers participated in the process just like the other participants. Apart from this practical solution, throughout the process the team was open and explicit about its interest.

12.3.3 The workshop: outcome, process, and follow-up

12.3.3.1 Workshop outcomes (contents)

As regards the suggestion by the researchers to have a 'materiality matrix' (see section 12.2.4) developed by collaborative action, it was observed that during the workshop particularly the representatives of the asset managers embraced this proposal. It was affirmed that such a framework, aimed at providing an overview of different sub-issues, *e.g.* water and land conversion, and specific BES risks and opportunities per sector, would be very valuable. It was also recognised that preparing such a framework would be too big an assignment to be taken up by one single organisation, and would require collaborative action. Most participants saw a way in which their respective organisations could contribute a piece to this puzzle. However, none of the participants seemed to be willing to take the lead. The question was raised whether governmental and international organisations should elaborate on this idea or fund a strategic project to establish an all-encompassing matrix.

The other proposal suggested by the researchers, which also would require collaborative action, concerned the idea to start an information clearing-house on companies and BES. The responses in the workshop were: ‘easier said than done’.

A few additional proposals for further development of the BES information market were welcomed, such as creating a biodiversity ranking or index regarding companies. Some asset managers and ESG Agencies indicated that they would further consider this idea. Furthermore, the participants agreed that the development of the BES information market would be tremendously assisted by expanding corporate disclosures, and by enhancing verification procedures for the published information. It was contended that ideally, this needs to be established by public regulation, but that companies can start by using the GRI G3 key performance indicators on biodiversity as a best practice, and help to develop these so that they will also include dependence links between companies and ecosystem services. Finally, the standardisation of information was also considered helpful. Some participants, mostly from the nature conservation organisations and scientific institutions, agreed to contact GRI to intensify the communication on the development of BES disclosure standards.

12.3.3.2 Impression of the workshop process

The atmosphere during the workshop was good, the participants engaged actively. There was a clear interest in an exchange of views and experience, and the participants engaged in dialogue, both during the official programme and during the breaks.

After two introductory presentations, respectively to present the research results and the current developments in the field, the participants responded immediately. They nuanced the research findings, and suggestions were made for solutions and steps to be taken. However, keeping the U-theory in mind, these first remarks were ‘parked’ by the facilitator. He introduced the next part of the programme which was aimed at discussing ‘the system as a whole’ with the expectation of coming to more fundamental insights and steps afterwards The creation of a shared understanding of the concept of the BES information market was considered to be one of the key conditions for defining and engaging in collaborative action (U-process level 3). In sub-groups, foreseeable developments regarding the role of BES in three sectors of industry were discussed. The outcome was interesting and the participants were actively exchanging views. When they were subsequently challenged to look at BES information products for the financial sector from the perspective of stake-holders other than their own organisation, it became apparent that this was more difficult than expected. The response to this assignment was limited.

During the brainstorming session on possible forms of collaborative action the suggestions presented in section 12.2.4 were provided as examples to start the discussion process within the subgroups. The participants actively reflected on these proposals, but only a few new suggestions were formulated. Even though the participants recognised the potential advantage of collaborative action, they mainly expressed an interest in using and, where readily achievable, contributing to the efforts of others.

Although the atmosphere was good and the participants expressed satisfaction about the day, concrete suggestions for a follow-up were not yet confirmed. A real sense of ownership of the issue seemed to be lacking. At the end of the day, the research group was uncertain whether it had succeeded in establishing a 'system-level perspective' which could serve as a basis for collaborative action in this field. However, realistically speaking fundamental changes do need time to take effect.

12.3.3.3 Follow-up after five months

The team contacted the participants five months later and spoke to 90 per cent of the participants and the persons who had contributed to the workshop with written comments or were contacted by telephone on the day of the workshop. They were asked to reflect on the workshop, about any follow-up activities in the field of BES, and about any contacts with other workshop participants. Obviously, it is impossible to establish 'objectively' what the actual output of the workshop was, because of the subtlety of the changes and the complexity of the issue. Also, the workshop was just one in a range of activities addressing the issue of business and biodiversity. However, the short interviews offered valuable feedback on the effect of the workshop.

The responses were analysed by using a 'four quadrants model' as developed within integral theory[61] (see Table 12.2). A distinction is made between output at an individual level (*i.e.* the participant, and his organisation), and output at a collective level. Changes on the *interior* (new views, perspectives, priorities) were compared with those on the exterior (change in behaviour). As explained in section 12.3.1, these fields are all interconnected and each plays a crucial role in achieving sustainable development.

61. This model is referred to as AQAL, an acronym for All Quadrants, All Levels, and forms the core of the work of Ken Wilber Brown (2005).

Table 12.2 Potential outcomes of the workshop as intervention instrument

OUTPUT	**Interior (Perspective on issue)**	**Exterior (Behaviour concerning issue)**
	Upper Left	**Upper Right**
Individual (participant + organisation)	– increased importance of issue – new knowledge re issue – new perspective on issue – 'seeing the system'	– internal follow-up steps
Collective (between participants/ organisations)	**Lower Left**	**Lower Right**
	– increased mutual understanding between stakeholders of their respective roles and positions – new relationships with others – a shared understanding of the issues at hand – a shared future perspective	– collaborative actions

The most ideal output falls in the Lower Right quadrant: concrete collaborative actions. Any developments in the Lower Left quadrant, *i.e.* a shared understanding of the issue, and relationships between stakeholders, would be necessary to allow for successful collaborative action. However, new perspectives at the individual level were also appreciated by the research team, such as identification with the system and recognising the role of the individual in the system, *i.e.* the Upper Left and Upper Right quadrant. The concrete results of the workshop as communicated in the follow-up telephone calls will be presented per quadrant below.

Upper Left: internal change at the individual level – Most of the participants expressed that they had gained new knowledge on the links between BES and business during the workshop. Especially the asset managers mentioned that their understanding of the issue had increased. NGO representatives, the recognised BES experts, obviously, did not gain many new insights. The participants from the NGOs and ESG Agencies mentioned that the most valuable output of the workshop for them was that they had gained more

insight into the perspectives of the investment sector. According to them, only on rare occasions does one hear the investor perspective first hand. As regards ESG Agencies, that sell information to investors on a daily basis, it was explained that the customer contacts are always handled by the sales/customer care department rather than by the analysts.

Upper Right: internal steps taken by the participants - Of the five participants representing the asset managers, two had taken concrete internal steps. They were actively looking for ways to incorporate BES considerations into their daily practices, either through pre-screening the investment universe on BES performance, or through specific engagement activities. One participant had designated BES as one of three key ESG issues of attention and had produced internal guidelines on how BES has to be treated by the organisation's investors. The other participant had started using information currently available on BES on a more structural basis, is looking for additional information and intends to commission a specific research assignment to further investigate how BES considerations can be incorporated in the investment processes. The other participants of this stakeholder group would still like to do more regarding this issue, and plan to do so in the near future, but as of yet they do not have any concrete plans. The sector organisation for responsible investment has put BES on the organisation's internal agenda. It is anticipated that this will result in new activities, *e.g.* addressing the theme during investors' seminars and in the engagement with companies. One of the ESG Agencies' representatives indicated to have communicated within the agency that there is a clear interest in the issue of financial institutions, thereby stressing the need to invest in effective and adequate indicators and possibly to invest in the development of new tools addressing the dependency relationship between companies and BES. Initial steps have been taken in this respect. The NGOs communicated that they will continue their attention to the issue, and that they will apply their new insights concerning the investors' perspective to further enhancing their communication strategies.

Lower Left: change in the collective understanding of the issue – As mentioned above, many participants indicated that their knowledge of the financial sector's perspective had increased, and that it was very valuable for them to exchange views with other stakeholders and to engage in discussion. NGOs underlined that their role had become clearer, *i.e.* further engagement with asset managers and ESG Agencies in order to make the understanding of the BES concept more sophisticated. Other participants confirmed that it was worthwhile to have acquired a common broader perspective of the field. A shared future perspective rooted in identification with the system as well as in ownership of the issue remains a challenge, however. Nonetheless, the workshop had been successful in establishing new, bilateral and international links between different actors,

who did not necessarily know each other beforehand. More concretely, during the workshop one of the participating NGOs had shared a presentation on a new tool to analyse a company's BES performance, targeted at the financial sector.[62] After the workshop several participants expressed interest in this tool, resulting in additional presentations or informative meetings.

Lower Right: collective steps taken by the participants/organisations – Collective actions taken after the workshop have been limited. Two organisations that already had a business relationship before the workshop, *i.e.* as a buyer and a seller of information, have proceeded with BES information services. Subsequent to the workshop, the asset manager had requested more extensive information on BES performance regarding specific companies with the purpose of including such knowledge in their engagement processes. Three other participating organisations are investigating the possibilities of jointly initiating the development of a 'materiality matrix'.

12.3.3.4 Evaluation: How successful was the intervention?

In general, all participants provided positive feedback on attending the workshop. The participants indicated that they had gained new insights and perspectives through the workshop. Some of them informed us that they already had translated these into their daily practices. Furthermore, several relationships had been established between participants. Solid changes at the system level did, however, not take place.

The analysis showed that the workshop delivered results, especially in the Upper Left quadrant. Some results have also been booked in the Lower Left quadrant. Although it seems that some progress has been achieved in the Upper and Lower Right side, the concrete steps still appear to be limited in number.

Referring to the aims set out in section 12.3.2, it can be concluded that the creation of an open space was accomplished and resulted in some new perspectives and increased understanding. However, the first aim of extending the participants' view on the system was only partly realised. Subsequent developments towards concrete collaborative action or the formulation of a shared strategy (*i.e.* the second aim) have been limited. The workshop was probably most successful as a network event, which was the third aim.

The ambition to create a shared understanding as a basis for concrete collective action in just a one-day workshop can – with hindsight – be considered too high. Part of the explanation is that, although in the initial set-up the frontrunners of all stakeholder groups were selected, due to some last-minute cancellations, the profile of the group changed. The ambitions

62. The Natural Value Initiative developed the Ecosystem Services Benchmark. See also note 14.

should have been adjusted. A key significance of action research is that the process should be tailored to the needs of the actual group. The facilitator has the responsibility to create the right conditions and to facilitate the process which enfolds. However, even with the 'right conditions', the outcomes can differ from the researchers' expectations. In this case, the workshop was considered to be valuable by the participants, because it suited their needs at this point, even though it did not meet all of the researchers' ambitions.

Change processes that involve multiple stakeholders and concern complex sustainability issues, provide a difficult setting for easy success. This has also been noticed by other academics, *e.g.* Brydon-Miller *et al*. indicate that action research settings are generally very successful in local settings, but that scaling up to large-scale societal-level changes proves to be difficult. Broader social change strategies and commitments would be needed.[63] It is important to realise that change processes need to grow.[64] In that respect, the workshop can be evaluated as one step in a range of events. In view of the fact that 2010 is the International Year of Biodiversity, this research project has contributed to the visibility of BES. Furthermore, it is interesting to note the explanation of Huxham as to why collaboration between organisations appears to be difficult to achieve, even when there is an obvious collaborative advantage. She asserted the following reasons:

– differences in aims, language, procedures, culture and perceived power;
– the tension between autonomy and accountability;
– a lack of an authoritative structure; and/or
– a shortage of time needed to manage the logistics.[65]

All these complicating factors can be considered to be applicable in the case at hand. The mutual understanding between the stakeholders needs to be improved. The workshop participants agreed that the BES information market could greatly benefit from a common framework which could be used to understand the link between BES and business, in particular when it would be detailed on a sector or industry level and on various BES themes. The development of such a so-called 'materiality matrix' could increase mutual understanding and improve communication. However, in the current situation, there is no authority that can induce change or collaborative action, *e.g.* as could be achieved within a single organisation. In bringing together the

63. Brydon-Miller *et al.* (2005), p. 25. See also: Bradbury *et al.* (2008).
64. Also within the field of developmental aid, the question of how to grow change is receiving more attention.
65. Huxham (1996).

participants for the workshop, the research team relied on persuasion based on the importance of the issue.[66]

Since ESG Agencies generally play a modest role in a competitive market, the short-term competitive advantages of developing and using one's own tools seem to outweigh any potential future advantages resulting from developing a common tool in collaborative action. Asset management companies have a different perspective. They are more willing to collaborate on BES issues, *e.g.* by aligning their engagement activities with other investors. Initiatives like the UN PRI already offer a joint investor platform. To connect all actors in the field, some sense of identification with the entire field of BES information would be needed. As one of the participants mentioned after the workshop: "the stakeholders involved should be forced together in a room to develop a joint strategy, and only let them out if they all agree". This also touches upon the third complicating factor: the time needed for the logistics. The stakeholders are spread around the globe and do not encounter each other on a regular basis. Cooperation – in whatever form – needs to be facilitated. A common structure would need to be established, but each individual stakeholder is caught up in everyday activities. Apart from time constraints, financial resources were mentioned to be another constraint for realising good ideas for a follow-up.

12.4 Concluding remarks

A starting point for the research project was the observation of a market failure in the market for information products on corporate behaviour regarding BES, where supply and demand do not match. This topic can be studied from different angles. This chapter has provided an overview of the state of the market for BES information products and has discussed barriers and opportunities for further development. One type of market failure is the lack of a market. Based on the research it was concluded that there is a market, but that it is (still) at an immature stage. Information is being traded, but the market is limited to niche investors with an ethical orientation. Generally, the information that is purchased focuses on the impact of corporate behaviour on BES. Information on the dependence relationship is close to non-existent. A well-functioning market for BES information products can also help to correct failures in other types of markets. A common form of market failure is the problem of externalisation, *i.e.* when not all impacts (positive and negative) are incorporated into transaction prices, hence resulting in the circulation of

66. Eden (1996) gives an overview of different types of influence which conveners of collaborative action may exert. Persuasion is characterised by informal authority and the convener's own initiative. The participation of stakeholders depends on the ability to present credible arguments that participation will be worthwhile, p.65.

false information in the market. A negative impact of corporate activities on BES is a typical example of costs which are borne by society, instead of by the company causing the impact. Ultimately, in a perfect market, such costs would have to be borne by the consumers buying the products produced by such company. The inclusion of information on BES performance could be the starting point for the correction of this market failure, which is currently the case in many markets for commodities and services. 'Perfect markets' need perfect information for all actors, hence including BES-related information. Currently, this information is not available and not integrated in ultimate prices. Finally, it was emphasised that the development of a strong business case for understanding and minimising dependence on ecosystem services would have to go hand in hand with strengthening legislation that protects biodiversity (*e.g.* by increasing legal penalties or requiring offsets), helps to establish a (monetary) value for BES, and stimulates corporate disclosure on BES.

Apart from the identification of various barriers, a more important conclusion derived from the research is that there is potential for growth in the BES information market. ESG Agencies and investors have indicated that especially the dependency relationship between companies and BES is considered necessary to strengthen the business and the investment case, which – in their view – is needed for the integration of BES information in investment decision-making. Asset managers and institutional investors would be interested in purchasing more information from ESG Agencies. There are already various initiatives (in progress or being developed) with the intention of filling existing gaps. Linking these initiatives and bundling efforts is important to create a catalysing effect for the development of the market. Furthermore, increased involvement by market parties is essential to get the basic mechanism of demand and supply going.

Collaborative action was the subject of the last part of this chapter. The suggestions for certain joint action initiatives proposed by the research team were tested in a workshop with participants representing different stakeholder groups. Process-wise, for action researchers, valuable lessons are: (i) the need to carefully select the participants to meet the ambitions, but at the same time to adjust the programme and the ambitions to the people actually participating in the workshop; (ii) to communicate realistic expectations, and to realise that the participants participate in the actual outcomes of the workshop; (iii) it can be valuable to communicate the results of the workshop with each of the participants some time after the workshop in order to generate feedback and reinforce their intentions to undertake action; and (iv) to facilitate and support collaborative initiatives to develop change process. Conditions can be created to allow change processes to take place, but the changes cannot be enforced and will need time to materialise, as well as resources to facilitate emerging collaboration.

Chapter 13.* Private investment in the conservation of Biodiversity and Ecosystems

Come forth into the light of things, Let Nature be your teacher.
William Wordsworth (1770-1850)[1]

13.1 Introduction

Biodiversity loss is a reality of the 21st century. The fight against it has become a priority for governments and nature conservation organisations all over the

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* The research ended on 23 May 2010. The chapter is based on an article by the author and Julia Levashova (junior researcher at the Center for Sustainability, Nyenrode Business University), which will be published in the *International Journal of Biodiversity Science, Ecosystem Services & Management* (2010). The chapter reflects the outcomes of a research project initiated by Nyenrode Business University, Center for Sustainability and the NGO International Union for Conservation of Nature-Netherlands Committee (IUCN-NL), and carried out by these parties and the NGO European Centre for Nature Conservation (ECNC). This chapter has benefitted from the Conference Paper, *i.e.* a discussion document prepared by the author and Levashova for the conference "Boosting Investments in Biodiversity and Ecosystem Services" held in Amsterdam on 11-12 November 2009. The conference was the main goal of the research project: bringing together pro-biodiversity projects, investors and other stakeholders in the field. This Conference Paper was distributed to the participants. In particular, Josh Bishop is thanked for his valuable comments to the Conference Paper, which have been incorporated in this chapter. Furthermore, the author thanks Ard Hordijk, Irene Jonkers, Sjef Gussenhoven, Vineta Goba and Lawrence Walter Jones for sharing project research results, as well as the project's Steering Committee, consisting of Arthur Eijs (Senior policy advisor on Biodiversity, Dutch Ministry of Housing, Spatial Planning and the Environment, the project's main financial supporter), Rob Lake (Head of Sustainability, APG Asset Management), Mark Campanale (Four Elements Capital Ltd), Sachin Kapila (Group Biodiversity Adviser, Shell) and Joshua Bishop (Chief Economist, IUCN) for their guidance in the project. The project was financially supported by the Dutch Ministry of Housing, Spatial Planning and the Environment, DFID – *i.e.* the UK Department for International Development, and the Swiss Government (Federal Department of the Environment, Transport, Energy and Communications, Federal Office for the Environment). APG, a large pension fund asset manager, has assisted in setting out the strategy of the project. See: www.nyenrode.nl/biodiversityfinance, accessed on 12 July 2010. The information in this report is provided for general informational purposes only, and should not be construed to contain legal, business, accounting, tax, or other professional advice. No one should act or refrain from acting on the basis of any information contained in this report without seeking appropriate professional advice based on his or her particular circumstances.

1. W. Wordsworth, 'The Tables Turned. An Evening Scene, On the Same Subject', in *Lyrical Ballads*, 1798.

world. However, despite the fact that most States in the world are a Party to the Convention on Biological Diversity (CBD) and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), their efforts have proved insufficient.[2] Governments and environmentalists are apparently not the only parties that need to be engaged. The corporate sector is a key player for the maintenance of the ecological balance. Its activities have an immense impact on nature, *i.e.* on the state of the world's biodiversity and the health of its ecosystem services. Consequently, if the private sector were to reduce its negative impacts and contribute to the preservation of nature, that would make a substantial difference. This ambition has been set out in many of the mainstream private regulatory regimes in the field of CSR, such as the Global Compact, the OECD MNE Guidelines, the Earth Charter, the Equator Principles, the Principles for Responsible Investment (PRI), the GRI G3 sustainability reporting guidelines.[3] Even though biodiversity is considered to be a 'public good', the view that business and society share a responsibility for the preservation of the environment is widely supported. The EU has commissioned an extensive study on the value of biodiversity: The Economics of Ecosystems and Biodiversity (TEEB) study,[4] and the year 2010 has been

2. According to IUCN research, the current species extinction rate is between 1,000 and 10,000 times higher than it would naturally be. The main reasons are urban development, farming etc. See: http://www.iucn.org/what/tpas/biodiversity/, accessed on 1 March 2010. See also the third Global Biodiversity Outlook (GBO-3) which warned that some eco-systems may soon reach 'tipping points' where they rapidly become less useful to humanity, *e.g.* rapid dieback of forest, algal takeover of watercourses and mass coral reef death. The GBO is a publication of the Convention on Biological Diversity. Drawing on a range of information sources, including National Reports, biodiversity indicators information, scientific literature, and a study assessing biodiversity scenarios for the future, it summarises the latest data on status and trends of biodiversity and draws conclusions for the future strategy of the Convention. On 10 May 2010, the GBO-3 was launched; at: http://gbo3.cbd.int/, accessed on 23 May 2010.
3. For example see: Global Compact, principles 7, 8, and 9 that require that business should be environmentally responsible, see: http://www.unglobalcompact.org/AbouttheGC/TheTEN-Principles/index.html, accessed on 3 April 2010; the OECD Guidelines for Multinational Enterprises in Chapter V explicitly mentions that companies have to establish and maintain a system of environmental management that contributes to a wider goal of sustainable development, see: http://www.oecd.org/document/18/0,3343,en_2649_34889_2397532_1_1_1_1,00.html, accessed on 4 April 2010; the Earth Charter deals with the environment in Chapter II, specifically underlying in Principle 5 that everyone, including businesses should: "protect and restore the integrity of Earth's ecological systems, with special concern for biological diversity and the natural processes that sustain life," See: http://www.earthcharterinaction.org/content/pages/Read-the-Charter.html, accessed on 3 April 2010.
4. See: TEEB for Policy Makers Report (13 November 2009); The TEEB Climate Issues (2 September 2009); The Economics of Ecosystems and Biodiversity Interim Report (2008). These studies are available at: http://www.teebweb.org/InformationMaterial/TEEBReports/tabid/1278/language/en-US/Default.aspx, accessed on 12 April 2010.

designated by the UN as the 'International Biodiversity Year'.[5] Besides impacting the ecological balance, companies also depend on ecosystem services for the continuity of raw material supplies and for regulatory services. From a business perspective, one of the solutions to combat the loss of biodiversity is the reorientation of the economic incentives that drive private investment.

This chapter will present the results of a study concerning the developments in the field of private actor investments in biodiversity and ecosystem services (BES). The research was conducted in 2009 by the author and her colleagues of Nyenrode Business University in the Netherlands in collaboration with the nature NGOs International Union for the Conservation of Nature – Netherlands Committee (IUCN-NL) and European Centre for Nature Conservation (ECNC).[6] The scope of the research project is outlined in Annex 13.1. The outcomes demonstrate that the development of market-based tools for the protection of biodiversity can lead to innovative business opportunities. In this chapter, firstly, the business case for biodiversity will be discussed, both from the perspective of companies and investors. Secondly, various emerging BES markets will be explored by providing examples of concrete projects. Existing opportunities as well as developing initiatives for BES investments will be recorded. Thirdly, an attempt will be made to identify barriers that may prevent investors from exploring these new markets. Possible solutions to overcome existing obstacles will be suggested. Finally, the conclusion will summarise the main ideas emphasised in the research.

13.2 The business case for biodiversity

13.2.1 What is biodiversity?

Biodiversity is a central element of sustainable development that affects the life of every living organism on the earth. It is a term used to describe a variety of genetically distinct populations within species and the natural communities and ecosystems of which they are a part. Ecosystems are defined as "a dynamic complex of plant, animal and micro – organism communities and their non – living environment interacting as a functional unit."[7] An incredible diversity of life, ranging from tropical savannah to ice-covered Antarctica with animals and

5. See: United Nations General Assembly (UNGA) Decision (15 April 2010) and Jonkers, I., Lambooy, T., Simons, H., Gussenhoven, S., 'Pro-Biodiversity Business: A New Landscape of Opportunity', in *Forum CSR International*, 1 April 2010, pp. 37-41. Both publications are available at: http://www.nyenrode.nl/facultyandresearch/workingconference_CFS/Pages/Library.aspx, accessed on 12 April 2010.
6. See the text at * preceding the notes of this chapter.
7. United Nations Convention on Biological Diversity (CBD), article 2, adopted 29 December 1993. See: http://www.cbd.int/convention/, accessed on 14 February 2010.

plants of all sizes and shapes, represents an enormous array of biodiversity existing on this planet. Everyone's livelihood depends on biodiversity: the trees help to purify the air we breathe and absorb greenhouse gasses; the diverse species of animals and plants provide people with food and medicine; bees are necessary for pollination, a necessary service for the generation of new plants and fruits; and watersheds supply us with clean drinking water.

13.2.2 Importance for companies

The decline in and loss of BES undermines the richness and variety of species. This deterioration also has a great impact on the private sector. Businesses interact directly with BES in two ways: (1) companies depend on BES for the provision of raw materials and regularity of ecosystem services; and (2) they contribute to the change in BES, both negatively due to the impact of economic activities, and positively when they are engaging in pro-biodiversity business.[8] Reference is made to Figure 12.1 of chapter 12. It is still difficult to quantify the financial link between ecosystem services and companies, hence the EU TEEB studies are working on defining the value of BES.[9] Research on business and biodiversity suggests, however, that business profits and a good condition of biodiversity are often correlated.[10] The facts suggest that: (i) biologically diverse soils are generally more productive for agriculture; (ii) various tropical forests are the main locations in which to discover novel genes and compounds for agricultural, industrial and pharmaceutical uses; (iii) tourists prefer more diverse ecosystems; and (iv) marine biodiversity is associated with the increased productivity of fisheries. Consequently, independent of a company's business activity – whether it relies on pharmaceutical raw materials for the production of medicine, or produces cat food made of fish – there is a very high chance that it depends in some way or another on the health and resilience of ecosystems and the ecosystem services that they provide. The deterioration and loss of ecosystem services will threaten business opportunities and reduce profits. This can be exemplified by examining the fish industry, which

8. 'Business & biodiversity' IUCN, 2007. See also: 'Biodiversity and Ecosystem Services: Bloom or bust', UNEP FI, 2008. Available at: http://www.unepfi.org/fileadmin/documents/bloom_or_bust_report.pdf, accessed on 2 January 2010.
9. See *supra* note 4 [TEEB reports].
10. J. Bishop, S. Kapila, Building Biodiversity Business, 2008, at: http://data.iucn.org/dbtw-wpd/edocs/2008-002.pdf, accessed on 22 May 2010. See: D. Tilman, D, P.B. Reich, J.M.H. Knops, 'Biodiversity and Ecosystem Stability in a Decade-Long Grassland Experiment', in *Nature*, 441, 2006, p. 629-632; B. Worm, E.B. Barbier, 'Impacts of Biodiversity Loss on Ocean Ecosystem Services', in. *Science*, 314, 2006, pp. 787-790; R. Naidoo and W.L. Adamowicz, 'Economic Benefits of Biodiversity Exceed the Costs of Conservation at an African Rainforest Reserve', in *The National Academy of Sciences of the USA*, 2005, at: www.pnas.org/cgi/doi/10.1073/pnas.0508036102, accessed on 3 September 2009.

increasingly finds it more difficult to trace schools of certain types of fish like cod due to the fact that there are basically less of them.[11] Another example is nature-based tourism. Profit generation in this case depends directly on the health of surrounding ecosystems and their maintenance; without nature, there cannot be any nature-based tourism. Water-based industries also depend on BES. Breweries and soft drink companies, the agricultural sector and energy companies are examples of businesses that depend heavily on a sufficient supply of (clean) water.[12] Chapter 11 has explored the theme of companies and water. Presently, depending on the region, 5 to 20 per cent of freshwater use exceeds long-term sustainable supply and 15 to 35 per cent of irrigation is not set up in a sustainable way.[13] The impact of water scarcity on water-related businesses will stimulate an increased competition for water supply. In addition, operational costs are anticipated to rise because of the expected extra cost necessary for cleaning water, and cost associated with finding new sources or substitutes. A last example concerns the ice-cream producer Häagen-Dazs. It communicated in 2009 that it is very dependent on bee pollination as pollination is essential for ingredients in nearly 50 per cent of their all-natural super-premium flavours. It started the "Häagen-Dazs Loves Honey Bees" campaign, which provides funding for research, education and outreach, as well as student training. The company's goal is to raise awareness concerning the honey-bee issue so that communities can work together to help conserve the pollinators.

Another factor in the relation between companies and BES is the reputation of a company. The reputation of a company is often influenced by its attitude towards biodiversity and the environment in general. Reputation is important for a company's relations with customers and employees. Every year, billions of euros are spent by businesses on improving their corporate image and "no company can afford to be seen as contributing to the destruction of nature".[14]

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11. The Atlantic Cod Stocks fishery collapsed in 1992 after hundreds of years of exploitation. Since 1950s, the fishermen exploited the deeper part of the stock, leading to a large catch increase and strong decline in underlying biomass. Ultimately, it resulted in stock collapse and a moratorium on commercial fishing. In the late 90s, commercial fishing was reintroduced, however the place was ultimately closed in 2003, because catch rates had enormously declined. See: Millennium Ecosystem Assessment, at: http://maps.grida.no/go/graphic/collapse-of-atlantic-cod-stocks-off-the-east-coast-of-newfoundland-in-1992, accessed on 2 May 2010.
12. For example, Coca-Cola is the world's largest beverage company, it has nearly 900 bottling plants around the world. See: http://www.thecoca-colacompany.com/citizenship/water_main.html, accessed on 15 April 2010.
13. Vorosmarty, J., Leveque, C., Fresh Water, Chapter 7. Millennium Assessment Report 2005. See: http://www.millenniumassessment.org/documents/document.276.aspx.pdf, accessed on 1 May 2010.
14. High Level Conference on Business and Biodiversity, European Initiative on Business and Biodiversity, Lisbon 12-13 November 2007. See: http://countdown2010.net/files/bb_proceedings_screen.pdf, accessed on 4 April 2010.

Being good for nature can uplift the reputation of a company and put it in a better position.[15] Furthermore, as a developing trend, companies which are known for their unsustainable catching or production methods risk being delisted by supermarket chains and boycotted by consumers.[16]

This chapter will show that companies can be motivated towards conserve nature by yet an additional reason: the possibility of making a profit by investing in BES. Traditionally, companies perceived (the protection of) biodiversity as a barrier or risk that had to be overcome in order to do business. This perception is changing. Whereas the decline in ecosystem services poses risks to corporate performance, it also provides business opportunities now that ecosystem restoration is increasingly being recognised as a new type of economic activity with which financial returns can be obtained. New markets for the goods and services of ecosystems are emerging, among others through the creation of new property rights, such as carbon emission rights and water rights.[17]

Concluding, from a business perspective there are two reasons why the preservation of BES can become a priority for the private sector. Firstly, the prosperity of companies depends to a certain extent on the continuous existence of BES. Secondly, engaging in pro-biodiversity projects can generate new business opportunities with financial returns. More generally, as awareness concerning BES expands, companies that reduce environmental impacts, improve eco-performance and employ innovative services and strategies will benefit. They will acquire competitive advantage due to reduced costs (*e.g.* less water use means less cost), less liabilities (*e.g.* no pollution means no costs for expensive cleaning operations), and they can realise additional benefits from selling innovative services and products (mentioned briefly above but this will be further elaborated on below).[18]

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15. Several studies of the Swiss ESG Agency Covalence into companies' performance in respect to impact on nature show that the appreciation of a company by the public increases when a company applies good practices and operates in a 'nature-friendly' way. *E.g.* Covalence, Food & Beverages Report, 2008. For example, in the automobile industry, companies re-design their business in a more sustainable manner to gain a good reputation and to apply innovative techniques, *e.g.* Toyota designed a new car model by employing a new solar technology. In the food industry, Dutch supermarket chain Albert Heijn launched a new brand range of "Pure and Honest". Products have been cultivated, manufactured and purchased with respect to the people, animals, nature and environment, see: http://greensupermarket.blogspot.com/2009/09/albert-heijn-pure-and-honest_5187.html, accessed on 21 April 2010.
16. Eurosif, Biodiversity, Theme – 2nd in a series, 2009.
17. Examples of these markets are markets for carbon credits, markets for watershed management pricing schemes, markets for sustainable agricultural products.
18. Business and Biodiversity, power-point presentation by Mike Packer and David Macdonald, prepared under the WildCRU's Jerwood Business and Biodiversity Initiative. This presentation is part of Business & Biodiversity: The Handbook for Corporate Action, 2002, produced collaboratively by Earthwatch Europe, IUCN and WBCSD.

13.2.3 The biodiversity business case for investors

As demonstrated in chapters 3 and 12, capital markets also show signs of becoming aware of sustainability issues. Over 600 of the world's largest asset owners and asset managers, responsible for investments exceeding in total USD 19 trillion in 2009, have endorsed the PRI (see Box 13.1). Investors increasingly appreciate information on extra-financial aspects of companies' business, such as ESG. They purchase such information from 'sustainability-rating agencies' (ESG Agencies; see chapter 12). Another sign is that various stock exchanges and other institutions have established sustainability indices, such as the Dow Jones Sustainability Indices, FTSE4GOOD, Domini 400 Social Index and ETHIBEL. ESG Agencies provide ESG information to these sustainability indices and cooperate with them in the ranking of companies. This chapter has a different perspective. It will explore the interest of investors to invest in projects and funds that directly contribute to conservation and the sustainable use of BES.

Box 13.1 Socially Responsible Investment (SRI)

Since the launch of the United Nations Principles for Responsible Investment (PRI) in 2006, the number of institutional investors and pension funds that became a signatory to the PRI has increased significantly.[19] They communicated that the ambition is to pay more attention to the environmental and social behaviour of the companies in which they invest, and to address governance issues. Stock exchanges around the world are also becoming increasingly active in raising awareness of ESG issues and standards among listed companies, driven by calls from institutional investors through initiatives like the UNEP Finance Initiative (UNEP FI) and the PRI. One of the latter's six principles calls on investors to "seek appropriate disclosure on ESG issues by the entities in which they invest." As Rob Lake,[20] the head of the sustainability department of APG (*i.e.* a large Dutch asset manager specialising in pension funds, amongst which ABP), has stated: "ABP firmly believes that integrating environmental, social and governance (ESG) factors into its investment processes will help to improve risk-adjusted financial returns. Engaging with companies to improve their →

19. For further information, please see: www.unpri.org, accessed on 2 March 2010.
20. APG advises ABP, the second largest pension fund in the world. For more information see: http://www.apg.nl/apgsite/pages/default.asp> and http://www.abp.nl/abp/abp/english/about_abp/, accessed on 3 November 2009.

> management of ESG risks is an integral part of this. We have expanded our resources in this area recently and plan to do so further in there future."[21]

According to a survey among institutional investors in the Netherlands, France and the UK, more than 70 per cent of the surveyed investors believe it to be their responsibility as a shareholder to pay attention to the ESG policies of a company.[22] Another survey however shows that only a few investors rank biodiversity conservation as a main concern at the top of their list of shareholder priorities.[23] For instance, only five per cent of French institutional investors have indicated that they see 'protecting biodiversity' as a priority. There appear to be two reasons for this. Firstly, investors seem to have little knowledge of investment possibilities linked to biodiversity. Secondly, on a more fundamental level, there is a lack of understanding that ecosystem degradation and species loss are directly interlinked with human well-being and the stability of 'normal' business activities. A long-term vision which includes these ecosystem concerns lacks. However, the perception regarding 'business and biodiversity' is changing. New markets that support and reward BES are developing.[24] An overview of these new investment opportunities will be provided in the next section.

13.3 Emerging markets that support BES

In this section new market mechanisms and related investment opportunities that support conservation and a sustainable use of BES will be explored. The

21. Report: 'Responsible Investments in Focus: How Leading Public Pension Funds are Meeting the Challenge', 2007, prepared by UNEP FI and UKSIF, at: http://www.unepfi.org/fileadmin/documents/infocus.pdf, accessed on 28 April 2010.
22. Survey of institutional investors concerning their responsibility for corporate ESG policies conducted by Novethic, with the support of BNP Paribas Investment Partners, 2009. See: http://www.novethic.com/novethic/v3_uk/upload/ESG_Study.pdf, accessed on 21 July 2009.
23. Thomson Extel & UKSif SRI & Extra-financial survey, 2006. Based on the Extra-financial survey 2006. One of the questions was to rate the importance of the following types of environmental data: (1) pollution incidents, (2) contaminated land, (3) greenhouse gas emissions, (4) resource efficiency, (5) prosecutions and fines, (6) biodiversity. Biodiversity was rated 6 out of 6 as being the least important. The report is available at: http://www.innovestgroup.com/pdfs/2006-07-13_THOMSON_EXTEL.pdf, accessed on 3 July 2009.
24. The Economics of Ecosystems and Biodiversity, Interim Report, UNEP, 2008, at: http://www.bmu.de/files/pdfs/allgemein/application/pdf/sukhdev_interim_report.pdf, accessed on 3 September 2009.

general perception that BES has no monetary value appears to be disputable. In fact, private actors have been engaged for a long time in sustainable forestry, eco-tourism, and in nature compensation schemes concerning the loss of wetlands and other natural habitats. These types of business have recently gained more attention and various companies have chosen to enhance the pro-biodiversity value of their business. A new area of business that directly supports BES is the creation of 'biodiversity offsets' or 'biodiversity credits'. Sections 13.3.1-13.3.3 will elaborate on respectively sustainable forestry, nature conservation including wetland banking and biodiversity offset programmes, and eco-tourism.

It appears that various types of finance mechanisms are currently in use. Besides traditional financing methods, innovative finance mechanisms are also developing. One of them aims at making users of ecosystem services pay for them, and is called 'Payment for Ecosystem Services' (PES) (see Box 13.2). Over the last decade, we have seen various PES systems rapidly develop such as those for carbon sequestration and watershed protection. Section 13.3.4 will discuss the emerging market of watershed protection and section 13.3.5 will illustrate how funds from private actors are being channelled into voluntary carbon sequestration projects, including projects based on REDD (Reducing Emissions through Deforestation and Forest Degradation).

Box 13.2 Payment for Ecosystem Services

Payment for Ecosystem Services (PES) represents a flexible compensation mechanism in which ecosystem service providers are compensated by service users.[25] An example is paying for water, *i.e.* in fact paying for nature's hydrological services – primarily the filtering of water through forests or wetlands. This is useful in the situation in which farmers in an upstream area preserve forests so that farmers or water companies in a downstream area can benefit from a continuous and regular supply of clean water. If the forest would be logged, the farmers and water company downstream bear the risk of suffering from dirty water due to erosion, and from a less secure supply of water because when there is no forest, rainfall will be more irregular. In that case, for the downstream users the risk of flooding will also be higher. For these reasons, the downstream users should be willing to compensate the upstream farmers to maintain the forest in good quality. Through PES, "those that benefit from these outputs→

25. Definition as used by Katoomba Group's Ecosystem Marketplace, at: http://www.ecosystemmarketplace.com/, accessed on 2 March 2010; Forest Trends, The Katoomba Group, and UNEP, 'Payments for Ecosystem Services: Getting started', May 2008, at: http://www.katoombagroup.org/documents/publications/GettingStarted.pdf, accessed on 1 March 2010.

can pay forest managers and owners directly to manage their forests for the production or protection of these outputs".[26]

There are different markets for ecosystem services.[27] The main categories of ecosystem services that are being traded include carbon sequestration, water management services, biodiversity conservation and landscape protection.[28] Often, payments are bundled securing all or a combination of carbon, water, and biodiversity services.[29] Bundled payments also include those in which the ecosystem service payment is built into the price of the product, such as certified timber or certified produce.

PES markets can also be differentiated from another perspective: (i) compliance markets, *i.e.* public regulation requires the payment for the use of ecosystem services (*e.g.* mandatory carbon emission trading for certain industries); (ii) government-mediated markets, *i.e.* where the government is the intermediate party that collects payments from users and distributes them to the service providers (*e.g.* PES markets based on water services); and (iii) voluntary markets, *i.e.* in which companies voluntarily decide to compensate their impact on BES by purchasing compensatory credits (*e.g.* voluntary carbon emission credits and biodiversity offsets).[30]

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26. Financing Sustainable Forest Management – Forest Policy Brief, at: http://www.fao.org/forestry/media/16559/1/0/, accessed on 2 August 2009. See further: D. Perrot-Maitre, P. Davis, 'Case Studies of Markets and Innovative Financial Mechanisms for Water Services from Forests', 2001, at: http://www.conservationfinance.org/Documents/CF_related_papers/water_service_markets.pdf, accessed on 15 January 2010; WWF, P. Gutman (ed.), 'From Goodwill to Payments for Environmental Services: A Survey of Financing Options for Sustainable Natural Resource Management in Developing Countries', 2004.
27. N. Carroll, M. Jenkins, 'The Matrix: Mapping Ecosystem Service Markets, Katoomba Group's Ecosystem Marketplace', 17 June 2008, at: http://www.ecosystemmarketplace.com/pages/dynamic/article.page.php?page_id=5917&section=home&eod=1, accessed on 3 October 2009.
28. Biodiversity markets design incentives for the preservation and managing of biodiversity including habitat and species. Definition as used by the Katoomba Group's Ecosystem Marketplace (see note 27). Also, see: P.A. Verweij, M. Schouten, P. van Beukering, J. Triana, K. van der Leeuw and S. Hess, '*Keeping the Amazon forests standing: a matter of values*' (WWF: Zeist, the Netherlands, 2009), p. 72; P.A. Verweij, and M. de Man, 'Looking after protected areas: Looking for increased donor support', report commissioned by Greenpeace International, and official submission to the UN Convention on Biological Diversity, Greenpeace International, Amsterdam, The Netherlands, 2005; P.A. Verweij, 'Increasing revenues for protected areas: a wealth of financing options', report commissioned by Greenpeace International, Department of Science, Technology and Society, Utrecht University, Utrecht, The Netherlands, 2004, p. 22; P.A. Verweij, (Ed.) 'Understanding and capturing the multiple values of tropical forests', Tropenbos International, Wageningen, The Netherlands, 2002, p.140. See for an introduction on landscape auctions: D. Wensing, in *Forum CSR International*, 2010, pp. 35-37.
29. Definition as used by Katoomba Group's Ecosystem Marketplace; see *supra* note 27.
30. Government-mediated markets are publicly-administered programmes that use public funds to pay private landowners for the stewardship of ecosystem services on their property. Definition as used by: Katoomba Group's Ecosystem Marketplace; see *supra* note 27.

13.3.1 Sustainable forestry

Forest degradation is a day-to-day occurrence. Tropical rain forests in particular are disappearing from the face of the earth with immense speed. They are being destroyed at a pace exceeding 200 square kilometres per day.[31] In the short term, deforestation results in the loss of the ecological services provided by tropical rainforests and related ecosystems. That implies a reduced access to renewable resources, such as medicinal plants and timber, and the loss of valuable rainforest services, such as water treatment and flood control.[32] Over the longer term, the effect of deforestation has an impact on climate and biodiversity.[33] Although rainforests cover less than two per cent of the planet's surface, they provide habitat for 50 per cent of the variety of life on the planet.[34] Deforestation therefore has a direct effect on the loss and degradation of biodiversity. One of the ways to halt unsustainable deforestation is to protect the forests and to only harvest timber in a sustainable manner, *i.e.* through sustainable forestry.

Sustainable forest management[35] offers business and investment opportunities along with environmental benefits. Investments in this asset class have clearly become more popular over the past few years: the volumes have increased and the spectrum of investors has widened.[36] Not only direct investments, *i.e.* in forestry funds, but also indirect investments are increasing in significance. An example of

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31. The 2010 Biodiversity Indicators Partnership (Global Intiative). See: http://www.twentyten.net/forestdegradation, accessed on 12 April 2010.
32. 'Consequences of Deforestation, Environmental Science and Conservation', News site: Chapter 9: Mongabay.com, at: http://rainforests.mongabay.com/0901.htm, accessed on 6 September 2009; Food and Agriculture Organisation (FAO), UN Report: 'State of the World's Forests', 2009. Available at: http://www.fao.org/forestry/sofo/en/, accessed on 21 June 2010. D. Dykstra, R. Heinrich, 'Sustaining tropical forests through environmentally sound harvesting practices', FAO, at: http://www.fao.org/docrep/u6010e/u6010e04.htm, accessed on 22 May 2010.
33. Climate Change, Loss of Biodiversity and Deforestation, Working Paper on Climate Change, Loss of Biodiversity and Deforestation, Djakarta, March 6-7, 2007, at: http://www.asem.mim.dk/NR/rdonlyres/4271D755-2C34-44B6-8A53-3767D7D76A01/0/WPon-BiodiversityandDeforestation280207.pdf, accessed on 3 April 2010.
34. The Nature Conservancy (conservation organisation), Facts about Rainforests, 2010. See: http://www.nature.org/rainforests/explore/facts.html, accessed on 1 May 2010.
35. According to Asia Pacific Forestry Commission: "it is the stewardship and use of forests and forest lands in a way, and at a rate, that maintains their biological diversity, productivity, regeneration capacity, vitality and their potential to fulfil, now and in the future, relevant ecological economic and social functions, at local, national and global levels, and that does not cause damage on other ecosystems." Available at: http://www.fao.org/forestry/33711/en/, accessed on 2 September 2009.
36. A. Suria, 'Considering Timber as an Asset Class', Suria Investments Inc., 8 December 2008, at: http://seekingalpha.com/article/109524-considering-timber-as-an-asset-class, accessed on 3 April 2010.

an indirect investment product is a forest-backed security. The value of these securities relates to expected future profits from commercial forest activities.[37] Today, investment funds aimed at socially responsible and green investments are an important source of private sector finance.[38]

A sustainable forest manager makes financial returns by selling timber and wood products, generally certified. He can also sell non-timber forest products (NTFP), such as fiber for biofuels and nuts. In addition, he can make use of PES mechanisms for generating other types of returns.[39] For example, selling water rights to downstream users, employing eco-tourism services, and he can tap into the emerging markets for environmental credits for carbon and biodiversity offsets.

To illustrate some developments in this market, three forestry-related initiatives will be presented in paragraphs 13.3.1.1-13.3.1.3. In addition, some Brazilian innovative forestry-related projects can be found in Appendix 13.21.[40] As a common denominator the initiatives combine conservation activity with the aim of commercial profitability.

13.3.1.1 New Forests Tropical Forest Fund LP

Tropical Forest Fund LP (TFF) is a USD 100 million 'closed-end equity fund',[41] launched by the company New Forests Asset Management Pty Ltd (New Forests). New Forests is a forestry investment management and advisory firm that makes equity and equity-related investments in sustainably managed natural forests, timber plantations and forestry-related assets. By 2008, New Forests managed USD 200 million in assets throughout Australia, New Zealand, the US and the Asia Pacific region.

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37. For instance, in Brazil, the Environmental and Social Stock Exchange (BVS&A) was established. Its goal is to bring together all relevant actors, such as NGOs that require funds and social investors willing to support their programmes and projects. Over 60 projects have already been funded, at: http://www.fao.org/forestry/media/16559/1/0, accessed on 2 September 2009.
38. Financing Sustainable Forest Management – Forest Policy Brief, PDF available at: http://www.fao.org/forestry/media/16559/1/0/, accessed on 2 September 2009.
39. *Idem.*
40. All information concerning the funds and projects described in this chapter is sourced from the fund managers directly or from their websites. The author takes no responsibility for the correctness or completeness of the information as these projects and funds are solely presented for illustration purposes concerning the new developing pro-biodiversity investment markets.
41. A closed-end fund is an investment company the shares of which are listed on a stock exchange or traded on over-the-counter markets. Its assets are professionally managed according to the fund's investment objectives.

TFF is designed to target opportunities in land and forestry assets in the Asia Pacific region, generating bundled payments consisting of a mix of timber revenues and environmental credits.[42] More specifically, its aims are:[43] (1) to generate returns from timber sales and energy products; (2) to manage land and forestry assets sustainably; and (3) to earn environmental credits such as carbon and biodiversity credits. TFF focuses on existing plantations and forestry assets (50 to 80 per cent) and 'greenfield plantations' (20 to 50 per cent). The primary revenues of TFF are expected to come from sales of hardwood tropical timber and latex. TFF further expects to generate revenue income streams through investments in processing facilities (<10 per cent), carbon credits (<10 per cent), and natural forest management (<5 per cent). TFF has a pipeline of approximately 20 projects in nine countries that in total account for 200,000 hectares. Although these indications concern projections, the project is 'mature' in the sense that is has set out to attract investments. For details, see Table 13.1. According to New Forests, forests are attractive assets for institutional investors, because they contribute to portfolio diversification.

Table 13.1: TFF Terms (source: Summary of Proposed Investment)[44]

Purpose	TFF aims to establish a portfolio of assets licated in the Asia Pacific region that: a. generates returns from the sale of timber and energy products, b. is managed on an environmentally and socially sustainable basis, and c. has potential to earn environmental credits such as carbon and biodiversity.
Target Returns	Contained in the detailed Investment Memorandum
Investment vehicle	Cayman Island Limited Partnership; 10 year term.
General Partner	New Forests Advisory Pty Ltd (Australian Financial Services License 301556)
Manager	New Forests Asset Management Pty Ltd.
Fees	Management fee as a percentage of capital committed, or (once capital is invested), the NAV of TFF. The manager is entitled to a performance fee as a percentage of excess returns once a target real internal rate of return is exceeded.
Capital raising	An initial close of at least US$25,000,000 with a minimum subscription amount of US$5,000,000. Total capital raising to be no more than US$100,000,000.
Initial Close	Aiming for 31 October 2009.
Final Close	The earlier of: the date at which USD$100,000,000 is committed, or 31 March 2010.

42. The main focus is on the Solomon Islands and in South East Asia, *i.e.* in Indonesia, Malaysia, Vietnam, and the Philippines.
43. Tropical Forest Fund LP, Summary of Proposed Investment, International Finance Corporation, 2009. See: http://www.altassets.com/private-equity-news/by-region/asia/malaysia/article/nz16464.html, accessed on 2 March 2010.
44. *Idem.*

13.3.1.2 Malua Bio Bank

Deforestation can be addressed in various ways. Another initiative commenced by New Forests, in combination with the company, Equator LLC, is an innovative project which is currently at the development stage. The partners wish to offer a commercial approach to nature conservation.[45] It concerns a voluntary biodiversity offset PES model that combines sustainable forestry with vegetation conservation eligible for carbon trading and conservation certificates.

In 2007, the Sabah Government in Malaysia signed a 'memorandum of understanding' with New Forests to set up the "Malua Wildlife Habitat Conservation Bank" (Malua Bio Bank). The project aims at restoring and protecting the Malua Forest Reserve. This Reserve is home to the rarest species of animals, birds and plants. However, in the same area severe logging has taken place and many palm oil plantations exist.

Subsequently, New Forests and the Sabah Government have established a private equity fund, ECO Products Fund LP.[46] The fund launched Malua Bio Bank as a partnership between private and public entities (Figure 1).[47] Malua Bio Bank received its start capital from ECO Products Fund LP to restore and to protect an area of 34,000 hectares of previously logged forest in the Malua Forest Reserve.

Malua Bio Bank's business plan is as follows: (i) in 2007, the company that holds the concession licences to the Malua Forest Reserve (owned by the Sabah Government) ceased all logging operations; (ii) ECO Products Fund LP invested up to USD 10 million in Malua Bio Bank to rehabilitate the Malua Forest Reserve; (iii) Malua Bio Bank is to manage the conservation of the forest over the remaining 44-year period of the license issued by the Malaysian government; (iv) Malua Bio Bank has obtained the right to create and to market so-called 'Biodiversity Conservation Certificates' to interested parties;[48] each

45. New Forests News: Malua Wildlife Habitat Conservation Bank Launches in Sabah, Malaysia, 2008, at: http://www.newforests.com.au/news/pdf/press/20080814_malua_biobank_release.php, accessed on 3 June 2009.
46. Malua Brochure, Malua Wildlife Habitat Conservation Bank, at: http://www.maluabank.com/, accessed on 3 September 2009.
47. The scheme was taken from: Malua Forest Reserve: Conservation Management Plan 2008-2013. Available at: http://www.maluabank.com/malua_cmp_08192008.pdf, accessed on 23 July 2009.
48. New Forests expects that interested parties include (i) cosmetics, energy and food companies, whose complicated supply chains structure may contain the use of palm oil as a key component of their products; (ii) Malaysian companies – with strong government support – can align themselves with a conservation venture and ultimately build an image of Malaysia as a world leader in conservation; (iii) palm oil growers and processors, for whom the purchase of Certificates is a direct and measurable contribution to conservation; and (iv) conservation-oriented organisations.

Certificate represents 100 square meters of rainforest restoration and protection; and (v) the Malua Trust,established by Malua Bio Bank, is to finance the conservation of the Malua Forest Reserve. The revenues from the sale of Biodiversity Conservation Certificates will be shared between the parties and serve the project in three ways: (1) an endowment will be made to the Malua Trust in order to fund the long-term conservation management by Malua Bio Bank; (2) part of the funds will be invested in a foundation, established by the Sabah Government, to improve the livelihood of local people; and (3) Malua Bio Bank investors. According to David Brand, Managing Director of New Forests, the innovative business model of this venture is that Malua Bio Bank will 'translate' rainforest protection into a market product so that biodiversity conservation can compete with other land uses on a commercial basis.

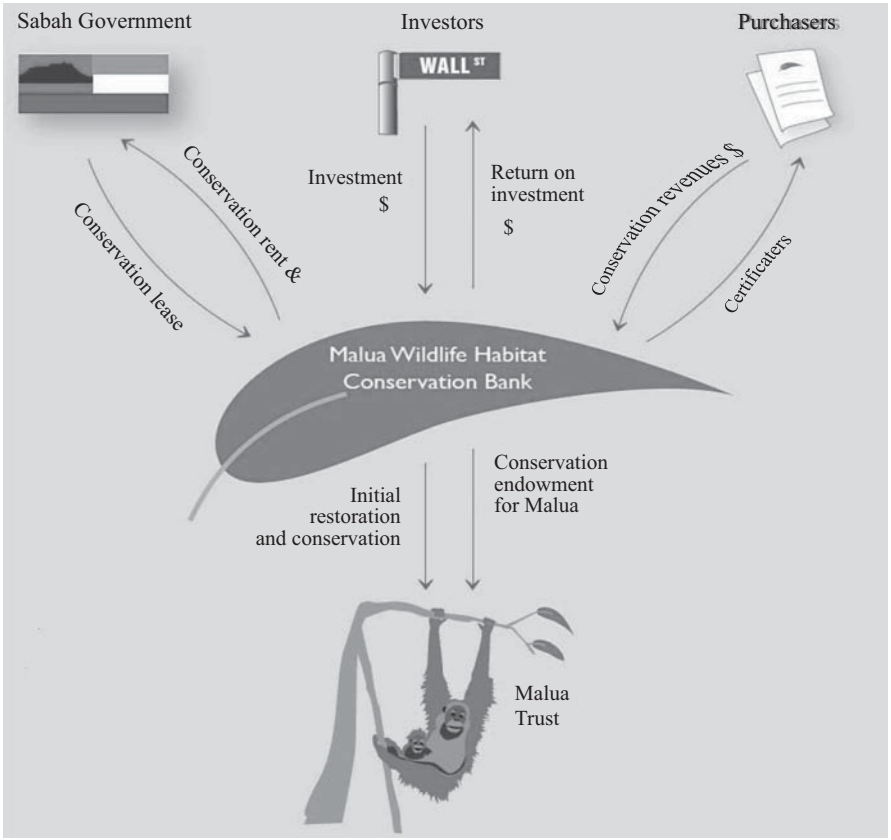

Figure 13.1 Structure of Malua Bio Bank (source: www.newforest.com.au)

13.3.1.3 Timber Opportunities Fund

Another sustainable forestry investment fund is the Timber Opportunities Fund SCA (TOF). This is a closed-end 'Specialised Investment Fund' (SIF) regulated by Commission de Surveillance du Secteur Financier (CSSF) in Luxembourg. TOF invests in projects in Latin America, predominantly in Panama, Costa Rica and Argentina. A German management company, Caudex Capital Timber Investments GmbH (Caudex Timber), advises TOF on new timber investments and manages the portfolio (see Figure 13.2). Caudex Timber is a joint venture between (i) Futuro Forestal S.A.,[49] a Latin-American forestry management company, and (ii) the German investment company Caudex Capital GmbH.[50] The structure is presented in Figure 13.2.

49. Futuro Forestal S.A. is a 'Reforestation and Service Company'. It claims to be one of the leaders among key timber investment management organisations; http://www.futuroforestal.com/en/page_type0.php and http://www.cssf.lu/, all websites accessed on 15 September 2009.
50. Caudex Capital GmbH is an independent investment boutique that focuses on structuring sustainable commodity investment products especially for institutional investors, at: http://www.caudex-capital.com/, accessed on 3 April 2010.

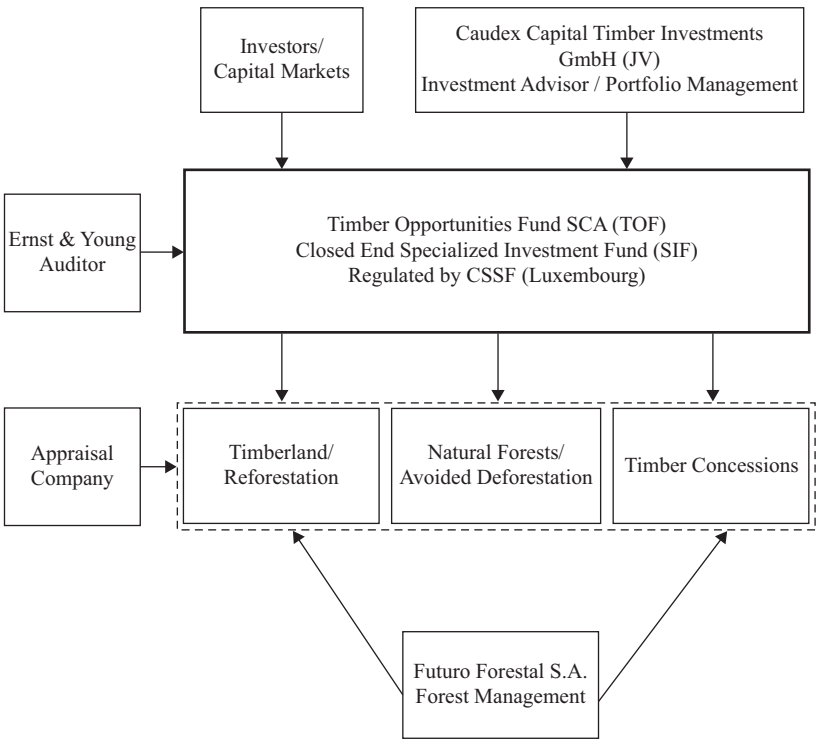

Figure 13.2 Structure of the Timber Opportunities Fund (source: Caudex Capital GmbH)[51]

51. *Idem.*

TOF invests in a diversified portfolio of sustainable timber projects, including timber concessions, natural forest, avoided deforestation projects and reforestation.[52] TOF describes its activities as follows:

- *timber concessions*: the concessions grant the right to harvest in a certain area of forest for a number of years (usually 20 years). Timber concessions require less capital than the purchase of forest. Upon the construction of sound infrastructure, immediate harvests along with early cash flow are possible. A mix of low initial investment and fast cash flow result in attractive returns. Moreover, it is emphasised that TOF is convinced about the necessity of forest certification, according to sustainability standards;
- *natural grown forest*: provides fast financial returns. However, more capital is required than in timber concessions. At the same time, the certified ownership of land offers more security and no time limits;
- *investment in avoided deforestation projects*: whilst no or low income from timber harvests will be achieved, noticeable revenue can, in time, be generated from the emerging market for forest-based carbon certificates. The advisors will be seeking to develop appropriate schemes that are 'REDD ready'; and
- *reforestation projects*: these are long-term investments with negative cash flow in the first years. However, the sustainable forest management during the growth phase would secure a higher return in the longer run in comparison to natural forests or timber concessions. The other advantages of reforestation projects are secured land ownership and potential capital appreciation of the forest and the land.

The company's communications claim that due to the unique nature of the fund, the success rate will be determined by the following factors:[53] (i) TOF has a clear focus (Latin America); (ii) its pipeline contains a substantial number of projects covering a volume of approximately USD 500 million; (iii) TOF follows high standards regarding ESG, *i.e.* biodiversity and sustainable forestry are incorporated as part of the risk management strategy; and (iv) the project entails the combination of local ground forestry management experience and expertise in capital markets, private equity and portfolio management.

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52. Caudex Capital, see: http://www.caudex-capital.com/index.php?id=33&tx_ghdisclaimer_pi1[redirect]=29, accessed on 3 February 2010. According to information obtained by email from Futuro Forestal of 11 May 2010, all operations including concessions will be FSC certified.
53. Timber Opportunities Fund, Geneva Forum for Sustainable Investment, 26 March 2009, at: http://www.gfsi.ch/admin/wp-content/uploads/caudex-capital_ateliers.pdf, accessed on 2 September 2009.

13.3.1.4 Conclusion regarding sustainable forestry

To conclude this section 13.3.1, it can be noted that one of the strategies to reduce deforestation is to encourage investments in sustainable forest management. This sector has a unique investment profile, because forestry by nature has a long-term business profile. As the interests of pension funds arguably also have a long-term horizon due to the long-term liabilities from pension obligations,[54] it has been advocated that investing in sustainable forestry could be especially attractive for institutional investors.[55] However, even though forestry-related initiatives are becoming more popular among the private sector,[56] it still appears difficult to attract substantial financing. An international, multi-stakeholder dialogue called 'The Forests Dialogue' (TFD) identified as the main obstacles: (i) constraints on institutional capacity; (ii) high costs associated with conservation investments; (iii) a limited demand from consumers for certified forest products; (iv) tax policies unfavourable to

54. Forest Re, An Insurance Contribution to Sustainable Forestry Investment, ITTO Presentation, 26-27 April 2006.

55. Attractive investment characteristics include strong physical asset backing in the form of land, standing timber and milling assets. Forest Investment Review, 2009, Chapter 2, Exploring Characteristics of Existing Forestry Investment Vehicles, at: http://www.forumforthefuture.org/files/Introduction_FIR.pdf, accessed on 1 March 2010.

56. The major Dutch pension funds, ABP and PGGM, invest substantial amounts in sustainable forestry. Investments & Pensions Europe, ABP makes first timber allocation, 13 July 2007, where it states: "The €211bn Dutch pension fund ABP has made its first foray into timberland investments with a $60m allocation to the Global Solidarity Forest Fund (GSFF). The fund will develop three sustainable forestry projects in the Republic of Mozambique, in south-eastern Africa, and Angola, in west Africa. Heerlen-based ABP, Europe's largest pension scheme, will acquire a stake of 60% in the fund through its 10-year investment. 'The GSFF is managed by the Global Solidarity Fund International (GSFI), an international investment manager owned by the Swedish diocese Västerås, the Lutheran church of Sweden and the Norwegian 'Lutheran Church endowment',' ABP said in a statement. ABP sees the investment as a desirable way to diversify as it said in a statement: 'It delivers a stable [investment] and is expected to deliver high returns, too.' Projects will be certified by the Forest Stewardship Council (FSC), which has set up guidelines for sustainable forestry management, and the fund has committed itself to the United Nation's Global Compact principles. The scheme, which has allocated 2% of its entire assets to its new so called 'innovation portfolio', has no specific target for further forestry investments. (…). Earlier this month, the €85bn Dutch healthcare workers' pension fund PGGM also made its first allocation to forestry, with a $200m (€150m) 15-year forestry mandate. PGGM chose US asset manager GMO, who will invest the money in its Long Horizons Forestry Fund in North and South America as well as the Asia/Pacific region", at: http://www.ipe.com/articles/print.php?id=22547, accessed on 3 June 2010. See also: the APG Sustainability Report 2008, p. 18, at: http://www.apg.nl/apgsite/pages/images/VVB%20APG%202008%20ENG_tcm124-91870.pdf, accessed on 21 July 2010; P. Klop, World Resources Institute, 'Stocks, bonds and … trees', at: http://www.grida.no/publications/et/ep5/page/2359.aspx, accessed on 21 July 2010. All sites accessed on 22 May 2010.

sustainable forest management; and (v) certain regulatory provisions contrary to maintaining and enhancing endangered species population.[57]

13.3.2 Nature conservation

The mechanisms that have been developed to cope with environmental liabilities ultimately serve the purpose of avoiding damage to nature. Environmental mitigation is a new concept that is currently on the rise. An innovative approach is to work with 'nature credits'. These are meant to compensate (future) damage to nature caused by economic activities and aim at creating a 'no net loss' of nature situation. Such credits can be traded in a manner similar to the carbon emission credits. Nature credit frameworks include wetland banking, habitat banking and biodiversity offsets. 'Habitat' refers to the environment or the place where an organism or biological population normally live. The US-based non-profit organisation Forests Trends researched existing compensatory mitigation programmes around the world and found 39 in 2010. They range from programmes with active mitigation banking of biodiversity credits to programs channelling development impact fees to policies that drive one-off offsets. Another 25 programmes appeared to be in various stages of development or investigation. Within each active offset program, numerous individual offset sites have been identified, including over 600 mitigation banks worldwide. The global annual market size is estimated between USD 1.8 and USD 2.9 billion at minimum, and is likely much more, as 80 per cent of the existing programmes appeared not to be transparent enough to estimate their market size. The conservation impact of this market includes at least 86,000 hectares of land under some sort of conservation management or permanent legal protection per year. To illustrate this business model of nature conservation, the approaches of wetland banking and biodiversity offsets will be discussed in the following sections.[58]

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57. The Forests Dialogue (TFD), Forest and Biodiversity Conservation, 15-17 May 2007. Available at: http://environment.yale.edu/tfd/dialogue/forests-and-biodiversity-conservation/fourth-regional-dialogue-on-forests-and-biodiversity-conservation/, accessed on 21 July 2009. Also see: The Forests Dialogue, Investing in Locally Controlled Forestry, 9-10 June 2009, at: http://environment.yale.edu/tfd/dialogue/locally-controlled-forestry/scoping-dialogue-on-investing-in-locally-controlled-forestry/, accessed on 3 April 2010.
58. B. Madsen, N. Carroll, 'State of Biodiversity Markets Report: Offset and Compensation Programs Worldwide', 2010, at: http://www.ecosystemmarketplace.com/documents/acrobat/sbdmr.pdf, accessed on 22 May 2010; "Bali Delegates Agree to Support Forest-for-Climate (REDD) Plan", 6 December 2007, at: http://news.mongabay.com/2007/1215-redd.html, accessed on 3 March 2010.

13.3.2.1 Wetland banking

Although wetlands only cover six per cent of the total world surface, they form hotspots for biodiversity and deliver ecosystem services to billions of people.[59] One of the ways to maintain the volume intact and generate biodiversity benefits is by means of 'mitigation banking'. A mitigation bank is a wetland, stream, or other aquatic resource area that has been restored, established, enhanced, or (in certain circumstances) preserved for the purpose of providing compensation for unavoidable impacts to wetlands, mostly drain and fill actions.[60] As the main objectives of wetland banking are to preserve wetlands and to provide a habitat for endangered species, it is therefore required that: (i) the real estate developer should first assess how to avoid or minimise impacts on wetlands; (ii) in instances where impacts cannot be avoided or minimised, and the real estate development plan will nonetheless be approved, the wetlands have to be replaced; (iii) replacement can take place through ensuring the restoration of prior wetlands, the enhancement of other low quality wetlands or the creation of new wetlands; and (iv) it will be ascertained that each hectare of wetland damaged or destroyed will be replaced (the mitigation ratio can vary, generally more than 1:1). In the commercial sense, 'wetland banking' should be understood as a "regulatory arrangement by which a company will restore a former wetland area to a sufficiently functional and diverse condition. People required to perform compensatory mitigation can then purchase "wetland credits" from this company, instead of creating the wetland themselves".[61] As the developers of new wetlands, the 'mitigation bankers', can be companies, agencies and individuals, wetland banking has become a business opportunity. This also makes it an investment opportunity.

Wetland banking is a well-developed mechanism that originated in the US under the Federal Clean Water Act 1972 of the US Army Corps of Engineers regulations (Clean Water Act). The creation of regulated wetland banking was inspired as a measure to protect America's rivers, lakes, swamps, and other wetlands from disappearing. The Clean Water Act established limits on how

59. See: website of the NGO Wetlands International, at: http://www.wetlands.org/Newsand-Events/NewsPressreleases/tabid/60/articleType/ArticleView/articleId/1830/Default.aspx, accessed on 10 September 2009.

60. United States Environmental Protection Agency (EPA), Compensatory Mitigation Fact Sheet, at: http://www.epa.gov/owow/wetlands/facts/fact16.html, accessed on 12 September 2009. J. Silverstein, 'Taking wetlands to the bank: The role of wetland mitigation banking in a comprehensive approach to wetlands protection,' in *Boston College Environmental Affairs Law Review*, 22, Issue 10, 1994, No 1907034; N. Carroll, R. Bayon, 'Conservation & Biodiversity Banking. A guide to setting up and running biodiversity credit trading systems', Earthscan, UK and US 2008, pp. 69-157 on legal, regulatory, business and financial considerations.

61. M. Robertson, 'The Neoliberalization of Ecosystem Services: Wetland Mitigation Banking and Problems in Environmental Governance', in *Geoforum*, 35/3, May 2004, pp. 361-373.

these different types of waters could be developed. After the Clean Water Act entered into force, it became illegal to fill, dredge, or in any other way to damage a wetland without a permit from the US government, specifically from the US Army Corps of Engineers, the regulatory governmental agency that supervises the wetland bank certification. In order to obtain such a permit, the Corps of Engineers first determines whether the damage can be avoided and then, in cases where the damage is unavoidable, whether it can be mitigated or minimised.[62] Different actors, *e.g.* private companies, public entities and public works agencies can establish and maintain wetland banks. In most cases of mitigation banking, a third-party entrepreneur, the mitigation banker, gains authorisation from the regulators to create or restore a relatively large area of wetlands. The process of replacement provides for the restoration or creation of wetlands in order to obtain replacement credits for future wetland impacts. Afterwards, these wetlands are used as a 'bank' of credits. The value of a bank is defined in 'compensatory mitigation credits.' The US Corps of Engineers and the EPA decide on the number of 'credits' a certain bank is worth, and determines the number of credits that are made available to the mitigation banker. Bank credits are released by the agency when "a bank project achieves its pre-determined performance standards".[63] The mitigation bankers can sell these credits to third parties, *i.e.* real estate developers that use them to satisfy their mitigation obligations towards regulators,[64] or use them themselves. It is important to note that wetland banking credits can be sold in a relatively open market, restricted to a defined 'service area'.

Wetland mitigation banking in the US is now largely an entrepreneurial activity: "77 per cent of 454 approved or proposed banks identified in a 2006 report by the US Army Corps of Engineers involve the private third-party production of wetland credits for sale".[65] Since the first permit for an entrepreneurial bank was submitted in 1991, wetland banking has developed into a market.[66]

Wetland banking can be considered the first successful environmental credit market that sells products certified using metrics of ecological function. It is

62. R. Bayon, 'Making Environmental Markets Work: Lessons from Early Experience with Sulfur, Carbon, Wetlands, and Other Related Markets', in *Forest Trends*, 25 September 2004, at: http://147.202.71.177/~foresttr/documents/files/doc_654.pdf, accessed on 25 June 2010.
63. Washington Department of Ecology, Status Report: Status of the Wetland Mitigation Banking Pilot Programme, December 2006, at: http://www.ecy.wa.gov/pubs/0606026.pdf, accessed on 20 September 2009.
64. T. Bendor, 'A Dynamic Analysis of the Wetland Mitigation Process and its Effects on the No Net Loss Policy', in *Landscape and Urban Planning*, 89, Issues 1-2, September 2007, pp. 17-27.
65. M. Robertson, 'The Work of Wetland Credit Markets: Two Cases in Entrepreneurial Wetland Banking', in *Wetlands Ecology and Management*, 17, 2009, pp. 35-51, at: http://www.springerlink.com/content/1l87t01u63480784/fulltext.pdf, accessed on 25 June 2010.
66. *Ibidem* [Robertson], p. 35.

quite distinct from carbon markets. What "is being traded isn't so much the right to pollute, but rather, in a complicated and oblique fashion, the right to develop" economic activities in a nature area.[67] This system has been copied by several countries. Puerto Rico has created a market in the right to develop beachfront property and New Zealand has established a market for the right to exploit fisheries.[68]

A concrete example of the wetland banking business is the '*Nanticoke Headwaters Project'* managed by Ecosystem Investment Partners (EIP).[69] EIP is a private equity fund manager that acquires and manages high priority conservation properties across the US. It invested USD 27.5 million in wetland, stream mitigation banking, and conservation (endangered species) banking across a variety of landscapes, and claims that the investments generate multiple revenue flows. In 2007, together with The Conservation Fund (TCF) and the State of Delaware (US), EIP developed a project that aims at the conservation of the last-remaining massive forest area in Delaware. Over the past two centuries this area has been significantly modified. The impact of intensive agriculture and the development of monoculture pine plantations resulted in the loss of over 50 per cent of Delaware's pre-settlement wetlands. By using private investment capital, market-based conservation mechanisms and the support of conservationists, the project claims to have saved 2,300 acres of the forest area that otherwise would be converted into residential subdivision. Collaborating with the "US Fish & Wildlife Service, the State of Delaware and the US Army Corps of Engineers, EIP utilises the demand for ecosystem service credits found in Southern Delaware (needed to offset unavoidable impacts to wetlands and streams) to pay for the conservation and restoration as well as to generate a financial return for EIP's investors."[70] The credits are being generated through the establishment of Delaware's first private wetland mitigation bank and the restoration of original wetlands. These credits are sold for profit either to the State Forest, the Wildlife Management Areas, or to a private conservation buyer.

13.3.2.2 Biodiversity offsets

Similar to wetland banking and habitat banking, biodiversity offsets constitutes a mechanism that is based on the 'like-for-like' compensation concept. It can be applied in the case of a loss of nature areas because of land conversion, *e.g.* for residual purposes, or other types of damage caused by economic development.

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67. Bayon, *supra* note 62, p. 13.
68. *Idem* [Bayon], p. 13.
69. Ecosystem Investment Partners, Project Summary: Nanticoke Headwaters, 2007, at: http://www.ecosystempartners.com/projects_nh.htm, accessed on 12 September 2009.
70. Restoration of the Daisey and James Tracts.

A biodiversity offset is a piece of land that is set aside from development to maintain its biodiversity values and thereby to offset the effects of development on biodiversity values elsewhere. Biodiversity offsets are best applied near to where the development takes place. They are intended to compensate for unavoidable, residual impacts to biodiversity caused by the development project, where avoidance, mitigation, and restoration activities are insufficient to protect the resident biodiversity. Ultimately, the goal of biodiversity offsets is 'no net loss', and if possible a net gain (see Figure 13.3). Biodiversity offsets thus constitutes an instrument to balance the impacts of development activities with the conservation of biodiversity.[71]

Biodiversity offsets have to be differentiated between 'regulatory biodiversity offsets' and 'voluntary biodiversity offsets'. The regulated biodiversity offsets are driven by the need to comply with governmental regulations or legislation.[72] Both categories will be elaborated on in the following sections of this chapter.

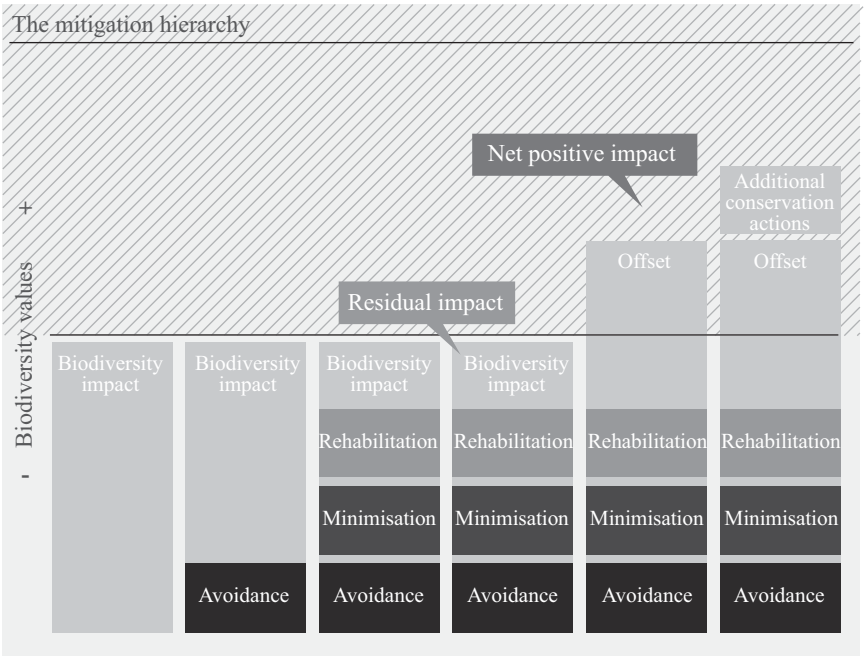

Figure 13.3 Mitigation Hierarchy: Rio Tinto and Biodiversity (source: http://www.riotinto.com/documents/ReportsPublications/RTBiodiversitystrategyfinal.pdf)

71. Business and Biodiversity Offsets Programme (BBOP), 'Business, Biodiversity Offsets and BBOP: An Overview', BBOP, Washington, D.C., 2009.
72. 'Payments for Ecosystem Services: Market Profiles', Forest Trends and Ecosystem Marketplace, May 2008.

13.3.2.3 Regulatory offsets

Regulatory biodiversity offsets can only be realised by legislation. In the US this was done through the Clean Water Act and the Endangered Species Act. In the EU, biodiversity offsets are regulated by the Habitats Directive (92/43/EEC)[73] and the Environmental Liability Directive (2004/35/EC).[74] The Habitats Directive applies before damage has occurred. According to article 6.4, a Member State may only proceed with the development of a plan or project that has negative ecological implications for a site if there is an overriding public interest to do so and if it takes compensatory measures. Such measures are independent of the project (including any associated mitigation measures). They are intended to offset the negative effects of the plan or project so that the overall ecological coherence of the Natura 2000 Network is maintained. The Environmental Liability Directive, in contrast to the Habitats Directive, applies after the damage has occurred. This Directive is based on the 'polluter pays' principle. The goal is to hold the polluter, who caused environmental damage, responsible. The Directive regulates prevention and remedies for damage caused to animals, plants, natural habitats, water resources and land.

The measures introduced by these EU Directives serve as an incentive for businesses not to pollute or destroy nature. Moreover, this type of legislation stimulates new developments in the insurance market: through the application of a differentiated premium system, a stimulus to minimise ecological risks is created. Furthermore, the legislation indirectly encourages the development of voluntary markets for biodiversity offsets and wetland or habitat banking, which will be discussed next.[75]

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73. Council Directive 92/43/EEC on the Conservation of natural habitats and of wild fauna and flora, Official Journal L 206, 22/07/1992, p. 0007-0050. Article 6.4 reads: "If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all *compensatory measures* necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted. Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest" [emphasis added]. See also: the EU Guidance Document on article 6(4), January 2007, at: http://ec.europa.eu/environment/nature/natura2000/management/guidance_en.htm#art6, accessed on 8 November 2009.
74. Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage.
75. I. Brauer, R. Mussner, F. Oosterhuis, 'The Use of Market Incentives to Preserve Biodiversity', Final Project under the Framework contract for economic analysis, ENV.G.1/FRA/2004/0081.

13.3.2.4 Voluntary offsets

The voluntary offsets business is an emerging industry. Mainstream investors such as Caisse des Dépôts, ABN-AMRO, Henderson Investors, BNP Paribas Bank, ISIS Asset Management, the World Bank Group and the IFC consider biodiversity offsets as a business opportunity.[76] According to Cortex Consultants Inc., certain large companies have already committed themselves to offsetting the harm they cause to biodiversity on a voluntary basis. Multinational companies such as BHP Billiton and Rio Tinto are using voluntary biodiversity offsets, and have communicated the ambition that their economic activities have no negative impact on biodiversity.[77] Another example is Wal-Mart. In 2006, this company made a ten-year commitment, totalling USD 35 million, to the National Fish and Wildlife Foundation for the creation of permanently protected reserves. Wal-Mart's "Acres for America" project is intended to ensure that the company preserves one acre of priority wildlife habitat for every acre developed by the company. By 2008, 395,000 acres of land have been protected in this way.[78]

Various programmes in the field of voluntary biodiversity offsets have been developed. One of them is the Business and Biodiversity Offsets Programme (BBOP).[79] This initiative was launched in 2004 by the NGO Forest Trends with support from the NGOs Conservation International and the Wildlife Conservation Society. BBOP is operating as a partnership that consists of 40 leading organisations and individuals including governments, financial institutions, companies and conservation experts. The essence of the programme is: (i) to demonstrate conservation and livelihood outcomes in a portfolio of biodiversity offset pilot projects; (ii) to develop, test and disseminate best practice on biodiversity offsets; and (iii) to contribute to policy and corporate developments

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76. K.B. Howard, Cortex Consultants Inc., Voluntary Biodiversity Offsets: Improving the Environmental Management Toolbox, December 2007, at: http://www.cortex.org/d-Cortex-%20Biodiversity%20Offsets_01Dec07.pdf, accessed on 22 May 2010. For *Caisse des Dépôts,* [French pension fund], see: http://www.cdc-biodiversite.fr/, accessed on 22 May 2010. It reads: '*CDC Biodiversité est une filiale de premier rang de la Caisse des Dépôts, lancée en février 2008. Dotée d'un capital de départ de 15 M€, CDC Biodiversité est entièrement dédiée aux enjeux de biodiversité.*'
77. 'Rio Tinto and biodiversity. Biodiversity offset design', 2008. Rio Tinto is being advised by the environmental NGO Fauna & Flora International. See: http://www.riotinto.com/documents/ReportsPublications/33993_RT_Bio_offsets.pdf, accessed on 21 July 2010. Also see: http://www.fauna-flora.org/riotinto.php, accessed on 2 August 2010. BHP Billiton, 'Biodiversity Offsets Strategy', at: http://www.bhpbilliton.com/bbContentRepository/docs/crseisAppendixA2.pdf, accessed on 22 May 2010.
78. Wal-mart, Sustainability Progress to Date 2007-2008, p. 15, available at: http://walmartstores.com/sites/sustainabilityreport/2007/documents/SustainabilityProgressToDate2007-2008.pdf, accessed on 22 May 2010.
79. Business and Biodiversity Offsets Programme, at: http://bbop.forest-trends.org/index.php, accessed on 21 September 2009.

on biodiversity offsets so that they can meet conservation and business objectives.[80] A set of guidelines for offset design and implementation was developed (see Annex 13.2). The guidelines were tested in a portfolio of pilot projects in a range of contexts and industry sectors aimed at demonstrating that the programme enhances additional conservation and business outcomes.[81] An example of a biodiversity offsets case study is offered by the Australian company Basslink Pty Ltd ('Basslink').

In Australia, ('Basslink') was constructing an electricity cable to link Tasmania with Victoria State in mainland Australia, thereby impacting an area located within the Special Protection Zone of a State Forest. The 'habitat hectares approach' was adopted. This approach constitutes a precise, quantitative method for assessing the type, quality and conservation significance of the vegetation at stake. The initial amounts of habitat hectares were combined with an additional multiplier to address risks and other factors to indicate the total number of habitat hectares needed to compensate for impact. The company purchased a property with similar, albeit degraded vegetation adjacent to the main impact site of the project, for purposes of the restoration, maintenance and improvement of the habitat. After the purchase of the property to be conserved, a management plan was prepared before the construction of the project began. The developer will manage the offset areas for a ten-year period. The land is to be given protective tenure by its inclusion in the Crown estate. Basslink's objective was to achieve a 'net gain' for native vegetation. It succeeded by using an explicit, systematic and transparent approach to establish compensatory conservation measures commensurate with the loss of biodiversity.[82]

In general, what would be the reason for companies to commit to voluntary biodiversity offsets? Apparently, there are several driving forces for this corporate behaviour. One of them is that companies in this way can show to society that it can trust them when they need access to land or sea for their business activities. In other words: that they are companies that conduct their business in a responsible way taking into account the P of Planet besides the P of People and the P of Profit. To participate in a biodiversity offsets programme will contribute to the enhancement of a company's reputation because biodiversity appears to have high symbolic value.[83] Another reason is that banks often demand guarantees from borrowers that their projects do not cause

80. *Idem.*
81. Business and Biodiversity Offsets Programme, 'Compensatory Conservation Case Studies' (BBOP, Washington, D.C. 2009), at: http://bbop.forest-trends.org/guidelines/non-bbop-case-studies.pdf, accessed on 3 March 2010.
82. *Idem*., Description of Case Studies, p.10.
83. IUCN, Insight Investment 'Biodiversity Offsets: Views, Experience and the Business Case', 2004, at: http://cmsdata.iucn.org/downloads/bdoffsets.pdf, accessed on 25 July 2009. Research by the Swiss ESG Agency Covalence shows that companies' reputation substantially improves when they embrace the topic of biodiversity. See: *supra* note 15.

environmental damage. Furthermore, the development of conservation tradable credits has business potential, especially in areas where there is a significant demand for offsets, or in places where demand can be easily stimulated. Hence, biodiversity offsets also constitute a new business opportunity for ecosystem service 'brokers' and investors, as was demonstrated in the US wetland banking and Malua Bio Bank examples.[84] To summarise, companies' motives for engaging in a voluntary biodiversity credit scheme are:

– it provides access to licences to operate;
– it contributes to managing reputational risks;
– it aids in getting access to capital at good terms;
– a voluntary offsets programme constitutes a practical tool for managing environmental risks and liabilities; and
– to embrace new market opportunities.

Certainly, investment in voluntary biodiversity offsets also entails risks equivalent to other business ventures in an emerging market. Possible set-backs can include that a company can be disappointed with the results, *e.g.* the conservation outcomes, good public relations and reputational benefits (although this risk can be minimised by closely attending to the design of the biodiversity offsets programme). Furthermore, any corporate involvement in innovative projects can lead to additional costs and related criticism from shareholders.

13.3.2.5 Conclusion regarding nature conservation

To conclude this section 13.3.2, there are indications that the application of biodiversity offsets as part of economic development projects is accepted as best practice by businesses, governments and NGOs. However, there is a long way to go before more countries will introduce biodiversity offsets as a requirement according to law.[85] Voluntary biodiversity offsets markets therefore represent a new and challenging sector.

13.3.3 Eco-tourism

Tourism is one of the largest global industries. The tourism industry is composed of a wide range of businesses, from small operations that operate within a local market, to large transport, hotel and tour operator companies that serve global markets and organise several million tour packages every year. Many countries heavily depend on it. South Africa for example, the country

84. See *supra* §§ 13.3.1.2 and 13.3.2.1.
85. For now, some states, *e.g.* Brazil, Canada, US and Australia, have introduced regulatory measures for biodiversity offsets. See: Madsen *et al* (2010), *supra* note 58.

with the largest national parks, receives up to 80 per cent of its annual budget from tourism receipts.[86] In more than 150 countries, tourism is one of the top five export earners, and in 60 countries it is the top earner.[87] Tourism seems to be particularly important for developing countries: it is a principal income generator for 83 per cent of developing countries and the leading one for one third of the poorest countries.[88]

Eco-tourism is a fast growing sector, with annual exports up to USD 100 billion. It is growing three times faster than other segments of the tourism sector.[89] Eco-tourism is a tool that can help to minimise the environmental effects of regular tourism or economic development in general, and it offers the possibility of compatible economic development to local and indigenous people. There is a direct link between biodiversity conservation and eco-tourism. The collected revenues from visiting the protected areas can support the preservation of lands, water areas and biodiversity in general. In addition, money is directed to the local communities for offering to the tourists lodging, food, guiding and transportation. According to The International Ecotourism Society (TIES), eco-tourism can be defined as "responsible travel to natural areas that conserves the environment and improves the well-being of local people".[90] To better understand what the notion of eco-tourism entails and how it is different from regular "mass" tourism, TIES developed the following eco-tourism principles:

– minimise impact;
– build environmental and cultural awareness and respect;
– provide positive experiences for both visitors and hosts;
– provide direct financial benefits for conservation;
– provide financial benefits and empowerment for local people;
– raise sensitivity to host countries' political, environmental, and social climate.

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86. Bishop *et al* (2008), *supra* note 10, pp. 84-95.
87. The statistics have been based on the The International Ecotourism Society, Ecotourism Fact Sheet, 2005, at: www.ecotourism.org/WebModules/WebArticlesNet/articlefiles/15-NEW%20Ecotourism%20Factsheet%20Sept%2005.pdf, accessed on 22 May 2010. Additional information can be obtained from the UN World Tourism Organisation, at: www.world-tourism.org and the World Travel & Tourism Council, at: www.wttc.org, both websites accessed on 2 July 2010.
88. International Ecotourism Society (Global Ecotourism Fact Sheet), 2006, at: http://www.ecotourism.org/atf/cf/%7B82a87c8d-0b56-4149-8b0a-c4aaced1cd38%7D/TIES% 20GLOBAL%20ECOTOURISM%20FACT%20SHEET.pdf, accessed on 22 May 2010.
89. Bishop *et al*, 2008, *supra* note 10.
90. See: http://www.ecotourism.org/site/c.orLQKXPCLmF/b.4835241/k.18B9/About_TIES.htm, accessed on 7 July 2009. See also Stefan Gössling, 'Ecotourism: means to safeguard biodiversity and ecosystem functions?', in *Ecological Economics*, 29, 1999, pp. 303-320, at: http://www.ideal.forestry.ubc.ca/cons481/Readings/Gossling1999.pdf, accessed on 22 May 2010.

Eco-tourism can be considered an emerging market and has been marked as 'the future of tourism'. More and more people wish to visit ecologically sustainable places that combine beautiful nature and habitats. Although today this market is still a grassroots movement, for the large part concentrated in a small number of regions and facilities and dependent on 'caring' consumers, it continues to develop.[91] To illustrate this, two eco-tourism business projects will be analysed in this section: the Pan Parks Foundation and the African Parks Foundation.

13.3.3.1 The Pan Parks Foundation

The Pan (Protected Area Network) Parks Foundation (Pan Parks) is a joint creation of the nature conservation organisation WWF and the Dutch tourism company Molecaten B.V. The alliance was established in 1997 and it launched its first project in 2001. Currently, it manages 11 projects. The main goal of Pan Parks is to establish a network where protected areas and businesses can work together both to conserve nature and support local communities in a sustainable way.[92] Pan Parks focuses on developing high-quality eco-tourism products based on the nature characteristics of the particular protected area. This innovative project pursues the ambition to develop partnerships with the private sector and investors to facilitate sustainable development and raise additional funds for nature conservation. The scope of Pan Parks focuses on the European natural landscape. Pan Parks allocates resources through the 'Pan Parks Small Grants Fund' to support 'Certified Pan Parks'.[93]

Interesting factors of this set-up are that Pan Parks has a WWF sub-branding which adds value from a business perspective. Secondly, Pan Parks follows the 'wilderness management concept,' meaning that an area can only qualify as a 'protected area' if there are at least 10,000 hectares designated for untouched nature, hence it adds to nature conservation. Thirdly, Pan Parks indicates that it offers high-quality tourism which includes local services and facilities provided by local partners. Pan Parks has begun to shift from a non-profit conservation organisation into a more business model structure. According to its 2007 report, Pan Parks aims to pursue a financially sustainable approach and to seek diverse sources of income. It has the ambition to attract institutional investors. As yet, no data are available on the success of this venture.

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91. S. Heher, 'Ecotourism Investment and Development Models: Donors, NGOs and Private Entrepreneurs', Johnson Graduate School of Management School of Hotel Administration, Cornell University, 2003. See also: IUCN-NL and World Land Trust, Land Purchase for Conservation. An effective strategy for biodiversity conservation, Amsterdam 2009.
92. Pan Parks Foundation Business Plan – Summary for External Use and also see: http://www.panparks.org/Introduction/Vision, accessed on 21 September 2009.
93. Pan Parks, Annual Report 2009, at: http://www.panparks.org/newsroom/news/2010/apr_annual_report_2009_available, accessed on 23 April 2010.

13.3.3.2 African Parks Network

The African Parks Network (APN) is another example of combining nature conservation with business. APN was established in 2000 and is registered as a not-for profit organisation in terms of Section 21 of the Companies Act of South Africa. The head office is located in South Africa. In six years, this organisation acquired responsibility for the management of five protected areas in three different countries, covering a total area in excess of 2,500,000 hectares. In each country that hosts a park, APN has incorporated a local operating company to manage the park. These legal entities are created in order to implement an agreement with the local government for the management of a specific national park (Figure 13.4).

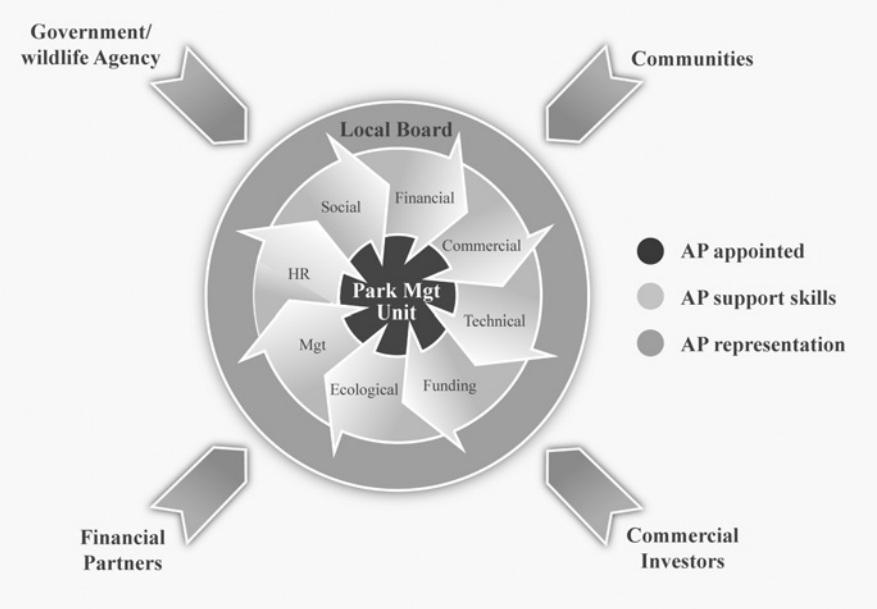

Figure 13.4 Business Model of the APN (source: www.african-parks.org)

APN is the first private park management institution in Africa. Its task is to provide long-term management to the national parks. In fact, APN operates as a public-private partnership: it combines the development of the parks and the stimulation of responsible tourism. Its goal is to achieve the financial sustainability of the parks as well as to provide a foundation for local sustainable economic development and poverty reduction.[94] Income streams include local

94. The African Parks Network, http://www.african-parks.org/apffoundation/index.php?option=com_wrapper& Itemid=129, accessed on 22 May 2010.

commercial revenues (concession fees, entrance fees, game sales and filming fees) and grants for particular projects, activities performed and paid for by wildlife and environmental NGOs, endowment income and payment systems for ecosystem services.[95] In addition, non-timber forest products are sold, as business alternatives to sustain the biodiversity resources in the protected park areas and the livelihood of park dwellers. APN indicates that it does not make any significant investments in tourism infrastructure itself: "the ones who make investments should be specialised organisations which have the skills, capital and marketing channels to make a success of it".[96] The role of APN is to create the right investment climate in the region where the parks are located and to conclude agreements with tourism companies in countries where the tourists come from.[97] Consequently, APN can play an important role in catalysing eco-tourist activities. The financing of APN comes from private (non-profit) investors, environmental funds, governments and commercial ventures with operations in or near the parks.

13.3.4 PES: watershed management

According to the definition of the Center for Watershed Protection, a watershed is: "the area of land where all the water that drains off goes into the same stream, lake or other water body. A watershed can cross country and state lines. We all live in a watershed."[98] Watershed protection serves as a mechanism for protecting a lake, river or stream by managing the entire watershed that drains into it.[99] Establishing a payment system for watershed protection can be qualified as PES, *i.e.* the payment is connected with the availability of water, the ecosystem service. Typically, a PES scheme for watershed management comprises the implementation of financial mechanisms to compensate upstream landowners so as to maintain a certain land use in order to positively affect the quality and availability of the downstream water resources. In this case, the upstream landowners are usually paid not to build roads, plant trees or perform

95. The African Parks Network, Business Model, at: http://www.african-parks.org/apffoundation/index.php? option=com_content&task=view&id=34&Itemid=72, accessed on 12 September 2009.
96. Pan Parks, Annual Report 2009, *supra* note 93.
97. The APN Board is supported by a number of affiliate organisations, including African Parks Foundation of America, Stichting African Parks Foundation based in the Netherlands and UK African Parks Foundation. Their role is to facilitate the establishment of partnerships with individuals, institutions and companies in their respective host countries, who are willing to become involved in and support the work of APN.
98. Center for Watershed Protection, at: http://www.cwp.org/Resource_Library/Why_Watersheds/index.htm, accessed on 12 September 2009.
99. See website: https://engineering.purdue.edu/SafeWater/watershed/, accessed on 12 September 2009.

other activities that have an impact on the quality of water.[100] Sometimes they are paid to keep a forest intact to avoid erosion that might impact the watershed. The PES systems vary from payments by private water users to environmental agencies and NGOs (which contribute to ensuring the watershed protection), to direct payments by central government (which acts as user, provider or seller of the water) to private landowners who protect a watershed.[101]

In Latin-American countries, the system for payments for watershed protection has gained popularity in recent years.[102] The scarcity of water and water-related conflicts have played a role in setting up PES water schemes in Costa Rica and Colombia.[103] In Latin America, as well as in other developing countries, these projects are usually public schemes and supported by external financing by way of loans, grants and the expertise of international organisations, development agencies and NGOs. Others are constructed in the form of public-private partnerships.[104] An example is a PES system set up in Costa Rica, presented in section 13.3.4.1.

The involvement of the private sector in the PES schemes for watershed management has not yet developed on a large scale. In fact, only five per cent of global private investments were directed towards the water sector, which of course also comprises many water-related business activities other than PES.[105] The SNS REAAL Water Fund explains that a lack of involvement is related to the presumptions of investors about water investments, such as that water issues are very complex and that investments have a high-risk and low-return profile, combined with high overhead and transaction costs. High transaction costs should be understood in relation to the acquisition of legal title or use rights and capacity building in order to change unsustainable land-use practices. In order

100. B. Kiersch, L. Hermans, 'Payment Schemes for Water-Related Environmental Services: A Financial Mechanism for Natural Resources Management Experiences from Latin America and Caribbean', Seminar on Environmental Services and Financing for the Protection and Sustainable Use of Ecosystems, Geneva, 10-11 October 2005.

101. Bishop *et al.*, *supra* note 10.

102. In 2002, in Latin America 18 PES water – related schemes were in place, study by Landell-Mills and Porras, 2002.

103. Kiers, *supra* note 100.

104. WWF has implemented a number of 'payment for watershed services' projects, *e.g.* in Guatemala, Peru, Indonesia and Tanzania. They are now entering into the last and critical phase of a four-year programme. Private-public partnerships have been established in the context of a conservation-development model centred around equitable business cases. Information Exchange Meeting, the Netherlands, 3 March 2010, in which the author participated. See also on PES schemes: J.C. Tresierra, Equitable Payments for Watershed Services (WWF-Care, 2008); M. Martinez, L. Dimas, Valoración Económica de los Servicios Hidrológicos: Subcuenca del Rió Teculután, Guatemala (WWF-Care 2007); M. Martinez, V. Reyes, Criterios para la priorización y selección de cuencas, Guatemala (WWF-Care 2007).

105. SNS REAAL Water Fund, SNS REAAL Bank invests in small and medium-sized water projects in different parts of the world, at: http://www.evd.nl/zoeken/showbouwsteen.asp?bstnum=191524&location=, accessed on 8 November 2009.

to improve the financial capacity of watershed protection businesses, private water users that have a higher ability to pay have to be involved. Examples are energy companies that depend on the stability of the water volume in a river or artificial lake to be able to generate electricity, and water companies, breweries and soft drink companies that depend on the availability and the quality of water near their production sites. In paragraph 13.3.4.2, this will be illustrated by describing a PES project in which the French company Perrier Vittel S.A. acted as an initiator and beneficiary of watershed protection services.

13.3.4.1 Costa Rica

The government of Costa Rica has developed a nationwide PES programme as a response to the country's rapidly increasing rates of deforestation. The ecosystem service providers, *i.e.* private owners of forest lands, are paid by the State and GEF funds[106] as well as by water users including hydropower companies, for the maintenance of forest cover in watersheds. In 1996, Forest Law No. 7575 was enacted in order to legally set up PES schemes.[107] The law provides a regulatory framework for the adoption of financial incentives for maintaining forest lands and a legal basis for the government to contract property owners to provide services originating from their land. One of the PES schemes within the framework of this national programme is the Costa Rica – Energia Global project. This initiative is a public-private partnership in which the following parties participate: the hydropower company Energia Global (the main investor), the Government of Costa Rica Fund (income source: mostly fuel tax revenues) and the National Fund for Forestry Financing that acts as a national intermediary. The ecosystem services that are being financed are: (i) the continuity of water flow for hydroelectricity generation; and (ii) biodiversity protection. Energia Global is heavily dependent on the storage of water. Two small reservoirs can only store an amount of water sufficient for five hours' generation. It is therefore fundamental for the company to increase the stream flow regularity, especially in the dry season, when prices for electricity production are highest. It is also important to reduce reservoir sedimentation.[108] It was estimated that an increase in forest cover upstream will provide for these

106. GEF stands for Global Environmental Facility. An independent financial organisation, the GEF provides grants to developing countries and countries with economies in transition for projects related to biodiversity, climate change, international waters, land degradation, the ozone layer, and persistent organic pollutants. See: http://www.gefweb.org/interior_right.aspx?id=50, accessed on 1 April 2010.
107. K. Bennet, R. Henninger, 'Payments for Ecosystem Services in Costa Rica and Forest Law No. 7575: Key Lessons for Legislators', 2008, at: http://www.e-parl.net/eparlimages/general/pdf/090422%20e-Parliament%20Forests%20Initiative.pdf, accessed on 2 October 2009.
108. Watershed Markets 'Costa Rica – Energia Global', at: http://www.watershedmarkets.org/casestudies/Costa_Rica_ Energia_Global.html, accessed on 2 September 2009.

services. At first Energia Global was focused on an increase in water quantity; however, after the renewal of the contract the emphasis was on water quality. The company was interested in the protection of the basins that drain into the San Fernando and Volcan rivers, which feed their plants. The company's ambition was to protect 1,818 hectares in the San Fernando area and 2,493 hectares around the Rio Volcan area. Energia Gobal had calculated that its investment in watershed management would be a profitable venture if it would be able to obtain an extra 460,000 cubic meters of water. There are no records as to whether this goal was achieved. However, the company's willingness in 2003 to prolong the contract for another five years suggests that both the farmers and the company perceive net benefits from their PES arrangement.[109]

13.3.4.2 Vittel

Perrier Vittel S.A. (Vittel) is one of the world's largest bottlers of natural mineral water. The maintenance of water quality is vital for a water bottling business. Often, the quality of a water source degrades over time. Vittel had calculated that the protection of an existing water source is more cost-effective than building a new filtration plant or transferring its operations to new sources.[110] Vittel therefore decided to finance 'quality drinking water' through compensation for services of landholders located around the springs. The services provided by farmers and forest landholders entailed the improvement of agricultural practices and the reforestation of sensitive infiltration zones. The farmers agreed to adopt less intensive farming practices in order to reduce agricultural run-off of herbicides and other pollutants. The idea behind this is that the enhancement of farming activities eventually restores and keeps the water quality at a desired level. Vittel had financed the programme with the support of the French National Agricultural Institute (INRA), and the French Water Agencies.[111] This project was claimed to be a success, because Vittel had achieved its goals. The level of non-point-source pollution[112] were reduced significantly and, according to a cost-benefit analysis study of the Vittel case by INRA, the project was economically justifiable.

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109. Bennet *et al*., *supra* note 107.
110. D. Perrot-Maitre, P. Davis, Case Studies of Markets and Innovative Financial Mechanisms for Water Services from Forests, May 2001.
111. The total cost for the first seven years was about USD 24.5 million.
112. Non – point-source pollution usually occurs when rainfall, snowmelt or irrigation runs over land, or through the ground, picks up pollutants, and deposits them into rivers, lakes, and coastal waters or introduces them into ground water. Definition in accordance with: http://www.sourcemolecular.com /definitions/definitionnonpointsourcepollution.htm, accessed on 12 September 2009.

This example illustrates the potential of these types of PES schemes. Financial institutions can play an important role as intermediaries in designing and implementing similar market-based instruments. As analysed in one of the studies, the Vittel model would be appropriate for profitable industries with a rapidly growing demand for water, because the high level of initial investment.[113] The Vittel model might however be difficult to implement in a large geographical area, or in a region with many farmers without government support.

13.3.4.3 Conclusion regarding watershed management

In conclusion of this section 13.3.4, it has to be noted that despite successful examples of watershed protection business, the potential to finance nature conservation through payments for water services has not yet been fully developed. Finding a willing buyer for watershed protection services is a challenge and hence appears to be the main barrier to introducing watershed protection schemes and to maintain them in the long run. However, as water becomes scarcer and more valuable as a resource, it is assumed that watershed management in the future will have more income-generating potential, including opportunities for long-term investments.[114] Furthermore, it is clear that any water-related scheme needs a certain degree of government involvement and support due to the complex legal and social situation in which these schemes have to operate. Since many projects still suffer from a lack of complete information regarding the impact of land use on hydrological services, further research in this field is required. Overall, if a well-balanced scheme can be established, the benefits will be three-fold: (i) financial returns where watershed protection is an optimal and cost-effective option; (ii) conservation of biodiversity, but the significance thereof will depend on the types of land use that are supported by the payments and their impacts on water supply; and (iii) as an extra 'selling point', watershed PES schemes can deliver social benefits, such as a contribution to poverty reduction by compensating farmers.

13.3.5 PES: voluntary carbon sequestration

The private sector is becoming increasingly involved in payments for voluntary carbon sequestration. The global demand for carbon sequestration is motivated by the Kyoto Protocol, regional and national legislation implementing policies

113. D. Perrot-Maitre, 'The Vittel Payments for Ecosystem Services: a Perfect PES Example', 2007, Department for International Development, at: http://www.iied.org/pubs/pdfs/G00388.pdf, accessed on 1 May 2010.
114. UNEP FI report, *supra* note 8, p. 25. Comments by the representatives of the watershed projects presented at the WWF meeting, *supra* note 104.

and trading schemes.[115] The market for carbon sequestration services has two bases: legislation[116] and voluntary initiatives.

As to the first dimension: legislation requires companies to reduce their carbon emissions to the level of the permits annually allocated to them (credits). Companies are required to hold a number of permits equivalent to their emissions. If they exceed such levels, they have to buy additional carbon credits on the carbon credit market. The total amount of permits cannot exceed the cap, limiting total emissions to that level (also called 'cap and trade' programmes). The cap is an enforceable limit on emissions that is usually lowered over time – aiming towards a national emissions reduction target. Economists have urged the use of "market-based" instruments such as emissions trading to address environmental problems instead of prescriptive "command and control" regulation. Command and control regulation is often criticised for being excessively rigid, insensitive to geographical and technological differences, and for being inefficient. However, emissions trading requires a cap to effectively reduce emissions, and the cap is a government regulatory mechanism. After a cap has been set by a government political process, individual companies are free to choose how or if they will reduce their emissions. Failure to reduce emissions is often punishable by a further government regulatory mechanism, a fine that increases costs of production. Companies will choose the least-costly way to comply with the pollution regulation, which will lead to reductions where the least expensive solutions exist, while allowing emissions that are more expensive to reduce.[117]

Carbon credits can be obtained for completing projects that cause a reduction of carbon emissions. Such projects can entail programmes enhancing industrial efficiency programmes that result in lower emission levels. They can

115. United Nations (UN) Kyoto Protocol to the United Nations Framework Convention on Climate Change, 1998, at: http://unfccc.int/resource/docs/convkp/kpeng.pdf, accessed on 12 September 2009.

116. In January 2005 the European Union Greenhouse Gas Emission Trading System (EU ETS) commenced operation. The scheme is based on Directive 2003/87/EC, which entered into force on 25 October 2003. In the US, the American Clean Energy and Security Act of 2009 (ACES or the Waxman-Markey Bill) is an energy bill that would establish a variant of a cap-and-trade plan for carbon to address climate change. The bill was approved by the House of Representatives on 26 June 2009, and is in consideration in the Senate. See: http://www.opencongress.org/bill/111-h2454/actions_votes, accessed at 23 May 2010.

117. R. Stavins, 'What Can We Learn from the Grand Policy Experiment? Lessons from SO2 Allowance Trading', in *The Journal of Economic Perspectives*, 12(3), 1998, pp. 69-88; R. Stavins, 'Experience with Market-Based Environmental Policy Instruments', Discussion Paper 01-58, Washington, D.C.: Resources for the Future, November 2001, at: http://www.rff.org/documents/RFF-DP-01-58.pdf, accessed on 21 July 2010. T. Tietenberg, N. Johnstone, 'ExPost Evaluation of Tradeable Permits: Methodological Issues and Literature Review', Tradeable Permits: Policy Evaluation, Design And Reform, OECD Publishing, pp. 1-13.

also constitute sequestration programmes, *e.g.* vegetation that absorbs carbon (planting trees). A company or even an individual can initiate a project that sequesters carbon in order to generate tradable carbon credits. Industrial companies buy carbon offsets in the framework of regulatory obligations. In addition, any company can voluntarily decide to offset its carbon emissions.

Regarding the second dimension of the market for carbon sequestration, the voluntary market, it should be noted that this market develops completely between private parties on a voluntary basis. This market is particularly well developed in the US. For instance, the reductions can be achieved through buying credits at the Chicago Climate Exchange (CCX). The CCX represents a legally binding compliance regime, providing independent, third-party verification by the Financial Industry Regulatory Authority (FINRA).[118] This system is based on voluntary membership; CCX emitting Members make a voluntary but legally binding commitment to meet annual carbon emission reduction targets (usually a one per cent reduction per year). Those who reduce below the targets have surplus allowances to sell or bank; those who emit above the targets comply by purchasing so-called 'CCX Carbon Financial Instrument® (CFI®) contracts'.

The Voluntary Carbon Standard (VCS) Programme provides a global standard and programme for the approval of credible voluntary offsets. Originally, the VCS Programme was initiated in 2005 by the Climate Group, the International Emissions Trading Association and the World Economic Forum. As forests and agriculture play an important role in carbon storage by storing carbon in plant matter and the soil, they can produce carbon credits. In 2008, VCS introduced a standardised approach for forestry and agriculture. REDD, *i.e.* 'Reducing Emissions through Deforestation and Forest Degradation', then became accessible to all market players. Starting from 18 November 2008, land use projects including forestry and agriculture can be validated and verified against VCS. New VCS rules allow agriculture, forestry and other land-use (AFOLU) activities to generate permanent voluntary carbon units (VCUs) that can be easily substituted with other carbon credits generated by non – AFOLU activities, such as industrial and energy projects.[119]

Both the regulated and the voluntary dimension of the market for carbon sequestration services can entail either a bilateral project-based transaction between the company-buyer and the carbon credit-producer, or the offset can take place through trading credits in a carbon sequestration market. This is how a new market for payments for agricultural and forestry sequestration services has come into existence over the last decade. The next sections will explain this.

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118. The Chicago Climate Exchange, at: http://www.chicagoclimatex.com/, accessed on 22 May 2010.
119. Voluntary Carbon Standards, at: http://www.v-c-s.org/181108redd.html, accessed on 1 October 2009.

13.3.5.1 Agriculture and climate change

Agriculture can play a major role in climate change mitigation: by reducing its own emissions and by increasing the storage of carbon in plants and the soil. Reductions would certainly make a difference because agriculture adds up to "about one third of the total carbon dioxide emissions and is the largest source of methane (from livestock and flood rice production) and nitrous oxides (primarily from application of inorganic nitrogenous fertilizer)."[120] Certain agricultural projects are eligible for carbon credits ('PES from agriculture'). Presently, the efforts to use agriculture to reduce carbon emissions focus on an increase in 'above-ground sequestration'. This process involves the absorption of carbon dioxide from the atmosphere through trees, plants and crops and ultimately storing it as carbon in biomass.[121] Also reforestation can produce carbon credits. For example, when infertile lands are transformed into forest, growing trees sequester carbon dioxide from the atmosphere and store it as woody biomass and soil organic matter; as a result carbon is being sequestered. The new carbon market aids farmers and landowners in receiving payments for land use practices that generate carbon offsets for the buyers. Yet, "around 100 megatons of carbon have been sequestered through voluntary payments to landowners in the framework of private-sector programmes, many of whom are in developing countries."[122]

13.3.5.2 REDD

Deforestation is another important source of carbon emissions.[123] One of the mechanisms created to address deforestation, forest degradation and the associated emissions of greenhouse gasses, is REDD. The idea behind this concept is to generate carbon credits for maintaining existing forests. In this way, financial incentives will be provided to forest owners, companies or governments of developing countries for keeping their forests intact instead of logging them.

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120. 'Payments for Environmental Services from Agricultural Landscapes', Food and Agriculture Organisation of the United Nations, at: http://www.fao.org/ES/ESA/pesal/index.html, accessed on 21 September 2009.
121. R. Jindal, J. Kerr, 'Payments for Carbon Sequestration Services', United States Agency for International Development, 2007, p. 1.
122. UN Food and Agriculture Organisation, Report: The State of Food and Agriculture: Paying Farmers for Environmental Services, 2007, p. 3, at: https://www.cbd.int/doc/external/fao/fao-2007-report-en.pdf, accessed on 22 September 2009.
123. G. Asner, Measuring Carbon Emissions from Tropical Deforestation: Overview, Department of Geological and Environmental Sciences, Stanford University, 2008, at: http://www.edf.org/documents/10333_Measuring_Carbon_Emissions_from_Tropical_Deforestation–An_Overview.pdf, accessed on 3 March 2010.

The REDD initiative was developed in 2005 by a group of States that named themselves the 'Coalition of Rainforest Nations'.[124] Two years later, the idea of REDD was taken up at the Conference of the Parties (COP) to the UN Framework Convention on Climate Change (UNFCCC)[125] in Bali, *i.e.* COP-13.[126] The participants at the COP came to a consensus on a road-map that should eventually lead to a regulatory system for REDD. It was agreed to include forest conservation in the further discussions on climate change. The plan was to reach a REDD accord at the COP in Copenhagen in December 2009, *i.e.* COP 15, as a part of the larger post-Kyoto negotiations.[127] However, Copenhagen was unsuccessful, and no agreement has been reached on a REDD framework.[128] The proposed funding methods for REDD were: (i) carbon credits; (ii) a fund; or (iii) a mixture of both.[129] The carbon emission trading potential of avoided deforestation credits depends very much on what a future REDD system will look like. In spite of not yet reaching a concrete international result, as explained above, REDD already has important implications for the regulatory and voluntary markets.

Currently, the sector of voluntary carbon emission credits from forestry projects is one the largest sectors in the voluntary markets. It amounted to 36 per cent of all voluntary market transactions in 2006.[130] There appears to be

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124. REDD Monitor (NGO Networks news site). Its goal is to share information about the way REDD is developing. See: http://www.redd-monitor.org/redd-an-introduction/, accessed on 2 September 2009.
125. *Supra* note 115.
126. During the Climate Change Conference of 2007, the Bali Action Plan was drafted. In § 1b (iii), it refers to the advanced concept "REDD+" and calls for "policy approaches and positive incentives on issues relating to reducing emissions from deforestation and forest degradation in developing countries; and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries". REDD+ activities include: conservation, sustainable management of forests and enhancement of forest carbon stocks. Available at: http://unfccc.int/meetings/cop_13/items/4049.php, accessed on 10 September 2009.
127. A Report for the Secretariat of the CBD: 'Challenges for a Business Case for High Biodiversity REDD Projects and Schemes,' Eco Securities Ltd., February 2009, p. 18.
128. The Copenhagen negotiations resulted in a 'Draft agreement of the Ad Hoc Working Group on Long-term Cooperative Action on reducing emissions from deforestation and degradation', 15 December 2009. Available at: http://www.carbonpositive.net/viewFile.aspx?FileID=170, accessed on 1 February 2010. See also: 'Copenhagen Accord', preliminary agreement between China, US, India and South Africa, 18 December 2009. See: http://www.carbonpositive.net/viewfile.aspx?fileID=171, accessed on 1 February 2010.
129. *Supra* note 126.
130. Voluntary Carbon Standards, at: http://www.v-c-s.org/181108redd.html, accessed on 1 October 2009. EcoSecurities, a leading organisation in the business of sourcing and developing greenhouse gas emission reduction projects, Conservation International, The Climate, Community & Biodiversity Alliance, ClimateBiz and Norton Rose Group reported in their second annual 'forest carbon offsetting report 2010', which focuses on corporations' →

an interesting potential for voluntary markets in REDD because of the following reasons:

– voluntary carbon emission offset markets will be an alternative for civil society and business if an international political agreement regarding REDD cannot be reached or will be substantively delayed;
– voluntary markets serve as a crossing point between purely voluntary and pre-compliance carbon emission reduction efforts for companies that are moving towards regulatory caps, *e.g.* aviation companies in the EU; and
– a development can be observed that a demand for conservation credits will be created by voluntary markets. Preserving forests would qualify for conservation credits (in addition to qualifying for carbon emission credits).[131]

In comparison to the situation five years ago, when forestry carbon emission credits were generated almost entirely from reforestation activity, there is evidence that the forestry sector is changing, particularly into REDD, but also to improved forest management practices.[132] Market analysts stated that the buyers of the carbon credits on voluntary markets are willing to pay higher prices if there are co-benefits like biodiversity conservation.[133] There are already examples of REDD projects that have been certified against the Climate, Community and Biodiversity Project Design Standards (CCB Standards).[134] One of them is Juma Sustainable Development Reserve Project in the Amazon Forest in Brazil.

Juma Sustainable Development Reserve in the Amazon Forest suffers from high deforestation caused by land conversion for agricultural practices and other economic activities. The Juma Sustainable Development Reserve Project aims to stop the deforestation. It is a landmark project which began in 2008 and

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attitudes towards carbon offsets from forestry projects, that positive attitudes towards forest carbon offsets have significantly increased in the past year, especially in Europe (Dublin, 4th May 2010). The report is available at: http://www.ecosecurities.com/Standalone/Forest_carbon_offsetting_report_2010/default.aspx, accessed on 23 May 2010.

131. The other important initiative is the Green Development Mechanism (GDM) 2010 Initiative. The GDM is a new financial structure at the global level to generate sufficient long-term resource streams to motivate owners of biodiversity-rich areas to exploit the area in a way which favours long-term conservation. The GDM will serve as an offset fund, which finances biodiversity enhancing projects, with a specific focus on activities in developing countries. For more information see: http://www.earthmind.net/bbb/gdm.htm, accessed on 3 March 2010.
132. Forest News, Forest Carbon Markets Grows Despite REDD Barriers, 27 May 2009.
133. L. Ashford, J. Barker, C. Davey, N. Dikeman, J. Harris, R. Mountain, N. Thorubrn, N. Wheeland, 'Carbon Offsetting Trends Survey', 2008; K. Hamilton, M. Sjardin, T. Marcello, G. Xu, 'Forging a Frontier: State of the Voluntary. Carbon Markets', 2008, Ecosystem Marketplace & New Carbon Finance, 2009.
134. CCB standards evaluate land-based carbon mitigation projects in the early stages of development. For more information, see: http://www.climate-standards.org/standards/index.html, accessed on 2 September 2009.

is due to finish in 2050. The instrument used is the creation of financial mechanisms to generate carbon emission credits under REDD. The structure of the project is the following: (i) it is supervised by the Sustainable Amazon Foundation (*Fundacao Amazonas Sustentavel*), established in December 2007 by the Amazonas Government and the Brazilian Bradesco Bank; (ii) it is audited in accordance with the VCS by the German Tuv-Sud company; and (iii) the project received the guidance of the Climate, Community and Biodiversity Alliance (CCBA, *i.e.* the organisation that set the CCB standards). Finally, the resources generated by avoided carbon dioxide emissions through controlling deforestation will be invested in the Juma Sustainable Development Reserve. It is expected to boost sustainable economic activities in the region and to improve the livelihoods of indigenous inhabitants of Juma Sustainable Development Reserve and its surroundings.[135] Concrete goals of the project are: (i) to generate carbon credits out of 189,767,027 tonnes of carbon emissions; and (ii) to avoid the degradation of 366,151 hectares of rainforest and hence the emission of 210,885,604 million tonnes of carbon dioxide into the atmosphere by 2050.

13.3.5.3 Conclusion regarding voluntary carbon sequestration

Concluding this section 13.3.5 on PES, it can be argued that voluntary carbon sequestration through REDD and agricultural sequestration services represents an interesting innovative business approach because it can contribute to the mitigation of climate change, the conservation of biodiversity (*i.e.* preservation of biodiversity through forest conservation), and equitable and sustainable development (REDD can direct financial flows to some of the world's poorest regions).[136] Furthermore, REDD supports a stabilisation of the rain required for a productive agriculture in a vast area around the preserved forests. One of the leading biologists and specialists in REDD, Dr Laurance of the Smithsonian Tropical Research Institute, stated: "the costs of forest conservation are modest and deforestation is a massive source of emissions, so slowing deforestation is like plucking the low-hanging fruit – there's a lot of benefit for not a lot of cost. And of course we're not just storing carbon; we're also saving the world's most biologically important real estate, providing a place for local and indigenous peoples, and helping to stabilise delicate soils and reduce catastrophic flooding."[137]

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135. Brazil's Juma Sustainable Development Reserve Project for REDD Implementation, Case Study: Forest Now. Org, November 2008, at: http://www.forestsnow.org/casestudies_full.php?csid=15, accessed on 2 October 2009.
136. It is estimated that it can generate USD 53 billion per year for halving deforestation rates. See: D. Brown, N. Bird, 'The REDD Road to Copenhagen: Readiness for what? Overseas Development Institute', Opinion, December 2008.
137. 'Bali Delegates Agree to Support Forest-for-Climate (REDD) Plan', 16 December 2007.

13.4 Barriers and suggested solutions

As has been set out above, various new markets are emerging in the field of paying for eco-system services and for investing in biodiversity or nature conservation. Some markets can be considered more mature (sustainable forestry) than others that are still in a developing phase (REDD). BES products range from eco-tourism products to PES schemes. Both deliver a positive net impact on the conservation of biodiversity and the maintenance of ecosystem services, and can generate financial revenues at the same time. However, these markets are still in their early stages. One of the main obstacles to 'biodiversity business' is the general perception that biodiversity and components related to it are a 'public good'; that is to say, are not viable from a business perspective. Companies often perceive ecosystem services as being 'free of cost'. However, the above-mentioned initiatives demonstrate that this perception is not necessarily true. Still, many risks and obstacles have to be reviewed by investors. The main risks and obstacles seem to be:

– *Lack of information and knowledge*: investors suffer from a lack of information concerning existing and developing biodiversity business opportunities. Furthermore, BES project managers often lack expertise and experience in structuring their funds in such a way that they meet the strict investment criteria of institutional investors. There is a two-way need for information provision and training in order to encourage the further development of a market framework that facilitates biodiversity business opportunities.[138] In addition, it appears that the biodiversity sector (including NGOs) – that possesses knowledge about biodiversity – is not effectively assisting commercial actors in the development of a portfolio of bankable biodiversity projects.[139] The knowledge gaps are an important factor in the present lack of investment in biodiversity projects.
– *High risks*: multiple risks can materialise regarding BES investments. One of them is the lack of predictability concerning the outcome. This is related to the fact that only a few front-runners have successfully engaged in the pro-biodiversity business. For example, the involvement of the private sector in PES is still relatively limited. Consequently, a lack of successful case studies in this field prevents large investors from considering biodiversity as a profitable business opportunity. Another risk relates to the implementation of pro-biodiversity projects located in developing countries

138. BTAU, 'Handbook for Developing and Implementing Pro-Biodiversity Business Projects', 2009, at: http://ec.europa.eu/environment/nature/partnerships/docs/btau_handbook.pdf, accessed on 13 April 2010.
139. I. Bräuer *et al*., 'The use of market incentives to preserve biodiversity', Final Report (2006), at: http://www.naider.com/upload/mbi.pdf, accessed on 23 May 2010.

that have a weak government and an inadequate regulatory environment. Apparently, in sustainable forest practices, land tenure and the enforcement of compliance are often not properly handled.

– *High transaction costs*: a main impediment to BES is the relatively high cost of due diligence required to meet financial and biodiversity criteria. Most BES projects are aiming at a long-term life cycle and require adequate assessments. The finance sector has often demonstrated its inability to estimate the size of transaction costs. It is important to address this issue in bidiversity business projects and to make it transparant.
– *Lack of management capacity and entrepreneurs*: in order to manage pro-biodiversity business – and especially to develop an effective system of payments for environmental services, like sustainable forestry and water services – project management needs to be knowledgeable and efficient. It was estimated that only well-designed and implemented pro-biodiversity businesses can deliver biodiversity objectives cost-efficiently.[140]
– *Small projects/low revenues*: voluntary mechanisms of biodiveristy business, with a few exceptions such as the voluntary carbon market, tend to be small and have relatively high transaction costs. Considering the fact that investors, especially institutional investors, are generally looking for a long-term investment of a substantial volume, this can constitute an obstacle to participation. As was mentioned before, most of the projects are too small for direct financing and need to be bundled to make them interesting for large investors.
– *Lack of enabling environment*: in order for a business to prosper, the environment in which it operates has to be favourable for commercial activities. An enabling environment includes an effective regulatory structure that reflects public expectations about the rights and responsibilities of business and society.[141] In the context of business and biodiversity, the enabling climate is often underdeveloped. Based on the perception that biodiversity is a public good, businesses consider that all related problems are the responsibility of the government and society in general. For most financial institutions and fund managers, biodiversity is no more than an 'environmental liability, responsibility or a resource that they can exploit.' Presently, the majority of the private sector does not see biodiversity as a business asset that ought to be conserved and managed in its own right.[142]
– *Inability to think 'long term'*: financial institutions lack an understanding of what biodiversity loss means for them. The investment in biodiversity can be a risk today which, however, can be turned into long-term benefits and profits tomorrow. The financial returns and conservatory benefits at the

140. *Idem*.
141. Bishop *et al*, (2008), *supra* note 10.
142. *Idem.*

early stage of commitment to pro-biodiversity business might not be as impressive as expected. Strict return-on-investment criteria employed by investors constitute a barrier to investing in BES funds. Presently, they do not seem to take into account the long-term nature of biodiversity business development.

The critical question is how to overcome the barriers mentioned above, which prevent investors from financing biodiversity businesses. Despite the recent financial crisis and ecological crises that have become apparent over the years, the key concern for investors still appears to be how to secure financial returns. Many initiatives discussed in this chapter have shown that well-structured biodiversity ventures can be rewarding. For example, creating a mechanism for payment for ecosystem services is a promising way of making investments in biodiversity profitable. On the basis of the research, aspects of BES have been identified that can be transformed in order to contribute to making pro-biodiversity business successful. Solutions suggested are:

– *Encouragement of multi-stakeholder cooperation*: all parties interested in biodiversity preservation have to work together in order to make it a priority issue. Governments, companies, individuals, religious groups and local communities, who are usually initiators of biodiversity conservation projects, could work closely with investors and other stakeholders.[143] The collaboration of actors also means shared responsibilities. Governments, as participants, therefore have to provide finance for research in the field of biodiversity and business, to provide financial contributions such as subsidies, grants and guarantees, to stimulate start-up pro-biodiversity initiatives, and to set up or maintain a sound regulatory framework that can support and stimulate a BES market (property rights, cap and trade liability). On the part of investors, clarification and consistency has to be achieved regarding companies' BES dependence and impacts through lending and investment requirements addressing these concerns. The identification and recognition of risks and opportunities related to BES markets can assist. Other actors could generate knowledge and share expertise in relation to biodiversity and ecosystem services that will help to trigger finance in biodiversity. Moreover, they can actively develop initiatives and monitor projects on biodiversity value.
– *Sharing information*: one of the main barriers that prevent investment in biodiversity is a lack of information. Information regarding the loss of biodiversity in general, and ecosystem degradation in particular, therefore needs to be available and widely accessible. The new business risks and

143. 'Other stakeholders' refers to NGOs, foundations, local authorities, farmers, forest landholders, consultants, companies and universities.

opportunities arising from a company's dependence and impact on ecosystem services have to be clearly mapped. Transparency in business practices and in research results in this field will help companies and investors to produce sound business planning and response strategies.

– *New tools to innovate BES business mechanisms*: according to the meeting of business leaders and other interested actors organised by the Earthwatch Institute in 2006, further actions could include the development of new tools that can help businesses to manage ecosystems. These new tools will facilitate the recognition of the true value of the ecosystem services and to internalise the costs of public goods and service usage in business operations.[144] On the part of investors, they could incorporate BES risks as a factor in their risk assessment mechanisms. Profound due diligence can assist in providing information about possible impacts. One of the recommendations for institutional investors[145] is to encourage sell-side analysts to consider other issues besides finance, such as BES, when making investment recommendations. Participation in the Enhanced Analysts Initiative might be worth considering.[146]
– *Creating a good investment climate*: this is primarily a task for (inter) national governments. Innovative biodiversity initiatives are usually successful in countries that have a favourable investment climate. It includes: good governance, a developed legal system, and supportive policies and institutions.

13.5 Conclusion

Biodiversity is the source of our common livelihood. The loss and degradation of biodiversity comprises a major threat to the sustainability of our society. Presently, the vast majority of financial decision makers are not aware of biodiversity-related problems. In particular, fund managers have limited ideas about the concept of biodiversity and as a result most of them do not consider it relevant enough for incorporating these concerns in investment decisions. History repeats itself, as a similar pattern could be observed with climate

144. EarthWatch Institute, IUCN, Business and Ecosystems, Issue Brief, 2006, at: http://www.wbcsd.org/DocRoot/Ejk5KCJOlkVkRngCksWD/Business%20and%20Ecosystems_211106_final.pdf, accessed on 12 February 2010.
145. This recommendation was proposed by UNEP FI, see report, *supra* note 8.
146. Enhanced Analysts Initiative is cooperation between asset owners and managers on the international level. The target of this initiative is to promote better investment research that also consists of extra-financial issues. See also: the news items at: www.unpri.org, accessed on 7 November 2009, which increasingly underlines that healthy investment decisions can only be taken when a long-term business, environment and social perspective is taken into account.

change five years ago. In contrast, nowadays a fund manager would estimate the value of a European utilities company by taking into account the European Emission Trading Scheme.[147] Price changes in the carbon market can influence the fund manager's decisions to buy or sell. Whereas global warming dominates the headlines today, ecosystem degradation will do so tomorrow.[148] Biodiversity loss should also be the concern of today's investor in order to avoid that the negative consequences of ecosystem degradation for human economies will become irreversible. That is one of the reasons why 2010 has been proclaimed by the UN as the 'International Year of Biodiversity.'

This chapter has offered insight into a wide spectrum of new market based approaches to nature conservation. 'Biodiversity business' is commonly explained as business conducted by a commercial enterprise that generates profits via activities which conserve biodiversity and ecosystems (BES), use biological resources sustainably, and share the benefits arising from this use equitably. Various emerging BES markets were briefly outlined in this chapter, illustrated with examples. They include: (1) sustainable forestry; (2) nature conservation (wetland banking and biodiversity offsets); (3) eco-tourism; (4) watershed management; and (5) agricultural carbon sequestration and REDD. It showed that innovative mechanisms are being explored for channelling private funds to ensure the protection of BES. At the same time, the chapter demonstrated that these emerging markets offer new opportunities to business entrepreneurs and investors, in particular to institutional investors with a long-term perspective. Although the business case for biodiversity is still developing, certain sectors like eco-tourism, forest products and watershed management are already being earmarked as prospective business opportunities. These sectors have aspects of biodiversity that are marketable and which are in fact currently being marketed.[149]

Subsequently, the main barriers to investing in pro-biodiversity business have been identified in a general way. Further research would be necessary to identify sector-level constraints. The obstacles mentioned are mostly related to a lack of knowledge and entrepreneurial spirit. The innovative approaches presented in this chapter and engagement in partnerships with other stakeholders can help overcome them. If the financial sector would succeed in seeing biodiversity, which used to be a risk and a liability problem, as a business opportunity, they could increase value not only in respect of Profit, but also in the other two dimensions Planet People.

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147. Business 2010 Newsletter: Financial Services, Volume 2, Issue 4, October 2007, at: http://www.cbd.int/doc/newsletters/news-biz-2007-10/?articleid=64, accessed on 10 September 2009.
148. Corporate Ecosystems Services Review, WRI *et al*., March 2008.
149. BTAU Handbook, *supra* note 138.

Annex 13.1 Scope of the research project Nyenrode, IUCN-NL and ECNC

The overall goal of the research project was to map the possibilities for private actors to make investments that support biodiversity conservation and a sustainable use of ecosystems. The research guidelines below limited the scope of the project to certain type of investments or activities, target groups, and coverage of ecosystems and geographic regions.

Type of activities/ investments	The project focused on cataloguing investments that directly support the conservation and sustainable use of biodiversity and ecosystem services (BES). Typical examples include sustainable forestry, fisheries and agriculture, eco-tourism, and nature conservation (associated revenues); and also the evolving carbon market through REDD (Reducing Emissions through Deforestation and forest Degradation).
Criterion 1 for inclusion in the research project: pro-biodiversity business activities	A main criterion for including a certain type of business in the research project was that it would (directly) enhance biodiversity and the provision of ecosystem services or at least maintain it. For example, investments in monoculture plantation forestry using exotic species were excluded from the scope of the research. Important in this respect is also the reference situation in the 'area of investment'. For instance, organic agriculture may lead, in terms of BES, to an improvement compared to large scale intensive agriculture, but is certainly a decline compared to the original, natural vegetation.
Exclusion from the research	Activities or investments that contribute more *in*directly to the conservation of BES were excluded. Examples include the development of sustainable energy sources (*e.g.* wind and solar energy), innovations that contribute to more efficient use of natural resources (*e.g.* Cradle to Cradle concept), and reduction of pollution.
Criterion 2 for inclusion in the research project: revenue stream/ rates of return	Another major criterion for the inclusion of a certain project in the research project was that the projects and investments deliver revenue streams and are ultimately aimed at becoming profitable. The type of investments may range from purely private to commercial investments. A mix of private and public investments (or a mix of commercial and philanthropic investments) was also addressed.
Target groups of the research outcome	The primary target groups of the project were major European institutional investors (*i.e.* pension funds) and commercial banks that operate internationally. These are the key players required to establish the necessary changes. Other target groups included governments (EU and the Dutch Government) and conservation NGOs as regulatory authorities and NGOs also have a role to play in promoting pro-biodiversity business and investments, respectively by creating a supportive enabling environment (*e.g.* through fiscal measures, regulations) and by providing knowledge and guidance on BES issues.
Collaboration with other institutions	In terms of project partners, collaboration was sought with leading players and initiatives, including UNEP FI and EUROSIF.

Ecosystem coverage	In principle, investments or activities in all types of ecosystems – terrestrial, marine, natural, semi-natural or cultivated systems – were included in the research.
Geographic coverage	Coverage of the investments was global; coverage of target groups was Europe and the Netherlands.

Annex 13.2 Innovative forestry-related initiatives in Brazil

SPVS Parana, Brazil[150] – An interesting initiative in the field of the restoration and protection of Atlantic rainforest in Paraná State in Brazil was developed by SPVS, a national NGO, *i.e.* the Society for Wildlife Research and Environmental Education. Paraná's coast is part of the biggest remnant of the Atlantic Rainforest biome, which once covered nearly all of Brazil's coast and is now reduced to less than seven per cent of its original extent. The investors in the project are three major American multinationals: AEP (an energy producer), General Motors and Chevron. With the investor's money 17,000 acres of former buffalo ranches were acquired. The revenue generation for investors comes from ownership of the land and aspects related to that. AEP invested USD 5.4 dollars in purchasing the land and in creating an endowment fund for maintenance costs. As a result, carbon emission credits will be owned by AEP, under the US voluntary carbon emission compensation schemes. The project is at a mature stage.

FUNBIO, Atlantic Forest Fund, Brazil[151] – One of the previous Brazilian Ministers for the Environment, Mr Carlos Minc, wished to introduce a scheme for investment in all protected areas in Brazil and to set up a mechanism for distributing funds to worthwhile environmental projects. He succeeded in setting up the National System for Conservation Units (SNUC), which was codified in a federal law which came into force in 2000.[152] This act lays the foundation for a duty to compensate for environmental damage. FUNBIO, the NGO Brazilian Biodiversity Fund, was requested to test a new innovative method for the distribution of funds accumulated under the Environmental Compensation Law. Within this framework, FUNBIO established a project known as the 'Atlantic Forest Fund'. An inventive aspect of the Atlantic Forest Fund, in comparison with other nature compensation and PES schemes, is that Brazil's Environmental Compensation Law does not determine a price linked to the market cost of replacing damaged areas. Instead, it requires "the assessment of a licensing fee based on the unmitigatable impact of the project development, the proceeds of which are then channelled to conservation projects in protected areas." The ambitious project was set up as a state-wide ecosystem marketplace. The main goal of the Atlantic Forest Fund is to channel private money into ecosystem development projects disregarding the source of the money: either

150. See: http://www.spvs.org.br/download/SPVS_Profile_Opportunities.pdf, accessed on 20 September 2009.
151. Forest Carbon Portal 'Rio's Atlantic Forest Fund: Spreading the Environmental Wealth', 2009, at: http://www.forestcarbonportal.com/article.php?item=306, accessed on 4 September 2009.
152. Federal Law No 9.985 of 18/7/2000.

from PES or philanthropic organisations or individuals. The project has a wide scope, the funds are invested in all types of protected areas. The organisational structure has the following components: the main one is the Atlantic Forest Fund, *i.e.* the 'compensation fund' that administers the money collected under the Environmental Compensation Law; the other one is the 'donation fund' that administers the money from philanthropic donors. Presently, USD 3.1 million in compensation payment schemes come from the German steel and engineering giant Thyssen-Krupp, while a donation of USD 510,000 has been made available by Germany's KfW Bank Group (formerly the *Kreditanstalt für Wiederaufbau*, or the Reconstruction Credit Institute).

Annex 13.3 Principles of Biodiversity Offsets (BBOP Advisory Committee)

Biodiversity offsets are measurable conservation outcomes resulting from actions designed to compensate for significant residual adverse biodiversity impacts arising from project development after appropriate prevention and mitigation measures have been taken. The goal of biodiversity offsets is to achieve no net loss of and preferably a net gain in biodiversity on the ground with respect to species' composition, habitat structure, ecosystem function and people's use and cultural values associated with biodiversity. Biodiversity offsets should be designed to comply with all relevant national and international law, and planned and implemented in accordance with the Convention on Biological Diversity and its ecosystem approach, as articulated in National Biodiversity Strategies and Action Plans. The BBOP Principles establish a framework for designing and implementing biodiversity offsets and verifying their success.[153]

1. **No net loss:** A biodiversity offset should be designed and implemented to achieve, *in situ*, measurable conservation outcomes that can reasonably be expected to result in no net loss and preferably a net gain in biodiversity.
2. **Additional conservation outcomes:** A biodiversity offset should achieve conservation outcomes above and beyond the results that would have occurred if the offset had not taken place. Offset design and implementation should avoid displacing activities harmful to biodiversity in other locations.
3. **Adherence to the mitigation hierarchy:** A biodiversity offset is a commitment to compensate for significant residual adverse impacts on biodiversity identified after appropriate avoidance, minimisation and on-site rehabilitation measures have been taken according to the mitigation hierarchy.
4. **Limits to what can be offset:** There are situations where residual impacts cannot be fully compensated by a biodiversity offset because of the irreplaceable nature or vulnerability of the biodiversity affected.
5. **Landscape context:** A biodiversity offset should be designed and implemented in a landscape context to achieve the expected measurable conservation outcomes taking into account available information on the full range of biological, social and cultural values of biodiversity and supporting an ecosystem approach. →

153. BBOP, Principles on Biodiversity Offsets, at: http://bbop.forest-trends.org/guidelines/principles.pdf, accessed on 23 April 2010.

6. **Stakeholder participation:** In areas affected by the project and by the biodiversity offset, the effective participation of stakeholders should be ensured in decision-making about biodiversity offsets, including their evaluation, selection, design, implementation and monitoring.
7. **Equity:** A biodiversity offset should be designed and implemented in an equitable manner, which means the sharing among stakeholders of the rights and responsibilities, risks and rewards associated with a project and offset in a fair and balanced way, respecting legal and customary arrangements. Special consideration should be given to respecting both internationally and nationally recognised rights of indigenous peoples and local communities.
8. **Long-term outcomes:** The design and implementation of a biodiversity offset should be based on an adaptive management approach, incorporating monitoring and evaluation, with the objective of securing outcomes that last at least as long as the project's impacts and preferably in perpetuity.
9. **Transparency:** The design and implementation of a biodiversity offset, and the communication of its results to the public, should be undertaken in a transparent and timely manner.
10. **Science and traditional knowledge:** The design and implementation of a biodiversity offset should be a documented process informed by sound science, including an appropriate consideration of traditional knowledge.

Samenvatting dissertatie (Dutch summary)

Maatschappelijk verantwoord ondernemen (MVO) is de laatste jaren een gevleugelde term geworden. Volgens de definitie van de Sociaal-Economische Raad betekent MVO ondernemen met inachtneming van mens en milieu en met als doel een waardevermeerdering te bewerkstelligen in de drie dimensies *Planet People Profit*. Duidelijk stelt de SER voorop dat het om de kernactiviteiten van een onderneming gaat: die moeten verduurzamen in de zin dat de aspecten milieu en mens in elke beslissing worden meegenomen. MVO gaat dus niet om charitatieve acties, al kunnen die natuurlijk een MVO-beleid van een onderneming mooi ondersteunen, in het bijzonder als de onderneming haar kernkwaliteiten naast het maken van winst ook aanwendt voor goede doelen.

Vanuit de Verenigde Naties en andere internationale organisaties zoals de OESO en de ILO (Internationale Arbeidsorganisatie) werd het bedrijfsleven opgeroepen om een steentje bij te dragen aan duurzame ontwikkeling. De meest gebruikte definitie daarvoor is van Gro Harlem Brundlandt: '*sustainable development is meeting the needs of today without compromising the needs of future generations*'.[1]

Verschillende internationale organisaties en initiatieven lanceerden gedragscodes voor het bedrijfsleven met daarin internationaal erkende minimum normen voor MVO.

Niet-gouvernementele organisaties (NGOs) zoals het Wereld Natuur Fonds (WNF), Greenpeace en Amnesty International hebben in de loop der tijd steeds meer aandacht gevraagd voor het gedrag van bedrijven ten aanzien van natuurverwoesting, klimaatverandering en mensenrechtenschendingen. Zij zijn ook in overleg met bedrijven getreden om samen aan verbetering te werken.

Tevens wordt MVO gepromoot door bedrijfsorganisaties zoals de Internationale Kamer van Koophandel en – in Nederland – verschillende vakorganisaties, de Stichting Multinationale Ondernemingsraden (MNO) en VNO-NCW (werkgeversorganisatie).

Veel bedrijven onderzochten de afgelopen tien jaar wat MVO voor hen betekende. Sommige bedrijven concentreerden zich vooral op het reduceren van

1. *Our Common Future* (Oxford University Press: Oxford 1987), p. 43. Toenmalig premier van Noorwegen, mw Brundtland, was de voorzitter van de World Commission on Environment and Development.

hun CO2 uitstoot en andere vormen van milieubelasting, andere bedrijven zochten contact met hun buitenlandse toeleveranciers teneinde de arbeidsomstandigheden waaronder producten worden gemaakt te verbeteren. Er zijn ook bedrijven die samen met NGOs nieuwe standaarden ontwikkeld voor duurzame producten, zoals duurzaam hout en duurzame vis, respectievelijk het 'FSC' en het 'MSC' keurmerk. In beide gevallen speelde het WNF een grote rol, maar was de bijdrage van bedrijven eveneens zeer belangrijk. Zo heeft Unilever bijvoorbeeld meegewerkt aan het ontwikkelen en in de markt zetten van het MSC keurmerk. Andere multinationals dragen bij aan het verwezenlijken van de door de Verenigde Naties geformuleerde *Millennium Development Goals* (MDGs) voor duurzame ontwikkeling. Een voorbeeld is het Nederlandse bedrijf Friesland Food dat in Afrika bijdraagt aan de drinkwatervoorziening. De aanwezigheid van schoon drinkwater is niet alleen een basisbehoefte van de mens (MDG 7) maar ook een essentiele voorwaarde om melkpoeder te kunnen verkopen, een van de voornaamste producten van Friesland Foods. Dit voorbeeld maakt duidelijk dat dit MVO-mes aan twee kanten snijdt: de hulp van dit bedrijf aan verbetering van de lokale levensomstandigheden vergroot ook de commerciële kansen. Er zijn ook bedrijven die MVO als een marketinginstrument zien en veelvuldig communiceren dat hun bedrijfsactiviteiten goed zijn voor mens en milieu. Indien die communicatie in overeenstemming is met de werkelijkheid, is het geen probleem om MVO in de marketing te gebruiken teneinde daarmee extra klanten te trekken. Als de bedrijfsberichtgeving op dat punt echter niet correct is, spreekt men van '*green washing*'. Dat doet MVO als moderne ontwikkeling niet goed en dient daarom bestreden te worden, bijvoorbeeld door transparantie van bedrijven te vragen over hun MVO-beleid en over de (internationale) ketens die hun producten en diensten produceren. Onafhankelijke verificatie van maatschappelijke verslaggeving is daarbij een belangrijk punt, evenals het verlenen van een recht op informatie aan consumenten over de MVO-aspecten van een product.

Deze studie bevat een onderzoek naar de ontwikkelingen met betrekking tot MVO in de periode 2000-2010. Met name wordt onderzocht wat de juridische raakvlakken van MVO zijn en hoe de interactie met het recht is. Nieuwe ontwikkelingen in het recht worden besproken en waar ruimte is voor verbetering wordt dat toegelicht. Naast rechtsontwikkelingen in Nederland worden ook relevante rechtsontwikkelingen in de Europese Unie en daarbuiten belicht. Voorts is alternatieve regulering, zoals gedragscodes, onderwerp van studie. Daarnaast wordt onderzocht hoe '*best practices*' op het gebied van MVO zich in het bedrijfsleven ontwikkelen. Met '*best practices*' wordt gedoeld op de meest vooruitstrevende wijze van ondernemen en inrichting van de bedrijfsactiviteiten.

Eerst worden in de hoofdstukken 1 en 2 de concepten MVO en '*corporate governance*' (d.w.z. het bestuur van een bedrijf) geïntroduceerd en met elkaar vergeleken. Daarna gaan de hoofdstukken 3 tot en met 8 in op specifieke

thema's (Deel I van de studie). Aan de orde komt achtereenvolgens wat de rol van MVO is of kan zijn in: een *corporate governance* code, jaarverslaggeving, bedrijfsmanagement- en informatiesystemen, gedragscodes en andere alternatieve regulering, *due diligence* onderzoeken en productinformatie.

Zo wordt in hoofdstuk 3 onderzocht in hoeverre het onderwerp MVO is opgenomen in de Nederlandse *corporate governance* code, de Code Frijns (de opvolger van de Code Tabaksblat). Deze code wordt bestudeerd tegen de achtergrond van relevante rechtsregels, zowel bestaande als aankomende.

Hoofdstuk 4 bespreekt in hoeverre een bedrijf helderheid (transparantie) in zijn jaarverslag moet bieden over de vraag of het daadwerkelijk in zijn kernactiviteiten rekening houdt met het milieu en de mens. Daarbij wordt relevante Europese en Nederlandse wet- en regelgeving geëvalueerd en wordt getest op welke wijze een aantal Nederlandse multinationals daaraan gevolg geeft.

Hoofdstuk 5 gaat in op het voorkomen van corruptie, een van de MVO-thema's. Hierbij wordt een link gelegd met bedrijfsmanagement- en informatiesystemen en betoogd dat het introduceren van doelgericht anti-corruptiebeleid essentieel is voor een bestuur om 'in controle' te zijn over de bedrijfsvoering. Het is aan bestuurders om hierover te beslissen.

In hoofdstuk 6 gaat de aandacht naar informele regelgeving, ook wel zelfregulering of alternatieve regelgeving genoemd. Daarmee wordt gedoeld op regels die niet zijn uitgevaardigd door de overheid, maar bijvoorbeeld door bedrijfsorganisaties of door samenwerkingsverbanden tussen bedrijven en NGOs die een keurmerk hebben ontworpen. Op het gebied van MVO is een grote toename van alternatieve regelgeving waar te nemen. Een aantal belangrijke internationale gedragsregels voor ondernemingen wordt op effectiviteit geanalyseerd in dit hoofdstuk.

In hoofdstuk 7 wordt onderzocht hoe het thema mensenrechten een ingang heeft gekregen in het zakendoen. Het is de verwachting dat met name bij het uitgeven van aandelen en het aangaan van nieuwe fusies en andere samenwerkingvormen, vooral als deze met buitenlandse partners worden aangegaan, steeds diepgaander zal moeten worden onderzocht of de mensenrechten worden gerespecteerd. Met ander woorden: dat de gebruikelijke *due diligence* onderzoeken die in dergelijke situaties door bedrijven worden uitgevoerd, het thema mensenrechten zullen moeten adresseren.

Hoofdstuk 8 richt zich op de andere kant van ondernemen: het contact met de klant. Transparantie over het MVO-gehalte van de bedrijfsactiviteiten gebeurt deels via jaarverslaggeving. Echter, voor een klant is het veel praktischer als hij of zij informatie op productniveau kan vernemen. De klant weet dan meteen of een bepaald product of dienst duurzaam is geproduceerd. Dit hoofdstuk biedt een analyse van het recht van een consument op informatie over de MVO-aspecten van een product. Vooral Europees recht wordt beoordeeld, waarna een Nederlands voorstel voor een wet specifiek op het vlak van

MVO-informatie van consumenten wordt besproken. Tot slot worden de uitkomsten van twee praktijktesten gepresenteerd.

Ter verdieping van de theorie wordt in Deel II een vijftal *case studies* gepresenteerd. De eerste *case study* gaat in op geschillen tussen Shell en milieuactivisten in Nigeria, de tweede geeft het verloop weer van een MVO-geschil in een internationale textielketen. In beide *case studies* wordt duidelijk dat oplossingen niet dichterbij kwamen door het voeren van lange juridische procedures. Onderdeel van MVO is juist het tijdig in overleg treden met belanghebbenden. Belanghebbenden kunnen zowel personen binnen als buiten een bedrijfsorganisatie zijn. Bij het opstarten van nieuwe projecten of het nemen van (strategische) bedrijfsbeslissingen is het zaak om eerst de belangen van de verschillende belanghebbenden in kaart te brengen en daarmee op een zorgvuldige wijze om te gaan. Indien daarna toch zou blijken dat bepaalde belanghebbenden, zoals bijvoorbeeld omwonenden van een nieuwe chemische fabriek, last hebben van bepaalde aspecten van de bedrijfsvoering, dan is de beste remedie vanuit MVO-perspectief om een mogelijkheid te bieden om klachten te uiten. Vervolgens kan het bedrijf met de klagers in overleg treden, de klachten op hun merites beoordelen en gezamenlijk met de klagers (en eventuele andere belanghebbenden) naar oplossingen zoeken. In het algemeen worden oplossingen niet snel gevonden indien partijen met behulp van alle rechtsmiddelen voorhanden proberen hun gelijk te halen. MVO-geschillen blijken dan te escaleren en zeer zeker geen recht te doen aan de belangen van de benadeelden en ook niet aan die van het bedrijf.

De derde *case study* gaat over het beheer van water en de rol van bedrijven daarin. Dient een bedrijf verantwoordelijkheid op zich te nemen om waterschaarste of overvloed te voorkomen? Zo ja, in welke situaties en tot hoe ver gaat die verantwoordelijkheid? Wat zijn de middelen en methoden om duurzaam watergebruik in de bedrijfsvoering te implementeren? Dit hoofdstuk eindigt met het verslag van een onderzoek naar watergebruik en *best practices* van 20 Nederlandse multinationals.

De vierde *case study* doet verslag van een onderzoek hoe institutionele beleggers (pensioenfondsen, banken en verzekeraars) omgaan met het thema biodiversiteit. Indien institutionele beleggers van *rating agencies* en andere adviseurs informatie kopen over individuele bedrijven, vragen zij dan ook naar de impact van die bedrijven op de natuur? En kopen ze informatie betreffende de afhankelijkheid van die individuele bedrijven van de natuur en ecosysteemdiensten? Dat soort informatie kan lange termijn beleggingsbeslissingen beïnvloeden. Immers, zoals de ijsfabrikant Haägendasz aangeeft: als de bijen uitsterven, kunnen wij geen vruchtenijs of notenijs meer maken; dat zal de winst drukken. Haägendasz publiceert op haar website dat zij wetenschappelijk onderzoek naar bijen steunt.

De laatste *case study* en tevens laatste hoofdstuk gaat ook over biodiversiteit en ecosysteem diensten en de kapitaalmarkt. Het hoofdstuk biedt een

overzicht van nieuwe investeringscategorieën voor investeerders: duurzame bosbouw, biodiversiteits *credits*, CO2 compensatie *credits*, waterkwaliteits- en kwantiteitszorg en ecotoerisme. Innovatieve bedrijven hebben investeringsfondsen opgericht waarmee institutionele en andere beleggers in natuurbehoud kunnen investeren teneinde de continuïteit van de beschikbaarheid van natuurproducten en ecosysteemdiensten zoals hout, water en het tegengaan van erosie te bewaken. De nieuwe investeringscategorieën worden aan de hand van concrete voorbeelden besproken.

Resumerend, dit boek geeft inzicht in de ontwikkelingen op het gebied van MVO in Nederland en voor zover relevant in de Europese Unie en in andere landen. In Deel I is de insteek om bestaande (semi)juridische kaders te analyseren en te beoordelen of zij MVO ondersteunen; of de regels recentelijk veranderd zijn zodat zij MVO kunnen ondersteunen; en of de regels nog verder zouden kunnen worden aangescherpt om MVO te bevorderen. Deel II laat zien hoe MVO in de praktijk werkt en niet werkt: welke lessen kunnen worden geleerd worden uit conflicten in het verleden? Welke innovatieve methoden worden ontwikkeld? En: welke knelpunten bestaan er in het huidige systeem die de voortgang van MVO belemmeren? Het gezichtspunt is nu eens vanuit het bedrijfsleven: hoe gaat het bedrijfsleven om met de nieuwe uitdagingen, wat zijn *best practices* en zijn bedrijven gebaat bij meer heldere kaders? Dan weer wordt vanuit de beleidsbepaler bekeken hoe bestaande kaders met kleine ingrepen kunnen worden verbeterd. Maar ook wordt vanuit het gezichtspunt van de belanghebbende gekeken: heeft de consument mogelijkheden om informatie te verkrijgen over de MVO-aspecten van producten? Of: op welke wijze kan een NGO een bedrijf assisteren bij het uitvoeren van een mensenrechtencheck bij een *due diligence* onderzoek? En: hoe kunnen NGOs en bedrijven en overheid hun krachten bundelen om die systeemveranderingen te introduceren die kunnen bijdragen aan een meer duurzame toekomst die ook voor de komende generaties nog de natuurlijke *treasures* biedt waar wij vandaag van kunnen genieten?

Tineke Lambooy, Amsterdam, 1 september 2010

Overview of abstracts

Introduction

Corporate social responsibility (CSR) has rapidly gained a foothold in business. In the last decade, many companies developed 'Planet, People, Profit' strategies, and put them in practice. Governments and civil society have called on private actors to contribute in resolving the dilemmas and difficulties of global governance. This book concentrates foremost on legal aspects of CSR but also deals with CSR in the broader perspective of assessing best practices. It elaborates on international developments in this field over the decade 2000-2010.

The introductory chapters sketch the background of globalisation in relation to sustainable development, thereby identifying the role of CSR and comparing it with corporate governance.

Part I of the book offers an overview of, and discussion on, the legal and semi-legal frameworks which can assist a business organisation in the course of becoming a socially responsible company. Examples are the institutionalisation of CSR in the corporate governance code, annual reporting on CSR, setting up an anti-corruption programme to support the internal control process, making human rights impact assessments part of corporate due diligence investigations, making use of private regulation and sustainability labels, and providing consumer product information.

Part II contains five case studies that show how CSR works in practice. Two of them focus on conflict situations concerning CSR practices of companies (one regards the oil industry in Nigeria, the second relates to the textile industry in India and the Netherlands). The other three case studies focus respectively on water management by companies, biodiversity concerns for the capital market and on how to invest in nature.

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Chapter 1 Introduction

This chapter sets out the parameters of the study contained in this book. The study focuses on the position of companies in realising sustainable globalisation. According to international organisations, governments, civil society and companies, corporate social responsibility (CSR) can contribute to sustainable globalisation. The concept of CSR embraces the idea that multinational companies (MNCs) should operate in a socially responsible manner and that they should publicly report on their policies and behaviour to ensure that they can be held accountable by civil society. Stakeholder engagement and mediation rather than litigation can also be considered part of responsible business conduct.

The chapter demonstrates that CSR has been promoted by governments through legislation, and by international organisations and civil society by providing codes containing ethical norms and values, *e.g.* the civil society document - the Earth Charter, the Global Reporting Initiative sustainability reporting guidelines (GRI G3), and the codes of conduct issued by the United Nations (UN) and by the Organisation for Economic Cooperation and Development (OECD). Companies themselves have also positively contributed to the acceptance of CSR over the last decade. They have formulated tangible ambitions concerning, for example, sustainable water use; they have agreed on industry codes of conduct and sustainability labels, often in collaboration with civil-society representatives; they have implemented anti-corruption programmes in their organisations; and they have established public-private partnerships (PPP) to contribute to the Millennium Development Goals (MDG).

In this chapter, it is pointed out that CSR relies on and interacts with certain legal and semi-legal frameworks, such as corporate governance, annual reporting, internal control and management information systems, private regulation, due diligence assessments, and (supply chain) product information systems. The author asserts that these frameworks can support CSR, but that companies have to actively use them. It is argued that if they do, incorporating CSR in their normal practices will enhance their business position in various ways: from managing risks in a more comprehensive manner to having early access to new product and services markets. On a fundamental level, CSR will help to safeguard companies' licence to operate because it encourages them to firmly engage with the communities in which they operate.

Chapter 2 Corporate social responsibility and corporate governance issues

CSR and corporate governance are international developments attracting considerable attention while sharing common features. Both developments concern the behaviour and internal management of large, mostly international,

companies. The international business community has been urged to incorporate ethical awareness and integrity practices into its everyday business.

This chapter provides an analysis of the developments in the field of CSR and corporate governance. These concepts are contrasted with each other on key issues such as their rationale and objectives, initiators and interested parties, initiatives taken, specification of objectives, voluntary versus compulsory standards, differences and parallels.

Codes of conduct are instrumental for CSR and corporate governance. With a view to stimulating good corporate conduct, the accountability of companies and directors has been increased. In addition, compliance with corporate governance standards demands that companies give reasons for derogating from corporate governance codes. Corporate transparency has also been increased in order to provide adequate information to interested parties, allowing them to judge whether or not a company behaves ethically and in accordance with corporate governance standards. If interested parties have doubts about this, the information provided may serve as a starting point for taking up the issue with the company in question. Communication between companies and interested parties is becoming ever more important. If communication cannot solve the matter, interested parties may initiate legal proceedings to enforce their view of good conduct or to claim damages.

CSR and corporate governance have not as yet evolved into strict legal norms and it will therefore be difficult for interested parties to successfully enforce their view of good corporate behaviour before a court. When interpreting open legal norms, a judge can take into account codes of conduct and developments in society. It is likely that a code of conduct that is entrenched in law and subscribed to by a company in its annual report, will be awarded more importance by a judge than a code of conduct that is established or adopted by a company on a voluntary basis.

PART I: LEGAL AND SEMI-LEGAL FRAMEWORKS SUPPORTING CSR

Chapter 3 Institutionalisation of corporate social responsibility in the corporate governance code. The new trend of the Dutch model.

Against the backdrop of the contemporary financial crisis, and the need for a corporate transition towards more sustainable business practices, the author explores the way in which CSR has recently been institutionalised in the new Dutch corporate governance code, *i.e.* the Frijns Code, which became effective in 2009. CSR promotes long-term business plans, the internalisation of external costs, the accountability for corporate conduct, stakeholder engagement, and

the transparency of Environmental Social and Governance (ESG) factors. The author discusses the background and the content of the new CSR provisions in the Frijns Code and pertinent corporate law revisions. One of the themes discussed more in depth concerns gender considerations in a board composition. Furthermore, the author poses the question whether institutional investors can play a more functional role in implementing CSR. She analyses to what extent important reports issued by UNEP FI (produced by Freshfields) and Eumedion allow and recommend ESG considerations to play a role in the investment process and evaluates the relevant Frijns Code provisions.

Chapter 4 Annual report can provide transparency on corporate social responsibility

Since 2003, the Member States of the European Union (EU) have been implementing the provisions of the Modernisation Directive, among which are the new standards for the annual reports of large EU-based companies. One of the new standards entails, where appropriate, the provision of information on non-financial matters, such as environmental and employee matters, relating to the worldwide business activities. The European Parliament (EP) has frequently directed political attention to the development of CSR. Transparency in corporate practices, in the EU and abroad, seems desirable for consumers, banks and institutional investors.

A quick scan of the 2006 annual reports of large Euronext listed companies, registered in the Netherlands, revealed that the majority addressed environmental and employee matters in their annual reports. However, companies tend to easily generate information on personnel matters, whereas they are lacking in generating substantial and clear information about other non-financial aspects.

The author points out that a number of leading MNCs prepare sustainability reports which follow the GRI Guidelines on a voluntary basis. These reports address the environmental, social and ethical aspects of business operations and activities.

Chapter 5 Corruption and corporate governance: 'in control' requires an anti-corruption programme

Corruption is a major obstacle to realising public goals. Corruption also has a severe impact on the private sector since it distorts competition and adds substantially to the cost of doing business. Corruption has two sides: a supply side and a demand side. Where public officers traditionally occupy the demand side, the private sector is usually the payer of the bribe. Over the past few years, various anti-corruption laws and conventions have been enacted targeting the private sector. A violation thereof can lead to prosecution in multiple jurisdictions, high penalties, and even the personal liability

of the directors. Reputational damage and loss of business opportunities complete the picture of how a corruption scandal can affect a company.

A company's internal control systems do not function adequately if employees can use company funds to pay bribes. By definition, such expenditures are not properly accounted for in the company books, hence the financial statements will be incorrect and the directors will not be 'in control'. It is an indication of poor corporate governance. Corruption can however be prevented by implementing an in-house anti-corruption compliance programme. In this contribution it is argued that, consequently, 'in control' implies that a company has such a programme in place.

With CSR developing, governments and civil society expect socially responsible behaviour and transparency from companies, also on the subject of corruption. These expectations can be fulfilled by providing public information on a company's efforts to keep its employees from becoming involved in corrupt practices. A next step for a company would be to join collective action initiatives in order to scale up best practices and to promote a value-based level playing field among businesses.

It is advocated in this chapter that any company involved in international business has to be alert to corruption risks, and will benefit from addressing these. The position of companies and corporate governance tools are the focal point of this chapter.

Chapter 6 Private regulation: setting the standards

Has private regulation proven to be generally more successful than public regulation in controlling the transnational conduct of multinational companies? The exponential growth of private regulations aimed at influencing corporate behaviour – as a result of the fast global market expansion – shows the full relevance of posing this question. In the light of existing international private standards, this chapter defines and analyses certain major elements of private regulation that may impact on compliance with private regulation, namely: quality, legitimacy, enforcement, and effectiveness. These elements are applied to three private regulatory initiatives that have been referred to by the EP as private regulation that has reached a certain level of maturity: the Global Compact Principles, the OECD MNE Guidelines and the GRI Guidelines. In assessing the characteristics of these private sets of norms, some interesting references to the privately developed norms by current public regulation in the field of corporate responsibility are observed as are links with the enforcement of norms in the 'normal' legal arena. The question emerges whether the development of private norms strengthens or weakens public regulatory systems. Moreover, lessons learned from the recent financial crisis pose the question whether vital matters should be entrusted to private actors to be regulated.

Chapter 7 Corporate due diligence as a tool to respect human rights

This chapter aspires to assist companies and human rights analysts in determining why, when and how human rights impact assessments can be integrated into existing corporate due diligence processes. It elaborates on the approach proposed by Professor Ruggie, the UN Special Representative on human rights and business. His policy framework relies, amongst other things, on 'the corporate responsibility to respect human rights', *i.e.* to act with 'due diligence' to avoid infringing on the rights of others. In this chapter, the corporate and human rights law origins and the application of 'due diligence' are explored. Subsequently, the concept of due diligence as catered for in the Ruggie policy framework is discussed, and suggestions are offered as to how this can be practically applied in business transactions. Dilemmas are identified.

Chapter 8 To know or not to know? The consumer's right to information under REACH and other European Union legislation

This chapter addresses the consumer's right to information against the background of the European 'REACH' legislation, which, amongst other things, obliges companies to supply information to consumers concerning whether certain chemical substances are present in a consumer product. Certain other European Directives are also briefly evaluated to the extent that they are relevant in the context of a consumer's right to information. Dilemmas related to the consumer's right to information also emerge in the current political debate in the Netherlands, where the Labour Party is preparing a legislative proposal on a corporate duty to supply information to consumers - motivated by concerns of CSR. This chapter goes into questions such as: (i) what does the consumer's and the worker's right to information entail under REACH? (ii) is the consumer's right to product information also regulated by other EU legislation? (iii) can a consumer obtain information on CSR aspects of the products he intends to buy? (iv) do companies have the obligation to provide the requested information? (v) how do these rights work in practice?

PART II: CASE STUDIES

Chapter 9 Shell in Nigeria: from human rights conflicts to corporate social responsibility

In the aftermath of the execution of the Nigerian activist Ken Saro-Wiwa, the leader of the Movement for the Survival of the Ogoni People (MOSOP), several

legal proceedings were brought against the company Shell, its subsidiary and the Government of Nigeria in connection with human rights violations and environmental damage caused by the oil exploitation. This chapter reviews the major related cases and the problems for the claimants in obtaining legal remedies against MNCs considering, *inter alia*, the concept of the 'corporate veil' and the uncertain application of human rights treaties' obligations to corporations. This situation triggers the question to consider whether the present development of CSR, which habitually embraces the protection of human rights, could serve as an alternative response and have positive impacts with regard to regulating corporate conduct of the oil industry in a socio-political situation such as the one of the Ogoni People.

Chapter 10 Case study: the international CSR conflict and mediation. Supply chain responsibility: Western customers and the Indian textile industry

In 2008, the former Prime Minister of the Netherlands, Mr Ruud Lubbers, led a mediation process to resolve the conflicts which had arisen between two Dutch campaigning organisations, various Indian non-governmental organisations (NGOs) and labour unions, two Dutch internet providers, an Indian clothing producer, and a Dutch jeans brand. The mediation took place at the request of the disagreeing parties and the Dutch and Indian governments. The conflict related to CSR standards followed by the textile companies. It, however, also concerned the way in which the campaigning organisations and NGOs communicated concerning these issues. Their campaigns against the Indian jeans producer and its Western customers nearly forced the Indian company into bankruptcy. In defence, the Indian company started lawsuits against the Indian and Dutch civil society organisations, which catalysed even more worldwide internet campaigning. Since some of the organisations received funds from the Dutch government, the Indian government was also provoked. It protested to the Dutch and European authorities, claiming that unfair trade practices had been used. Finally, the imminent threat that 5,500 Indian employees and their families would become the victims of the closure of the factories, contributed to finding and implementing a structural solution supported by all parties.

The essential dilemmas in this case were: (i) whether the filing of lawsuits against civil society organisations is an effective way of countering public campaigns and of avoiding reputation damage; (ii) to which extent should civil society organisations investigate the truthfulness of allegations concerning labour rights abuses; (iii) which role should local labour law play in pursuing a sustainable international supply chain; (iv) whether engaging in a battle concerning CSR standards leads to better CSR practices; and (v) to what extent can or should a government require accountability on the part of civil society organisations?

Chapter 11 Corporate social responsibility: sustainable water use

Freshwater scarcity is no longer limited to sub-Saharan developing countries; also in Western society, access to unlimited amounts of freshwater is not assured at all times. It has been argued – and laid down in many national legal systems – that access to freshwater is a basic human right. What if corporate freshwater use threatens to interfere with this human right? The main focus of the chapter is to explore the role of today's companies in relation to freshwater. A number of tools have been developed to attend to the necessity to reduce corporate use of freshwater. This chapter discusses specialised water reporting instruments such as the 2007 Global Water Tool and the 'water footprint' calculation method. In addition, attention is paid to a CERES report (2010) revealing that the majority of the 100 world's leading companies in water-intensive industries still has weak management and disclosures of water-related risks and opportunities. To obtain tangible information about corporate water strategies and practices, an explorative analysis was conducted on 20 Dutch multinational companies. The chapter highlights various innovative practices. In sum, it is demonstrated that companies are expected to bear responsibility for their impact on water resources, in particular when it influences public access to water in areas with freshwater scarcity and/or weak government. Notwithstanding the critical conclusions of the CERES report, it is interesting to see an evolution in corporate research concerning sustainable water use and the development of greener products and greener ways of production. Thanks to CSR?

Chapter 12 Integrating companies' impact and dependence on biodiversity and ecosystem services in investment decisions

This chapter analyses to what extent and how institutional investors (can) pay attention to a company's performance in relation to biodiversity and ecosystem services (BES) in their investment decision-process (as part of the considerations regarding the P of Planet and the E of Environmental aspects).

'Biodiversity' refers to the variety of all forms of life. 'Ecosystems' sustain biodiversity. Biodiversity is pivotal for the life of every living organism and ecosystems provide the basis for life. We all depend on them, business is not an exception.

The impact of the activities of companies on the environment can imply business risks, both from a financial and a reputational perspective. Besides company impacts, an investor also needs to consider a company's dependence on ecosystem services, such as the provision of natural products (food, timber), freshwater, fertile soil or pollination by bees, that are threatened by the current

ecological crisis. The dependence implies a risk that the company's business activities cannot be continued, or only at much higher cost. It is pertinent for an investor to be informed of the links between companies and BES as they can be material in determining the financial value of an investment.

The focus of the study is on the market for 'information products', which relate to companies and BES. The research revealed that ESG rating agencies are exploring ways to create such information products and wish to sell them to institutional investors. Interest from the side of institutional investors to buy such products is awakening. However, overall, this market is currently immature. The study identified nine characteristics of this market, also referred to as 'barriers', which explain why the market is not functioning to its full potential. At the same time they can also be considered 'opportunities' for ESG rating agencies because new products can be developed. Since the characteristics are interrelated, it was estimated that collaborative action by asset owners, asset managers, ESG rating agencies, companies, governments and NGOs is needed for a further development of the BES market.

The last part of this chapter specifically focuses on change processes within a multi-stakeholder setting. The question is addressed how such a change process can be stimulated by external intervention. This part discusses relevant theoretical frameworks and provides a methodological reflection on a workshop which was organised as a follow-up to the study. The workshop aimed at stimulating the participants to actively pursue the exchange of information on companies' links with biodiversity (both impact and dependency links). The workshop made use of action research, systems thinking and change management insights. This case study shows the complexity of starting up a process of multi-stakeholder collaboration.

Chapter 13 Private investment in the conservation of Biodiversity and Ecosystems

Investors can contribute to nature conservation, and can also profit from its enhancement. One of the ways to contribute to, and to profit from, biodiversity conservation is to invest in it. Investing in BES markets is a niche. This chapter presents the results of a study into new markets related to BES and into BES investment opportunities. They offer interesting investment opportunities and contribute to nature conservation at the same time. The research showed that the emerging BES markets can be classified as follows: (i) sustainable forestry; (ii) nature conservation including wetland banking and biodiversity offset programmes; (iii) ecotourism; (iv) watershed management; and (v) carbon sequestration through agricultural projects and REDD (Reducing Emissions through Deforestation and Forest Degradation). Many BES investment funds have been structured as private equity funds. They often cooperate with local authorities and NGOs, often as a PPP. In the analysis of the BES markets and

the BES funds, certain barriers and obstacles that hinder the full participation of mainstream investors are identified and addressed.

The study revealed that investors have little knowledge of the existing options to invest in BES. Secondly, on a more fundamental level, there is a lack of understanding of the links, and dependencies, of business and ecosystems. In their decision-making, mainstream investors do not consider the fact that ecosystem degradation and species loss are directly interlinked to 'normal' business activities, nor that the long-term profitability of most investments depends on healthy ecosystems.

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Relación de Resúmenes

Introducción

La Responsabilidad Social Empresarial (RSE) se ha afianzado rápidamente en el mundo de los negocios. En el último decenio, muchas empresas desarrollaron e implementaron estrategias *'Planet, People, Profit'*. Los gobiernos y la sociedad civil estimularon a los actores privados para que brindaran un aporte para resolver los dilemas y dificultades relacionados con la gobernanza global. El presente libro se centra, en primer lugar, en los aspectos legales de la RSE, pero también trata la RSE desde una perspectiva más amplia, es decir, la evaluación de "mejores prácticas". Además, explica en mayor detalle los procesos internacionales que se produjeron en el ámbito de la RSE durante la década 2000-2010.

Los capítulos introductorios describen el telón de fondo de la globalización, en relación con el desarrollo sostenible, identificando el papel de la RSE y comparándola con el gobierno corporativo.

La Parte I del libro consiste en un resumen y una discusión sobre los marcos legales y semilegales que pueden ayudar a una organización comercial a transformarse en una empresa socialmente responsable. Ejemplos son la institucionalización de la RSE en el código de gobierno corporativo, los informes anuales sobre la RSE, la creación de un programa contra la corrupción para apoyar el proceso de control interno, la evaluación del impacto en los derechos humanos como parte de los exámenes de debida diligencia (*due dilligence*), hacer uso de reglamentos privados y sellos de sustentabilidad, y brindar información sobre productos al consumidor.

La Parte II describe cinco estudios de casos que muestran como la RSE funciona en la práctica. Dos estudios se centran en conflictos sobre prácticas de RSE por parte de determinadas empresas (en la industria petrolera en Nigeria, y en la industria textil india y neerlandesa. Los otros tres estudios se centran respectivamente en la gestión de agua por parte de las empresas, en las preocupaciones sobre la biodiversidad que existen en el mercado de capitales y cómo invertir en la naturaleza.

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Corporativo & Comercial en la Grotius Academy, Países Bajos. Comenzó su carrera en una firma internacional de abogados en los Países Bajos. En este momento, ocupa puestos en la Universidad de Utrecht y en la Universidad de Nyenrode.

Capítulo 1 Introducción

Este capítulo describe los parámetros del estudio. El estudio se enfoca en la posición de las empresas en la implementación de una globalización sostenible. Según las organizaciones internacionales, los gobiernos, la sociedad civil y las empresas, la responsabilidad social empresarial (RSE) puede contribuir a una globalización sostenible. El concepto de la RSE abraza la idea de que las empresas multinacionales deberían operar de manera socialmente responsable, y que deberían informar al público sobre sus políticas y comportamiento para asegurar que rindan cuentas a la sociedad civil. El compromiso de las partes implicadas y la mediación en vez de litigios también pueden formar parte de una conducta empresarial socialmente responsable.

Este capítulo demuestra que la RSE fue promovida por gobiernos a través de la legislación, y por organizaciones internacionales y la sociedad civil a través de la creación de códigos que contienen normas éticas y valores, *e.g.,* el documento de la sociedad civil -la Carta de la Tierra, las directrices de *Global Reporting Initiative* para la elaboración de informes de sostenibilidad (GRI G3), y los códigos de conducta de las Naciones Unidas (ONU) y de la Organización para la Cooperación y el Desarrollo Económico (OCDE). En el curso de la última década, las empresas brindaron un aporte positivo a la aceptación de la RSE. Formularon ambiciones concretas, por ejemplo, con respecto al uso sustentable del agua, acordaron códigos de conducta sectoriales y sobre sellos de sustentabilidad, muchas veces, en cooperación con representantes de la sociedad civil, implementaron programas contra la corrupción en sus propias organizaciones, y establecieron Asociaciones Público Privadas (PPP por sus siglas en inglés) para dar una contribución a los Objetivos de Desarrollo del Milenio.

En este capítulo, se señala que la RSE depende de y se relaciona con algunos marcos legales y semilegales, como lo son, el gobierno corporativo, informes anuales, control interno y sistemas de información gerencial, reglamentos privados, evaluaciones de debida diligencia, y la prestación de información sobre productos. La autora afirma que dichos marcos pueden sostener la RSE, pero las empresas deben usarlos de manera activa. Expone que la integración de la RSE en las prácticas empresariales normales mejorará la posición comercial de las empresas: desde la gestión integral de riesgos, hasta el acceso temprano a nuevos mercados de productos y de servicios. A nivel fundamental, la RSE ayuda a garantizar su licencia de operación, ya que alienta a las empresas a establecer compromisos sólidos con las comunidades donde operan.

Capítulo 2 Responsabilidad social empresarial y cuestiones vinculadas al gobierno corporativo

La RSE y el gobierno corporativo son procesos internacionales que atraen mucha atención, y que comparten varios aspectos. Ambos procesos están relacionados con el comportamiento y la gestión interna de grandes empresas, generalmente, compañías internacionales. Se instó a la comunidad de negocios internacionales a que incluyera la conciencia ética y las prácticas de integridad en sus negocios habituales.

Este capítulo analiza los procesos que ocurren en el ámbito de la RSE y del gobierno corporativo. Ambos conceptos son contrastados el uno con el otro, con respecto a aspectos clave, como lo son, su base y objetivos, iniciadores y partes interesadas, iniciativas que se tomaron, especificación de objetivos, normas voluntarias en oposición a normas obligatorias, diferencias y paralelos.

Los códigos de conducta juegan un papel fundamental en la RSE y el gobierno corporativo. Ha aumentado la prestación de cuentas por parte de empresas y de directores para estimular una buena conducta corporativa. Además, el cumplimiento de las normas de gobierno corporativo impone que las empresas presenten razones cuando se desvían de los códigos de gobierno corporativo. La transparencia de las empresas también ha aumentado, para poder brindar información adecuada a las partes interesadas, permitiéndoles juzgar si una empresa se comporta de manera ética o no, y conforme a las normas de gobierno corporativo. Si las partes interesadas tienen dudas acerca de ello, la información puede servir como punto de partida para hablar sobre el tema con la empresa en cuestión. La comunicación entre las empresas y las partes interesadas se hace cada vez más importante. Si no es posible resolver la cuestión comunicándose, las partes interesadas pueden entablar juicio para hacer cumplir su visión de buena conducta o para reclamar una indemnización.

La RSE y el gobierno corporativo todavía no se han transformado en normas legales estrictas y, por lo tanto, será difícil para las partes interesadas hacer cumplir su visión de buena conducta corporativa ante un tribunal. Para interpretar las normas legales abiertas, un juez puede tener en cuenta los códigos de conducta y los procesos societales. Es probable que un juez otorgue más importancia a un código de conducta consolidado en la legislación y suscrito por una empresa en su informe anual, que a un código de conducta aceptado voluntariamente por una empresa.

PARTE I: MARCOS LEGALES Y SEMILEGALES QUE SOSTIENEN LOS PROCESOS DE RSE

Capítulo 3 Institucionalización de la responsabilidad empresarial en el código de gobierno corporativo. La nueva tendencia del modelo neerlandés.

La crisis financiera actual y la necesidad de que las empresas desarrollen prácticas empresariales más sostenibles, son el telón de fondo de la exploración que hace la autora acerca de cómo la RSE ha sido institucionalizada recientemente en el nuevo código de gobierno corporativo neerlandés, *i.e.* el Código Frijns, que entró en vigor en 2009. La RSE promueve planes de negocio a largo plazo, la internalización de los gastos externos, la rendición de cuentas respecto a la conducta corporativa, el compromiso de las partes implicadas, y la transparencia de los factores Ambientales, Sociales y de Gobierno (ESG por sus siglas en inglés). La autora discute los antecedentes y el contenido de las nuevas cláusulas de RSE en el Código Frijns y las revisiones legales corporativas pertinentes. Uno de los temas que trata más a fondo es el aspecto género en la composición de una junta directiva. Además, la autora plantea la cuestión de si los inversionistas institucionales pueden desempeñar un papel más funcional en la implementación de la RSE. Compara en qué medida informes importantes, publicados por UNEP FI (producidos por Freshfields) y Eumedion permiten y recomiendan que aspectos de ESG tengan un rol en el proceso de inversión y evalúa las cláusulas pertinentes del Código Frijns.

Capítulo 4 Los informes anuales pueden ofrecer transparencia sobre la responsabilidad social empresarial

Desde 2003, los Estados Miembros de la Unión Europea (UE) han estado implementando las cláusulas de la Directiva de Modernización, entre otras, las nuevas normas para los informes anuales de grandes empresas con sede en la UE. Una de las nuevas normas implica, cuando sea apropiada, que se ofrece información sobre temas no financieros, por ejemplo, aspectos relacionados con el medio ambiente y los empleados, y las actividades empresariales a nivel mundial. El Parlamento Europeo (PE) ha llamado frecuentemente la atención sobre el desarrollo de la RSE. La transparencia de las prácticas corporativas, en la UE y en otras partes del mundo, parece ser deseable para los consumidores, los bancos y los inversionistas institucionales.

Una exploración rápida de los informes anuales de 2006 de grandes empresas que cotizan en la bolsa Euronext, y que se encuentran registradas en los Países Bajos, revela que la mayor parte de ellas aborda temas ambientales y laborales en sus informes anuales. Sin embargo, las empresas tienen tendencia

a brindar suficiente información sobre temas laborales, mientras que falta información substancial y clara sobre otros aspectos no financieros.

La autora señala que algunas multinacionales líderes preparan informes de sostenibilidad siguiendo voluntariamente las directrices GRI. Dichos informes abordan los aspectos ambientales, sociales y éticos de las operaciones y actividades empresariales.

Capítulo 5 Corrupción y gobierno corporativo: 'mandar' requiere un programa contra la corrupción

La corrupción es un obstáculo importante para alcanzar objetivos públicos. La corrupción también tiene gran impacto en el sector privado, ya que distorsiona la competencia y aumenta los costes. La corrupción tiene dos lados: la oferta y la demanda. Tradicionalmente, los funcionarios públicos representan la demanda y el sector privado, por lo general, paga los sobornos. En los últimos años, se aprobaron varias leyes y convenios contra la corrupción, apuntados al sector privado. Violarlos puede resultar en una acción judicial en varias jurisdicciones, multas elevadas e, incluso, a la responsabilidad personal de los directores. La reputación manchada y la pérdida de oportunidades comerciales completan la imagen de cómo un escándalo de corrupción puede afectar a una empresa.

Los sistemas de control interno de una empresa no funcionan de manera adecuada, si los empleados pueden usar los fondos de la empresa para pagar sobornos. Esto significa por definición que no es posible dar una explicación adecuada sobre el destino de dichos montos, por lo tanto, los estados financieros no pueden ser correctos y los directores no 'mandan.' Es una indicación de la debilidad del gobierno corporativo. Sin embargo, la corrupción puede prevenirse implementando un programa interno contra la corrupción. En esta contribución se expone que, por consiguiente, 'mandar' implica que una empresa haya implementado un programa de este tipo.

Mientras que la RSE se está desarrollando, los gobiernos y la sociedad civil esperan que las empresas sean socialmente responsables y transparentes, también respecto a la corrupción. Dichas expectativas pueden satisfacerse suministrando información pública sobre las tentativas de la empresa de prevenir que los empleados se impliquen en prácticas de soborno. Un próximo paso que la empresa podría dar es adherirse a iniciativas de acción colectiva para ampliar las mejores prácticas y promover condiciones iguales para todas las empresas, sobre la base de valores.

En el artículo se aboga que cualquier empresa involucrada en negocios internacionales tenga que percatarse de los riesgos relacionados con la corrupción, y que deba darse cuenta de que se beneficiará si encara dichos riesgos. La

posición de las empresas y las herramientas de gobierno corporativo son el enfoque de este capítulo.

Capítulo 6 Reglamentos privados: definir las normas

¿Ha resultado que los reglamentos privados son generalmente más exitosos que las normas públicas para controlar la conducta transnacional de empresas multinacionales? El crecimiento exponencial de reglamentos privados, apuntados a influenciar el comportamiento corporativo –como resultado de la expansión rápida de los mercados globales– muestra la relevancia de esta pregunta. A la luz de las normas internacionales privadas que ya existen, este capítulo define y analiza algunos de los elementos más importantes de los reglamentos privados que pueden tener un impacto en el cumplimiento de los reglamentos privados, a saber: la calidad; la legitimidad; el cumplimiento; y la efectividad. Dichos elementos se aplican a tres iniciativas privadas reguladoras al las que el PE refiere como reglamentos privados que han llegado a determinado nivel de madurez: los Principios de Pacto Global, las directrices de la OCDE para empresas multinacionales y las Directrices GRI. Evaluando las características de dichas normas privadas, se observan algunas referencias interesantes a las normas privadas por parte de los reglamentos públicos actuales en el ámbito de la responsabilidad empresarial. También se analizan las relaciones entre el cumplimiento de normas promovidas por los sistemas reguladores privados por un lado, y el cumplimiento en el campo legal 'normal', por otro. Surge la pregunta si el desarrollo de normas privadas fortalece o debilita los sistemas reguladores públicos. Además, por la reciente crisis financiera, surge la pregunta si temas tan importantes deben ser confiados a actores privados para su reglamento.

Capítulo 7 Debida diligencia corporativa como herramienta para respetar los derechos humanos

Este capítulo tiene como intención ayudar a empresas y analistas de derechos humanos a determinar por qué, cuándo y cómo las evaluaciones del impacto en los derechos humanos pueden integrarse en los procesos de debida diligencia que ya existen. Elabora el enfoque propuesto por el Profesor Ruggie, Representante Especial de la ONU sobre derechos humanos y empresas. Su marco político se basa, entre otras cosas, en la 'responsabilidad empresarial de respetar los derechos humanos', *i.e.* actuar con 'debida diligencia' para evitar violar los derechos de los demás. En este capítulo, la autora explora el origen de los derechos corporativos y humanos, y la aplicación del concepto 'debida diligencia'. Posteriormente, discute el concepto debida diligencia tal y como

se presenta en el marco político de Ruggie, y ofrece sugerencias para su aplicación práctica en las transacciones comerciales. Además identifica problemas.

Capítulo 8 ¿Saber o no saber? El derecho del consumidor a la información en el marco de REACH y otras leyes de la Unión Europea

Este capítulo describe el derecho del consumidor a la información, en el contexto de la legislación europea 'REACH', que, entre otras cosas, obliga a las empresas a brindar información a los consumidores sobre la presencia de determinados productos químicos en bienes de consumo. Además, la autora hace una breve evaluación de varias otras Directivas Europeas para ver en qué medida éstas son pertinentes en relación al derecho del consumidor a la información. Los dilemas relacionados con el derecho del consumidor a la información también surgen en el debate político actual en los Países Bajos, donde el Partido Laborista está preparando una proposición de ley sobre la obligación de las empresas de dar información a los consumidores, motivado por las preocupaciones acerca de la RSE. Este capítulo aborda temas como, por ejemplo: (i) ¿qué implica el derecho del consumidor y del trabajador a la información en el marco de REACH?; (ii) ¿hay otras leyes de la UE que regulan el derecho a la información sobre productos?; (iii) ¿el consumidor puede obtener información sobre aspectos de RSE de los productos que quiere comprar?; (iv) ¿las empresas tienen la obligación de dar la información solicitada? y (v) ¿cómo funcionan los derechos en la práctica?

PARTE II: ESTUDIOS DE CASO

Capítulo 9 Shell en Nigeria: desde conflictos sobre los derechos humanos hacia la responsabilidad social empresarial

Tras la ejecución del activista nigeriano Ken Saro-Wiwa, líder del *Movement for the Survival of the Ogoni People* (MOSOP), se entablaron distintos juicios contra la empresa Shell, su empresa filial y el Gobierno de Nigeria en relación con las violaciones de los derechos humanos y los daños ambientales causados por la explotación petrolera. Este capítulo estudia los principales casos relacionados y los problemas que tuvieron las partes demandantes en obtener reparación legal contra las multinacionales, considerando, *inter alia,* el concepto del 'velo corporativo' y la incierta aplicación a las empresas de las

obligaciones previstas por los convenios de derechos humanos. Así surge la pregunta si el desarrollo actual de la RSE, que, por lo general, abarca la protección de los derechos humanos, podría ser una respuesta alternativa y tener un impacto positivo en el reglamento de la conducta corporativa de la industria petrolera en una situación socio-política como la del pueblo Ogoni.

Capítulo 10 Estudio de caso de un conflicto internacional sobre la RSE y la mediación. Responsabilidad de la cadena de suministro: clientes occidentales y la industria textil de la India

En 2008, el ex Primer Ministro de los Países Bajos, el Sr. Ruud Lubbers, dirigió un proceso de mediación para resolver los conflictos que se habían producido entre dos organizaciones neerlandesas de campaña, varias organizaciones no gubernamentales (ONG) y sindicatos de la India, dos proveedores neerlandeses de Internet, un productor de prendas de vestir de la India, y una marca neerlandesa de pantalones vaqueros. La mediación se llevó a cabo a pedido de las partes en desacuerdo y de los gobiernos de los Países Bajos y de la India. El conflicto estuvo relacionado con las normas de RSE aplicadas por las empresas de textil. Sin embargo, también estuvo relacionado con la manera en que las organizaciones de campaña y las ONG comunicaron sobre dichos temas. Por sus campañas contra el productor indio de los pantalones vaqueros y sus clientes occidentales, la empresa india estuvo al borde de la quiebra. Para defenderse, la empresa india entabló demandas contra las organizaciones sociales indias y neerlandesas, lo que provocó una campaña de Internet aún más intensiva, a nivel mundial. Ya que algunas organizaciones recibieron fondos del gobierno neerlandés, el gobierno indio también se sintió provocado. Protestó ante las autoridades neerlandesas y europeas, afirmando que habían usado prácticas comerciales injustas. Finalmente, la amenaza inminente del despido de 5.500 empleados indios por el cierre de las fábricas, contribuyó a que se buscara e implementara una solución estructural, que recibió el apoyo de todas las partes.

Los dilemas esenciales en este caso fueron: (i) si una demanda contra organizaciones sociales es una manera efectiva de contraatacar las campañas públicas y evitar que se manche la reputación; (ii) en qué medida las organizaciones sociales investigan la veracidad de las acusaciones de violaciones de los derechos laborales; (iii) qué papel debería jugar la legislación laboral local en la búsqueda de una cadena de suministro internacional sostenible; (iv) si una lucha a favor de normas de RSE conlleva mejores prácticas de RSE; y (v) en qué medida un gobierno puede o debe demandar la prestación de cuentas por parte de las organizaciones sociales.

Capítulo 11 Responsabilidad social empresarial: uso sustentable del agua

La escasez de agua dulce ya no se limita a países en desarrollo subsaharianos; en el occidente, el acceso a cantidades ilimitadas de agua dulce tampoco está garantizado. Siempre se afirmó –y se determinó en muchos sistemas legales nacionales– que el acceso al agua dulce es un derecho humano fundamental. ¿Qué pasa si el uso de agua dulce por las empresas amenaza interferir en este derecho humano? Para ilustrarlo, este capítulo documenta algunos casos de mala gestión de recursos hídricos por parte de determinadas empresas. Sin embargo, el enfoque principal del estudio consiste en explorar el papel actual de las empresas en relación con el agua dulce. El estudio identifica y describe algunas herramientas que se han desarrollado para lidiar con la necesidad de reducir el uso corporativo de agua dulce. Las directrices generales de los informes de RSE son el telón de fondo de una descripción de herramientas especializadas para informar sobre el agua, como lo son, el 2007 *Global Water Tool* y el método para calcular 'la huella de agua'. Además, para obtener información concreta, se realizó una 'exploración rápida' de 20 multinacionales neerlandesas y sus estrategias hídricas. Se destacan varias prácticas innovadoras. Este capítulo demuestra que se espera que las empresas asuman la responsabilidad del impacto que tienen en los recursos hídricos, particularmente, cuando influyen en el acceso público al agua en áreas donde el agua dulce es escasa y/o el gobierno, débil. Fue gratificante que el estudio reveló, por un lado, una evolución de las investigaciones empresariales y del uso sostenible de agua y, por otro lado, una nueva tendencia que implica que las empresas desarrollan productos más verdes y maneras más verdes de producir, gracias a la RSE.

Capítulo 12 Integrar el impacto y la dependencia de empresas de la biodiversidad y de servicios ecosistémicos en las decisiones sobre inversiones

Este capítulo analiza en qué medida y cómo los inversionistas institucionales (pueden) prestar atención a los desempeños de una empresa en relación con la biodiversidad y los servicios ecosistémicos (BES por sus siglas en inglés) en su proceso de toma de decisiones (P de Planeta y E de *Environment* (medio ambiente) –uno de los aspectos de ESG).

La biodiversidad representa una variedad de todas las formas de vida. Los ecosistemas sostienen la biodiversidad. La biodiversidad es fundamental para la vida de cada organismo vivo y los ecosistemas ofrecen la base para la vida. Todos dependemos de ellos, y el mundo de los negocios no es una excepción.

El impacto de las actividades de una empresa en el medio ambiente puede implicar riesgos para la compañía, desde una perspectiva financiera o de reputación. Además del impacto causado por la empresa, un inversionista también debe tomar en cuenta la dependencia de una empresa de servicios ecosistémicos, por ejemplo, el suministro de productos naturales (alimentos, madera), agua dulce, suelo fértil o polinización por abejas, que son amenazados por la actual crisis ecológica. La dependencia implica el riesgo de que las actividades comerciales de la empresa no puedan continuar, o sólo con costes más elevados. Es importante para un inversionista informarse acerca de las relaciones que existen entre las empresas y los BES, ya que pueden ser fundamentales para determinar el valor financiero de una inversión.

El estudio se centra en el mercado de 'productos informativos', relacionados con empresas y los BES. La investigación reveló que las agencias de clasificación de ESG están explorando maneras de crear este tipo de productos informativos, y que quieren venderlos a inversionistas institucionales. Está despertando el interés por parte de los inversionistas institucionales de comprar este tipo de productos. Sin embargo, por lo general, el mercado todavía no está maduro. El estudio identificó nueve características de este mercado, a las cuales refiere también como 'barreras', que explican por qué el mercado todavía no funciona al máximo. Asimismo, dichas características también pueden considerarse como 'oportunidades' para las agencias de clasificación de ESG, porque les permite desarrollar nuevos productos. Como las características están interrelacionadas, se opina que es necesaria una acción colaborativa entre dueños de activos, gerentes de activos, agencias de clasificación de ESG, empresas, gobiernos y ONG para desarrollar el mercado de BES.

La última parte del capítulo se centra específicamente en los procesos de cambio en un contexto de múltiples actores. Se describe cómo una intervención externa puede fomentar un proceso de cambio de este tipo. La autora presenta los marcos teóricos relevantes y ofrece una reflexión metodológica sobre un taller que se organizó como seguimiento del estudio. El taller tuvo como objetivo estimular a los participantes a intercambiar información sobre las relaciones de las empresas con la bioversidad, tanto relaciones de impacto, como de dependencia. El taller hizo uso de la investigación de acción, el pensamiento sistémico y nociones sobre la gestión de cambios. El estudio de caso muestra la complejidad de iniciar un proceso de colaboración con múltiples actores.

Capítulo 13 Inversiones privadas en la conservación de la biodiversidad y ecosistemas

Los inversionistas pueden contribuir a la conservación de la naturaleza, y también beneficiarse de su mejora. Una manera de contribuir y de beneficiarse

de la conservación de la biodiversidad, es invertir en ella. Invertir en los mercados de BES es un nicho. Este capítulo presenta los resultados de un estudio sobre nuevos mercados, relacionados con los BES y sobre las oportunidades de inversión en los BES. Ofrecen oportunidades interesantes de inversiones y contribuyen asimismo a la conservación de la naturaleza. La investigación muestra que los mercados emergentes de BES pueden clasificarse como sigue: (1) gestión forestal sostenible; (2) conservación de la naturaleza, incluso, las bancas de humedales y programas de compensación; (3) ecoturismo; (4) gestión de cuencas; (5) secuestro de carbono por medio de proyectos agrícolas y la REDD (Reducción de Emisiones de la Deforestación y Degradación). Muchos fondos de inversión de BES se estructuraron como fondos de patrimonio propio. Muchas veces cooperan con las autoridades locales y ONG, a menudo, como PPP. En el análisis de los mercados y los fondos BES, se identificaron y se abordaron algunas barreras y obstáculos que impiden la plena participación de inversionistas convencionales.

El estudio reveló que los inversionistas tienen pocos conocimientos sobre las opciones existentes para invertir en los BES. En segundo lugar, a un nivel más fundamental, falta comprensión sobre las relaciones y dependencias de negocios y ecosistemas. En su toma de decisiones, los inversionistas convencionales no consideran el hecho de que la degradación del ecosistema y la pérdida de especies se relacionen directamente con las actividades empresariales ‘normales’, ni tampoco que la rentabilidad a largo plazo de la mayor parte de las inversiones dependa de ecosistemas saludables.

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副标题： **法律和准法律框架支持的企业社会责任**
2000-2010 企业社会责任的发展及案例研究

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简 介

企业社会责任已经在商业领域获得了其立足点。在过去的十年中，许多企业都发展了各自的“地球、人民、利润”(Planet, People, Profit)战略，并将之付诸实践。与此同时，各国政府以及民间社会也已经开始呼吁私营部门为解决全球治理所面临的困境做出相应的贡献。本书着重于以法律的视角对企业社会责任进行了研究，但同时也从更广泛的角度对这一概念的实践做出了评估。本书详细阐述了国际上这一领域自2000-2010年来的发展。

本书的引言部分介绍了全球化与可持续发展的相关背景，说明了企业社会责任所起到的作用，并将其与公司治理进行了比较。

本书的第一部分简要介绍并讨论了能够协助商业组织更加具有社会责任感的各种法律和准法律框架。例如：将企业社会责任在公司治理准则中制度化、发布企业社会责任的年度报告、建立支持内部控制进程的反腐败程序、将评估企业对人权状况的影响力作为尽职调查的一部分、积极推广对民间准则的遵守以及使用可持续发展标签，和向消费者提供有关产品的信息。

第二部分包括了5个展示企业社会责任实践的案例研究。其中2个案例有关企业与实践企业社会责任的争端（一个涉及尼日利亚的石油行业，另外一个则与印度和荷兰的纺织业有关）。剩下3个案例的关注焦点分别是企业的水资源管理、资本市场对生物多样性的关注以及如何对自然界进行投资。

作者蒂尼卡•兰布伊在荷兰进行过宪法、行政法以及国际法的学习，在美国学习过美国公司法和税法，并在荷兰的格劳秀斯学院（Grotius Academy）进修了公司法和商业法的课程。之后她在荷兰的一所国际性律师事务所担任执业律师。目前她作为讲师和研究人员供职于荷兰的乌特勒支大学和奈耶诺德大学。

文章摘要

第1章 引言

本章介绍了本书所进行研究的各种指标。这项研究的重点是企业在实现可持续的全球化中所处的位置。正如诸多国际组织、各国政府、民

间社会以及企业所指出的，企业社会责任（CSR）可以推进可持续的全球化。企业社会责任的概念包含了跨国公司（MNCs）应该本着对社会负责任的态度来运营，并且应对社会公开其政策和行为报告，以确保它们的行为能够被行民间社会所监督。除诉讼以外，利益相关者的参与及调解也可以被视为负责任的商业行为的一部分。

本章指出各国政府已经通过立法手段来促进企业社会责任；于此同时，众多国际组织以及民间社会也通过提供包含道德准则和价值观念在内的各种行为规范——比如由联合国（UN）和经济合作与发展组织（OECD）所颁布的行为守则——来推动企业社会责任。与此同时，在过去十年里许多企业也积极的推动了企业社会责任为其自身所接受。它们制定了许多计划，例如水资源的可持续利用；它们也已经——经常以是与民间社会代表进行合作的形式——订立了许多行业行为准则以及可持续性指标；他们已经开始在其组织内实施反腐败方案，并通过建立公私伙伴关系（Private Public Partnership, PPP）以促进联合国千年发展目标（MDG）的实现。

本章同时也指出了企业社会责任与法律以及准法律框架之间的关系以及互动，这些框架包括公司治理、年度报告、内部控制和信息系统管理、公司章程、尽职评估、以及提供与产品有关的信息。笔者坚信，这些框架可以支持对企业社会责任，但企业必须积极的使用它们。如果企业能够这样做的话，将执行企业社会责任纳入其日常运营的做法将会在各个层面上加强企业的运营：企业将不仅可以更好的应对风险，而且可以更早的获得新产品以及服务市场。而在一个更为基本的层面上，由于企业社会责任鼓励企业更加广泛的参与到与其所运营业务相关的环境中去，因此这也会帮助企业保障其运营许可证的有效性。

第 2 章　企业社会责任与公司治理

企业社会责任和公司治理拥有许多共同的特点，同时也在全球范围内被广泛的关注。这两个概念的发展与许多大型的、特别是跨国企业的行为以及内部管理有很大关联。国际商业社会一直都在极力敦促将道德和诚信意识纳入其日常业务之中。

本章分析了企业社会责任和公司治理领域的发展。这两者在一些核心问题上与彼此形成了对比——例如其理念和目标、发起者和有关各方、动机、各自的目标、自愿与强制性标准——本章则分析了它们的差异和相似之处。

行为准则是企业社会责任和公司治理的重要工具。为了促进良好的企业行为，企业及其负责人应承担更多的责任。此外，对公司治理标准的执行也要求企业给出其背离自身公司治理准则的原因。而为了向利益相关方提供充足的信息，企业的透明度也会有所提高，进而允许这些利益相关方对企业的行为是否符合公司治理的标准做出判断。如果利益相关方对企业的行为存有疑问，这些由企业提供的资料则可以作为对企业提出质询的出发点。与此同时，企业与其利益相关方之间的沟通甚至比以上更加重要。如果沟通解决不了问题，利益相关方可能会启动法律程序来迫使企业执行它们理想中的企业所应执行的“好的”行为，或者追索损失。企业社会责任和公司治理都尚未发展成为严格的法律规范；也正因为如此，利益相关方要想成功的通过法院来推动其理想中的企业行为是很困难的。在解释一个开放的法律准则之时，法官可以将行为准则和社会的发展情况纳入到其所考虑之中。可以预见的是，相对于企业自愿遵守或建立的行为准则，法官将会更加重视那些由法律确立的被企业在其年度报告中所采纳的行为准则。

第一部分：法律和准法律框架所支持的企业社会责任

第 3 章 在公司治理准则中制度化企业社会责任——荷兰模式的新趋势

在当前金融危机以及企业纷纷向可持续性经营发展转型这一大背景下，笔者对最近一段时间制定的荷兰公司治理准则——于 2009 年起开始生效的弗莱恩斯准则（the Frijns Code）——中被制度化的企业社会责任进行了探讨。企业社会责任能够对长期的运营规划、外部成本的内部化、企业行为的问责制、利益相关方的参与，以及环境和社会治理（ESG）的透明度等因素起到促进的作用。笔者讨论了弗莱恩斯准则以及相关公司法修订中新的企业社会责任条款的内容及其背景。其中一个被深入讨论的主题是在企业董事会组成中性别的因素。此外，笔者还

提出了机构投资者是否可以在实施企业社会责任时发挥更多职能作用这样一个问题。她比较了联合国环境署(Freshfields 提交)和 Eumedion 的报告，并指出在何种程度上这两份报告对环境和社会治理在投资过程所发挥的作用，并对弗莱恩斯准则的相关条款进行了评估。

第 4 章　年度报告提供的有关企业社会责任的透明度

自 2003 年以来，欧盟（EU）成员国已经实施了现代化指令（Modernisation Directive）的条文，其中包括对欧盟内部各大企业年度报告的新标准。其中一个标准中规定，在适当的情况下，企业应披露其非财务事项的信息，如涉及到全球业务活动的与环境和员工有关的问题。欧洲议会（EP）则经常的引导政治目光关注企业社会责任的发展。无论是在欧盟内部或是外部，企业运营的透明度似乎都为消费者、银行以及机构投资者所需求。

在对众多于泛欧交易所挂牌上市的注册地在荷兰的大型企业其 2006 年度报告的审视后，笔者发现它们中的大多数都对环境和员工问题进行了论述。然而，企业往往倾向于发布那些比较容易获得的有关人事事项的资料，而不喜欢公布更为重要的其它非财务方面的信息。

笔者指出，许多成功的跨国公司都自愿基于《全球报告倡议组织指南》（GRI Guidelines）来准备其可持续报告；而这些报告往往都包含环境、社会、道德层面的与其经营有关的活动。

第 5 章　公司治理与腐败：对其的“监督”需要反腐败计划

腐败是实现公共目标的主要障碍。同时，腐败也对私营部门有着严重的影响——因为它扭曲了竞争，并且大大增加了企业的经营成本。腐败的产生总是牵扯到两个方面，即腐败的供应方和需求方。通常来说，政府公职人员是受贿方，而私营部门则通常是行贿者。在过去的几年里，各种针对私营部门的反腐败法律和公约已被制定出来。因此，违反这类法律和公约的行为不仅可能导致企业面临在多个司法管辖区的诉讼，而且会使企业受到高额处罚，甚至企业的相关负责人也会被追究个人责任。与腐败有关的对企业名誉的损害以及因此而失去的商机也是造成企业形象受损的一部分原因。

如果企业员工可以利用企业的资金来支付贿赂，那么企业的内部控制制度肯定是没有效果的。根据定义，由于这些资金没有被正确的记录到企业账目的支出项目中，因此企业的财务报表肯定是不正确的，而且企业负责人也不会被“监督”。而这也正是公司治理失败的标志。但是腐败可以通过实施企业内部反腐败方案而被避免。正因为如此，也有人认为“监督”也意味着企业已经拥有一套自己的反腐败方案。

随着企业社会责任这一概念的不断发展，各国政府和民间社会同时期望企业能够提高其透明度，并表现出其社会责任感；当然，腐败的问题也包括在内。而这些期望则能够通过公开企业禁止其员工参与腐败行为的努力来实现。而企业在这一问题上更进一步的表现则是参加“集体行动倡议”（collective action initiatives）以建立良性循环，并推动以共同价值观为基础的企业间公平竞争的环境。

本章指出所有经营跨国业务的企业都应该警惕发生腐败的风险，同时也会因这种警惕性而获益。企业的态度以及公司治理的手段是本章论述的重点。

第 6 章　民间准则：制定中的标准

那么，民间准则真的比公共制度更能有效的影响跨国企业的多国运营行为吗？作为全球市场快速扩张的结果之一，越来越多民间准则的诞生正在影响着企业的经营方式，而这一现象也使这个命题显得非常重要。依据现有的国际民间准则，本章定义并分析了一些会对民间准则的执行造成影响的主要因素，它们分别是：力度、合法性、执行性、和有效性。这些元素都适用于三个已经达到一定的成熟度、并被 EP 作为民间准则的民间制度；这三个制度分别是：《全球契约原则》（Global Compact Principles）、《经合组织多国企业指导方针》（the OECD MNE Guidelines），和《全球报告倡议指南》。在评估这一系列有关企业责任领域的民间准则的特点时，一些有趣的、来自公共制度层面的评论被认为是将这些民间准则付诸实施的纽带。而现在出现的问题是，民间准则的发展到底是强化还是削弱了公共制度系统。此外，对最近一次金融危机的反思也带来这样一个问题：民间社会是否应该被委托以制定有关企业行为事项的准则。

第 7 章 企业尽职调查——一种尊重人权的手段

本章旨在协助企业和人权分析人士确定人权为什么、何时以及会如何影响到进程中的企业尽职调查。本章阐述了“联合国人权和商业秘书长特别代表” 鲁格教授所提出的方法。他的框架提出依靠包括企业责任在内的各种形式来尊重人权，即以“尽职调查”来避免对人权的侵犯。本章对企业法和人权法的起源以及对“尽职调查”的应用进行了探讨。本章也对在鲁格教授所提出的框架中的“尽职调查”的概念进行了讨论，并就如何将这一框架运用于商业领域提出了建议。此外，笔者还指出了这一框架可能面临的困境。

第 8 章 欧盟 REACH 法案以及其它欧盟法律所保障的消费者的知情权

本章所关注的是消费者的知情权与欧盟 REACH 法案。该法案责成企业向消费者提供有关其消费产品所含化学成分的相关资料。其它一些欧盟指令也要求企业提供能满足消费者相关知情权的信息。同时，荷兰的政坛也正在进行着关于消费者知情权的辩论。荷兰的工党（Labour Party）正在准备一项基于企业社会责任考量的有关企业有责任向消费者提供信息的立法建议。本章所探讨的问题包括（一）基于 REACH 法案的消费者和企业雇员的知情权有哪些？（二）哪些欧盟法规也保护消费者对产品信息的知情权？（三）消费者是否可以获得与其有意购买的产品相关的企业社会责任方面的信息？（四）企业是否有责任提供这些被要求提供的信息？以及（五）以上这些权利如何实现？

第二部分：案例研究

第 9 章 壳牌公司在尼日利亚：从人权争端到企业社会责任

在处决了尼日利亚社会活动家肯•萨罗-维瓦——奥戈尼人民生存运动（Survival of the Ogoni People， MOSOP）的领袖之后，壳牌公司及其子公司、乃至尼日利亚政府都被卷入到一系列的与违反人权以及因石油泄漏而造成的环境污染有关的法律程序之中。本章主要回顾了与这一事件相关的判决以及案件的索赔人在获得针对跨国企业的法律救济时所面临的问题，尤其是“企业面纱”这一概念以及在人权条约中未

被明确的企业责任的定义。由这一案件引发的思考是：企业社会责任——当然包括了对人权的保护——这一概念的发展是否能替代在特定的社会政治形势下（例如奥戈尼人）的石油行业企业及其经营行为所遵循的准则，以及其能否对该准则产生积极的、有推动性的影响。

第 10 章 关于国际企业社会责任冲突和调解的案例研究 供应链的责任：西方客户和印度纺织工业

2008 年，荷兰前首相吕德•吕贝尔斯先生主导了一项调解程序来以解决两个荷兰非政府组织、一些印度非政府组织（NGO）以及工会、两个荷兰互联网服务提供商、一家印度服装生产商以及一家荷兰的牛仔品牌公司之间产生的冲突。该调解程序是应以上当事人以及荷兰和印度政府的提出而开始的。该次争端是因纺织企业所遵循的企业社会责任标准而产生的。然而该争端也与以上提到的荷兰以及印度非政府组织之间的沟通有关。这些非政府组织一道挑战印度的服装生产商以及其西方的顾客，并且几乎迫使这家印度企业破产。作为回击，这家印度企业对这些非政府组织提出了法律诉讼，并由此引发了全球范围的互联网争论。由于这些非政府组织中的一些受到荷兰政府的资助，印度政府也因此被激怒并加入其中。印度政府向荷兰政府及欧盟提出抗议，称其使用了不公平的贸易手段。由于有 5500 名印度籍雇员及其家属将会成为该印度工厂倒闭的受害者，最后各方都同意一同寻求一项皆大欢喜的解决方案。

这一案例中所涉及的主要难题是：（一）对民间社会组织所提出的诉讼是否是企业应对公众活动和避免声誉受损的有效途径；（二）民间社会组织应在多大程度上调查劳工权利受到侵害案件的真实性；（三）所在国的劳动法在追求可持续国际供应链时应扮演什么样的角色；（四）卷入到与企业社会责任标准有关的争端中是否能导致更合理的企业社会责任实践；及（五）政府在多大程度上能够或者应该要求民间社会组织承担责任？

第 11 章 企业社会责任：水资源的可持续利用

淡水资源短缺的问题已不再仅仅是撒哈拉沙漠以南的发展中国家的问题了；西方国家现在也不能够永远保证无限量的淡水供应。现在有

一种观点认为——并且许多国家的法律也已经确认——获得淡水的权利是一项基本人权。那么如果企业对淡水的使用威胁到了这项人权呢？为了说明这一点，本章引用了一些因企业对水资源管理不善而造成危险的案例。然而，本章研究的重点则是探讨当今企业与淡水资源之间的关系。这项研究指出了一系列针对这一关系而发展出的解决方法以减少企业对淡水资源的使用，并进行了详细的阐述。除了一般的企业社会责任准则之外，一些关于水资源问题的专门报告文书也得到了广泛的关注，如《2007 年度全球水资源工具》（2007 Global Water Tool）以及“‘水的足迹’计算法”（“‘water footprint’ calculation method”）。此外，已经有 20 家荷兰的跨国企业正在使用一种“快速扫描”分析法以帮助其水资源战略获得更加具体的信息。其它各种创新的实践也在本章中所探讨。本章指出企业有意愿承担其对水资源造成影响的责任；尤其是当它影响淡到水资源匮乏或（以及）弱势政府所在的地区的公众获取水资源的权利之时，这一责任显得尤为重要。这项研究揭示了企业社会责任所发挥的积极影响：一方面，企业在研究与发展对水资源的可持续利用上的进步；另一方面，企业发展绿色产品和绿色生产方式整在成为一种新的趋势。

第 12 章 把企业对生物多样性和生态系统的影响以及对其的依赖性及纳入投资决定当中

本章分析了机构投资者（可以）在多大程度上以及如何关注企业对生物多样性和生态系统所提供服务（biodiversity and ecosystem services，BES）的表现，并将其纳入投资决策过程之中（地球（Planet）和环境（Environmental）的角度——ESG 的一个因素）。

生物多样性代表了各种各样形式的生命形态，而生态系统则维持了生物多样性。生物多样性是维系单个生命体以及整个生态系统的基础；我们一切的一切都依赖着它们，企业也不例外。

企业与环境有关的活动不光会影响到其财务状况，同时也会对其声誉产生影响。除此之外，投资者也需要考虑企业对生态系统的依赖性——比如天然产品（如食物、木材）、淡水、耕地、甚至蜜蜂的授粉——所有会因现在的环境危机而受到威胁的因素。这一依赖性意味着企业可

能会面临其经营无法继续或者成本暴增的风险。投资者应该被告知企业与 BES 之间的关系，以作为他们在作出投资决策时的参考。

这项研究的重点是与企业以和 BES 有关的“信息产品”。研究表明 ESG 评级机构正在探讨如何创造这样的产品，并希望出售给机构投资者。机构投资者购买这种产品的意识也正在觉醒。然而总体而言，这个市场目前不成熟。该研究确定了这个市场也可以被认为是“障碍”的 9 个特点，而这也解释了为什么这个市场没有达到其应有的潜力。当然也由于新的产品有待开发，这些特点也可以被视为是 ESG 评级机构的商机。由于这些特点是相互联系的，据估计，资产所有者、资产管理者、ESG 评级机构、企业、非政府组织以及各国政府之间在发展 BES 相关市场的上合作行动有待进一步加强。

本章的最后一部分特别着重在分析改变多方利益相关者关系的进程上。现在的问题是如何使这一进程能够由外部干预而被引发。这里对相关的理论框架进行了讨论，并在一次作为这项研究后续工作的研讨会上提出了相关方法论。这次研讨会的目的是激励参与者主动的追寻企业与生物多样性之间（影响以及被依赖的关系）的信息交换。这次研讨会使用的方法包括动态研究、系统思维以及变革管理。本案例研究展示了启动了一个多方利益相关者合作进程的复杂性。

第 13 章　民间投资与生物多样性和生态系统的保护

投资者可以为自然保护做出贡献，也可以从得到保护的自然中获取利润。其中一个对其贡献并从中获利的方法是投资于生物多样性的保护。对 BES 市场的投资是一个很好的决定。本章介绍了有关 BES 的新市场以及对 BES 投资机会的研究结果。BES 相关市场既提供了很好的投资机会，对其投资的同时又可以对环境保护做出贡献。研究表明新兴的 BES 市场可以划分为如下大类：（1）可持续发展的林业；（2）包括自然湿地保护以及生物多样性补偿计划在内的环境保护；（3）生态旅游；（4）流域管理；（5）通过农业和 REDD（减少因砍伐森林和森林退化而引起的过度排放）项目进行的碳封存活动。许多 BES 投资基金已经开始重组为私募基金。他们经常与地方当局和当地非政府组织以公私伙伴关系的

方式（PPP）进行合作。在对 BES 市场以及 BES 基金的分析中，一些阻碍大部分投资者充分参与到这一进程中的壁垒和障碍被明确的提出。

该研究显示，投资者对投资 BES 的现有方案都有不全面的了解。其次，在一个更基本的层面上，缺乏对商业和生态系统之间的关系以及依赖性的了解。大多数投资者在做出其投资决定的时候没有考虑到生态系统退化以及物种的丧失是与“一般的”商业活动有直接联系的，也没有意识到大多数投资的长期盈利能力取决于一个健康的生态系统。

Название: Корпоративная социальная ответственность

Разделы:
- правовая и квази-правовая области применения КСО
- совершенствование концепции 2000-2010 и примеры практического применения

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Введение

Корпоративная социальная ответственность (КСО) стремительно завоевывает устойчивые позиции в коммерческой деятельности. В течение последних десяти лет многие коммерческие организации разработали и применяют на практике стратегии «Планета, Люди, Прибыль». Правительства и гражданские общества призывают частных лиц участвовать в решении проблем и устранении трудностей, встающих на пути глобального управления. Предлагаемое исследование затрагивает правовые аспекты корпоративной социальной ответственности и, кроме того, автор на особо значимых примерах оценивает особенности примения КСО. Работа охватывает 10-летний период совершенствования норм КСО с 2000 по 2010 годы.

Введение и первые главы посвящены предпосылкам глобализации, связанным с устойчивым развитием, определению роли КСО и сравнению данной концепции с корпоративным управлением.

Часть первая содержит обзор и критический анализ правовой и квази-правовой областей применения КСО. Предлагаемая информация должна помочь компаниям в превращении их в социально ответственных участников рынка. В качестве примера внедрения социальной ответственности можно привести утверждение компанией собственной политики КСО, ежегодную отчетность по вопросам КСО, становление собственной анти-коррупционной программы в целях поддержки собственных контролирующих процессов, включение оценки соблюдения прав человека в рамки процедур дью-дилидженс, использование внутренних нормативов и обозначений устойчивого развития, а также предоставление информации для потребителей.

Вторая часть книги посвящена пяти примерам практического применения КСО. Два из предлагаемых примеров – это конфликтные ситуации, касающиеся применения коммерческими организациями принципов КСО (один из примеров рассказывает о нефтедобывающей компании в Нигерии, второй взят из сферы текстильной промышленности в Индии и Нидерландах). Три других ситуации включают в себя соответственно распределение водных ресурсов в коммерческой деятельности, проблемы биологического разнообразия, затрагивающие фондовый рынок и, наконец, вопросы инвестиций в природу.

Тинеке Ламбой изучала конституционное, административное и международное право в Нидерландах и американское корпоративное и налоговое право в США. По завершению основного образования, автор прошла дополнительный курс по корпоративному и коммерческому праву в Академии Гуго Гроция в Нидерландах. Начала практическую деятельность в качестве корпоративного юриста в одной из международных юридических фирм. В настоящее время работает в Утрехтском университете и университете Найенроде (Нидерланды).

Обзор и выдержки из книги

Глава 1. Введение

Данная глава определяет параметры исследования. Вопросы, которые поставил перед собой автор, в основном касаются политики компаний в рамках устойчивой глобализации. Международные организации, правительства, гражданское общество и компании имеют возможность участвовать в процессах глобализации. В основе принципа корпоративной ответственности лежит утверждение, что мультинациональные компании принимают на себя ответственность перед обществом при осуществлении своей деятельности. Данные о проводимой ими политике и корпоративном поведении должны быть доступны широкой общественности для того, чтобы обеспечить возможности по возложению гражданским обществом ответственности на участников бизнес индустрии. Достижение акционерами компании соглашений путем переговоров и медиации без привлечения судебных органов также может рассматриваться как ответственное корпоративное поведение.

Автор раскрывает как правительства стран содействуют практике применения КСО путем принятия законодательных актов, а международные организации и представители гражданского общества путем кодификации этических норм и ценностей. В качестве примеров указываются Хартия Земли, Руководства по отчетности в области устойчивого развития (G3), разработанного международной организацией «Глобальная инициатива по отчетности», кодексы поведения, разработанные совместно ООН и Организацией экономического сотрудничества и развития (ОЭСР). Последние 10 лет КСО все чаще применяется на практике участниками коммерческой деятельности. Компаниями были разработаны, в частности, проекты, связанные с рациональным водоиспользованием, были сформулированы кодексы корпоративного поведения в области промышленности, условные экологические обозначения. В рамках сотрудничества с представителями гражданского общества и в целях

выполнения Декларации тысячелетия, ряд коммерческих организаций утвердил анти-коррупционные программы и содействовал реализации проектов в форме публично-частных партнерств.

В первой главе указывается, что КСО применяется в рамках определенных правовых и квази-правовых концепций, таких как корпоративное управление, ежегодная отчетность, внутренний контроль, информационные системы управления, частное регулирование, комплексные юридические проверки, предоставление информации потребителям. Подчеркивается, что использование подобных методов способствует внедрению принципов КСО, однако не освобождает участников рынка от более активного применения норм КСО на практике. Автор предлагает доказательства того, что внедрение норм корпоративной ответственности в практическую деятельность компании способствует укреплению ее позиции на рынке различными путями: через уменьшение производственных рисков и получение доступа на новые рынки продуктов и услуг. В целом, следование нормам КСО способствует выполнению условий предоставления лицензии, так как компании вынуждены поддерживать тесные связи с обществом, в котором они функционируют.

Глава 2. Корпоративная социальная ответственность и вопросы корпоративного управления

В чем-то схожие между собой КСО и корпоративное управление являются областями международного развития, привлекающими значительное внимание. Обе концепции затрагивают корпоративное поведение и внутреннее управление крупных, в основном международных, компаний. Участники международного рынка вынуждены учитывать этические нормы и деятельность по интеграции в своей каждодневной деятельности.

Во второй главе представлен анализ совершенствования норм КСО и корпоративного управления. Несмотря на

некоторую схожесть, данные концепции демонстрируют различные подходы к ключевым аспектам, таким как основополагающие принципы и цели, основоположники и заинтересованные стороны, направления действий, характеристика сформулированных задач, факультативных и обязательных к применению стандартов.

Кодифицированные правила являются инструментами КСО и корпоративного управления. В целях стимулирования позитивного коропоративного поведения была усилена ответственность компаний и их руководства. Кроме того, нормы корпоративного управления требуют от компаний предоставить объяснение причин, по которым правила, определенные кодексами корпоративного поведения не были исполнены. Попытки усиления обеспечения корпоративной информационной открытости также объясняются необходимостью предоставления заинтересованным сторонам объективной информации, с помощью которой они самостоятельно смогут определить, сооветствует ли корпоративное поведение компании этическим нормам и стандартам корпоративного управления. В случае сомнений, заинтересованные стороны смогут воспользоваться предоставленной информацией для дальнейшего оспаривания действий компаний. Все большее значение придается возможностям переговоров между компаниями и заинтересованными лицами. В случаях когда переговорные инструменты не помогают в решении возникшей проблемы, судебные процедуры могут быть инициированы заинтересованными лицами в целях возмещений убытков и принуждения компаний к соблюдению норм должного корпоративного поведения.

В силу того, что нормы КСО и корпоративного управления все еще не включены повсеместно в законодательство, обоснование требований, основанных на этих нормах в суде повлечет за собой известные трудности. Интерпретация диспозитивной нормы требует от суда принять во внимание существующие в обществе нормы поведения. Вместе с тем вероятнее всего, нормам корпоративного

поведения, регулируемым на законодательном уровне и утвержденным внутри компании, будет придан судом больший вес, чем нормам кодекса корпоративного поведения, которому компания следует на добровольной основе.

Часть 1. Правовые и квази-правовые сферы применения КСО

Глава 3. Кодификация КСО актах корпоративного управления. Новые тенденции на примере голландской модели

На фоне текущего экномического кризиса и принимая во внимание необходимость учета компаниями норм ответственного бизнес поведения, автор рассматривает новый голландский Кодекс корпоративного управления, вступивший в силу в 2009 г, который закрепил и кодифицировал нормы КСО. Социальная ответственность содействует долгосрочным бизнес планам, интернализации внешних издержек, усилению ответственности за корпоративное поведение, сближению интересов акционеров, осведомленности о факторах окружающей среды, управления и общественных факторах. Автор поднимает вопросы исторического обоснования и содержания новых положений голландского Кодекса корпоративного управления и соответствующих дополнений в корпоративное законодательство.

Одна из глубоко затрагиваемых проблем касается решения гендерного вопроса при формировании управленческих органов компаний. Кроме того, автор задается вопросом, могут ли корпоративные инвесторы играть более значимую роль в реализации принципов КСО. В главе проводится сравнение отчетов, выполненных «Eumedion» и фирмой Фрешфилдс Брукхаус Дерингер для Финансовой Инициативы Программы ООН по окружающей среде (*UNEP FI*). Автор оценивает представленные в этих двух отчетах указания и рекомендации по учету факторов окружающей среды, управления и общественных факторов в инвестиционных процесах и дает оценку соответствующим нормам голландского Кодекса.

Глава 4. Ежегодная отчетность и доступность информации о КСО

С 2003 г. в законодательство стран-участников ЕС входят положения Модернизационной директивы,[1] которая регулирует помимо прочего стандарты предоставления ежегодной отчестности крупнейших европейских компаний. Один из стандартов включает в себя положения касающиеся предоставления информации о нефинансовых аспектах деятельности, таких как обусловленные мультинациональным бизнесом вопросы защиты окружающей среды и вопросы, касающиеся трудовых ресурсов. Европейский Парламент зачастую поднимает вопросы о совершенствовании положений социальной ответственности. Потребители, банки и инвесторы полагают желательным доступ к информации о корпоративном поведении компаний.

Краткий обзор поданных в 2006 году отчетов крупнейших нидерландских компаний, котирующихся на Euronext, показал, что большинство из этих компаний включает в ежегодные отчеты сведения, касающиеся труда и защиты окружающей среды. Однако, хотя компании с легкостью обеспечивают доступ к информации, касающейся трудовых ресурсов, в тоже время они затрудняются предоставить четкую и существенную информацию о других нефинансовых аспектах своей деятельности.

Автор указывает, что ряд ведущих мультинациональных компаний добровольно готовит социальные копоративные ежегодные отчеты с учетом Руководства по отчетности в области устойчивого развития (*GRI*). Подобная отчетность затрагивает вопросы защиты окружающей среды, социальные и этические аспекты коммерческой деятельности.

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[1] Directive 2003/51/EC of the European Parliament and of the Council of 18 June 2003 amending Directives 78/660/EEC of the annual and consolidated accounts of certain types of companies, banks and other financial institutions and insurance undertakings.

Глава 5. Коррупция и корпоративное управление: соблюдение норм КСО требует внедрения анти-коррупционных программ

Коррупция является основным препятствием к достижению поставленных общественных целей. Кроме того, коррупция оказывает значительное влияние на частный бизнес путем деформирования конкуренции и увеличения издержек. Коррупция – явление, включающее двух участников: того, кто предлагает взятку, и того, кто ее берет. В то время как чиновники традиционно относятся к берущей стороне, представители бизнеса обычно предлагают взятки. В течение нескольких последних лет был принят целый ряд анти-коррупционных законов и конвенций, регламентирующих частный бизнес. Нарушения данных актов могут повлечь за собой уголовное преследование, высокие штрафы и даже персональную ответственность руководства компаний. Вред репутации и утрата возможностей по развитию бизнеса дополняют картину возможного ущерба компании вследствие коррупционного скандала.

Эффективность системы внутреннего контроля компаний подрывается, если денежные средства компании используются персоналом для дачи взяток. Так как подобные расходы по определению не учитываются в бухгалтерской отчетности, то результаты финансовой отчетности изначально неверны. Как следствие, руководство компании утрачивает возможности по осуществлению внутрихозяйственного контроля, что и является примером неэффективного корпоративного управления. Тем не менее, коррупцию возможно предотвратить путем использования внутренних анти-коррупционных мер. В данной главе автор указывает, что эффективное управление компанией означает наличие во внутренней системе управления программ, предусматривающих подобные меры.

Все более частое применение норм корпоративной ответственности способствует укреплению ожиданий, связанных с доступностью информации о бизнес поведении и

уменьшению коррупции, которые предъявляются компаниям правительствами и гражданским обществом. Реализованы эти ожидания могут быть через предоставление открытого доступа к информации о программах и мерах, которые компания применяет в рамках борьбы с коррупцией. Следующим шагом стало бы участие в общественных проектах в целях привлечения внимания участников международного бизнеса к наилучшим способам борьбы с коррупцией и демонстрации собственных намерений по ведению честной игры.

Автор доказывает, что участники международного рынка должны принимать во внимание высокую возможность коррупционных рисков и выиграют от принятия участия в их устранении. Результаты исследования, предложенные в этой главе, сфокусированы на позиции компаний в анти-коррупционных программах и управленческих инструментах, используемых в данных программах.

Глава 6. Определение стандартов частного регулирования

Является ли внутреннее факультативное регулирование бизнес поведения мультинациональных компаний более эффективным по сравнению с государственным регулированием? Вопрос звучит вполне уместно, учитывая рост в геометрической прогрессии количества внутренних факультативных нормативных актов, направленных на регулирование корпоративного поведения. Причиной столь активного роста является активное освоение новых рынков.

В 6 главе автор, с учетом существующих международных факультативных регламентов, определяет и анализирует основные элементы внктреннего регулирования, которые могут повлиять на реализацию предусмотренных в них норм. Среди таких элементов: качество, законность, применение и эффективность. Именно эти элементы являются частью трех факультативных регламентов, эффективность которых была отмечена Европейским Парламентом (Десять принципов Глобального договора, Руководства по отчетности в

области глобального развития, руководства ОЭСР для межнациональных корпораций).

Рассматривая эти нормативные документы, автор отмечает как встречающиеся в публичных нормативных актах, принятых в области регулирования КСО, отсылки к внутренним регламентам, так и связь между факультативным регулированием и исполнением традиционных правовых норм. Автор устанавливает в своем исследовании, укрепляет ли или ослабляет факультативное регулирование систему публичного нормотворчества. Кроме того, уроки недавнего экономического кризиса вынуждают задаться вопросом: возможно ли доверить регулирование жизненно важных отношений частным лицам.

Глава 7. Процедуры дью-дилидженс как средство защиты прав человека

Данная глава посвящена описанию условий, при которых вопросы защиты прав человека могут быть включены в задачи дью-дилидженс. Глава описывает подход, предложенный профессором Джоном Рагги, специальным представителем ООН по вопросам бизнеса и прав человека. Предложенная им концепция включает в себя обязательство компаний “руководствоваться принципами корпоративной ответственности в целях защиты прав человека”, т.е. действовать в рамках коммерческой деятельности с осмотрительностью, которая позволит избежать нарушения прав третьих лиц.

В этой части исследования автор поднимает вопросы происхождения прав человека и корпоративных прав и принципы применения процедур дью-дилидженс. Таким образом, автор обсуждает возможности применения дью-дилидженс в рамках подхода Рагги, выявляет проблемные вопросы и предлагает конкретные сценарии по применению результатов данной части исследования в коммерческих операциях.

Глава 8. Знать или не знать? Право потребителя на информацию в рамках регламента «РИЧ»[2] и иных законодательных актов, принятых в рамках ЕС

В главе рассматривается право на получение потребителями информации с учетом норм регламента ЕС «РИЧ» и ряда иных нормативных актов ЕС, обязывающих производителей доводить до потребителей информацию о содержании определенных химических веществ в продукте.

Автор анализирует также ряд иных нормативных актов ЕС регулирующих отношения в сфере доступа к информации. Этот вопрос также стоит на повестке дня обсуждений, которые ведутся в политическом сообществе Нидерландов. В настоящее время Трудовая партия Нидерландов, учитывая необходимость внедрения норм корпоративной социальной ответственности, занимается подготовкой законопроекта, призванного регулировать обязательства компаний по предоставлению информации.

В 8 главе автор поднимает следующие вопросы: 1) какие права потребителей и работников, связанные с получением информации, регулируются регламентами «РИЧ»? 2) какие иные нормативные акты направленные на регулирование права на получение информации приняты в рамках ЕС? 3) вправе ли потребитель требовать предоставления информации о следовании производителя нормам корпоративной ответственности? 4) обязаны ли производители предоставлять такую информацию? 5) как реализуются на практике нормы, регулирующие защиту этих прав?

Часть 2. Примеры практического применения КСО

Глава 9. «Шелл» в Нигерии: от нарушений прав человека к корпоративной социальной ответственности

[2] Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH).

После казни Кена Саро-Вивы, нигерийского активиста, основателя и лидера Движения за освобождения народа огони, ряд судебных исков был подан к компании «Шелл», ее дочерним структурам и правительству Нигерии. Иски основывались на фактах нарушения прав человека и ущербе, причиненном в рамках деятельности компании по добыче нефти.

В данной главе представлен анализ основных судебных решений, принятых по аналогичным делам, и сложностей, с которыми сталкиваются истцы, требующие защиты прав, нарушенных мультинациональными корпорациями. При проведении анализа автор учитывает понятие «корпоративной вуали»[3] и неопределенность в вопросе к применению к деятельности корпораций международных норм, защищающих права человека. Автор задается вопросом, могут ли принципы КСО, которые обычно включают в себя защиту прав человека, рассматриваться в качестве альтернативного регулирования, корпоративного поведения нефтедобывающих предприятий в социо-политических ситуациях, подобных той, которая возникла с народом огони.

Глава 10. Примеры практического применения медиации в спорах, вытекающих из социальной ответственности. Применение цепочки обязанностей: западные потребители и индийская текстильная промышленность

В 2008 г. Бывший премьер-министр Нидерландов Рууд Любберс выступил в качестве медиатора в процессе разрешения конфликта возникшего между двумя голландскими агитационными компаниями, различными индийскими негосударственными организациями и профсоюзами, двумя

[3] Термин, который ссылается на тот факт, что акционеры компании не несут ответственности за долги компании, а также пользуются иммунитетом от судебных исков в отношении договоров и т.д

голландскими Интернет-провайдерами, индийским предприятием по пошиву одежды и голландским производителем джинсов. Медиационные процедуры были инициированы по запросу конфликтующих сторон, а также правительств Нидерландов и Индии.

К спору, имеющему отношение к применению стандартов КСО, подключились предприятия текстильной промышленности. Кроме того, спор также касался методов коммуникации по данным вопросам между агитационными компаниями и негосударственными организациями. Агитация против индийских производителей джинсов и их западных потребителей практически довели индийскую компанию до банкротства. Для защиты нарушенных прав, индийская компания обратилась с рядом исков к голландским и индийским общественным организациям, что и послужило причиной новой волны агитации в сети Интернет.

Индийское правительство возмущенное тем фактом, что часть общественных организаций финансировалась Нидерландами обратилось к европейским и голландским властям с заявлением о осуществлении недобросовестной конкуренции. В результате только угроза влияния закрытия фабрик на положение более 5500 рабочих и членов их семей привела к вынужденному поиску всеми участниками конфликта путей его разрешения.

Данный пример поднимает следующие проблемные вопросы: 1) является ли обращение с иском в суд эффективном средством, способствующим возмещению репутационного вреда и защите от публичных кампаний? 2) каковы пределы полномочий общественных организаций в расследований нарушений трудовых прав; 3) какова роль внутреннего трудового права в поддержании устойчивых рынков сбыта; 4) ведут ли споры в сфере применения стандартов КСО к улучшению практики ее применения; 5) каковы пределы возложения правительствами ответственности на общественные организации.

Глава 11. Корпоративная социальная ответственность: рациональное водоиспользование

Нехватка свежей воды теперь не рассматривается исключительно как проблема исключительно развивающихся стран, расположенных в регионе пустыни Сахары. Также и в западном обществе больше нет уверенности относительно безграничных запасов воды. Существует утверждение, закрепленное во многих национальных правовых системах, что право на доступ к свежей воде – это одно из основополагающих прав человека. Что происходит, когда использование свежей воды в промышленных целях препятствует осуществлению этого права? В целях иллюстрации подобных примеров, данная глава анализирует ряд примеров нерационального использования компаниями водных ресурсов.

Однако главным образом эта часть исследования фокусируется на роли современного бизнеса в сфере водоиспользовании. В результате исследования были выявлены инструменты, созданные для уменьшения промышленного использования свежей воды. В соответствии с основными руководствами по отчетности, специализированные формы отчетности были разработаны, такие как глобальный «водный след» и Глобальный водный договор 2007.

Помимо прочего, в целях получения информации, автором было проведено исследование стратегий промышленного водоиспользования, применяемого 20 голландскими корпорациями. Особое внимание автора было обращено на инновационные внедрения. Автор указывает, что корпорации самостоятельно несут ответственность за рациональное использование водных ресурсов, особенно в странах, страдающих от недостатка воды и/или имеющих слабое правительство.

Заслугой автора является то, что в первую очередь исследование раскрывает неизученные вопросы корпоративных исследований и совершенствования рационального и экологически обоснованного водоиспользования, а во вторую

выявляет стремление компаний к производству экологичной продукции в условиях экологичного производства.

Глава 12. Корпоративные слияния, биоразнообразие и услуги экосистем. Их влияние на инвестиционные процессы

В данной главе автор анализирует способы оценки инвесторами деятельность компании по критерию отношения компании к биоразнообразию и услуг экосистем. Основное внимание инвесторы обращают на учет в инвестиционном процессе корпораций таких факторов, как факторов окружающей среды, управления и общественных факторов.

Биоразнообразие - разнообразие жизни во всех ее проявлениях. Функция экосистем - поддерживать биоразнообразие. Существование каждого живого организма зависит от биоразнообразия, а экосистемы, в свою очередь, являются основой жизни на земле. Мы все зависим от экосистем и бизнес не является здесь исключением.

Влияние деятельности компании на окружающую среду может послужить причиной негативных последствий с точки зрения финансового положения компании и ее репутации. Помимо последствий для окружающей среды, оценивая деятельность компании, инвестор принимает во внимание зависимость производственного цикла компании от услуг экосистем, к которым относятся использование натуральных ресурсов (древесина, продукты питания), вода, плодородные почвы, процессы опыления пчелами, т.е. все то, что находится под угрозой уничтожения. Подобная зависимость указывает на возможность либо полного остановления производства, либо резкого увеличения издержек. Именно поэтому для инвестора в рамках оценки инвестиционного пакета, совершенно необходимы сведения о включении в вопросы производства проблем биоразвития и экосистем.

Исследование посвящено распространению так называемого «информационного продукта», относящегося к взаимоотношениям участников рынка и биоразнообразию. Результаты исследования показывают, что агентства по

рейтингу факторов окружающей среды, управления и общественных факторов заняты поиском создания и распространения «информационного продукта» между основными инвесторами. В свою очередь, инвесторы демонстрируют серьезный интерес к подобного рода информации. Тем не менее, рынок распространения информации все еще остается неразвитым. Автор указывает на 9 характеристик рынка, которые также считаются «барьерами», которые служат причинами неразвитости рынка. В тоже время, эти характеристики могут быть использованы рейтинговыми агентствами для создания условий по развитию новых “информационных продуктов”. В связи с тем, что перечисленные характеристики независимы друг от друга, автор полагает, что дальнейшее развитие рынка требует тесного взаимодействия между инвесторами, управляющими компаниями, рейтинговыми агентствами, корпорациями, правительствами и негосударственнми организациями.

В завершение, автор останавливается на обменных процессах между основными акционерами. В частности, автор задается вопросом, насколько такие процессы могут быть спровоцированы внешними факторами? В этой части главы можно ознакомиться с соответствуюшим теоретическим обоснованием подобных процессов.

Кроме того, автор методологически анализирует результаты семинара, который был организован по завершению проводимого в данной области исследования. Семинар был направлен на обмен информации между участниками о взаимоотношении деятельности компании и биоразнообразия. При проведении семинара были использованы результаты активных исследований, позиции специалистов по управлению обменными процессами. Приводимые примеры показывают всю сложность начала сотрудничества между участниками рынка.

Глава 13. Частные инвестиции в сохранение биоразнообразия и экосистем

Частные инвестиции в защиту окружающей среды не только крайне важны для поддержания экологического баланса, но и могут приносить дивиденты инвесторам. Лучший способ защитить биоразнообразие – это инвестиции. На текущий момент инвестирование в экосистемы - это незанятая доля рынка.

В последней главе автор публикует результаты исследования экорынков и инвестиций в них. В рамках этих исследований показаны возможные пути вложений, которые в свою очередь, способствуют сохранению окружающей среды.

Автор приводит следующую классификацию экорыков: 1) экологическое лесоводство; 2) сохранение природных зон, включая осушение заболоченных участков и офсетных программ; 3) экотуризм; 4) управление водными ресурсами; 5) депонирование углерода путем внедрения сельскохозяйственных программ и РЕДД (концепции сокращения выбросов от обезлесения и деградации лесов).

Большая часть финансирования экорынков осуществляется за счет частных ивнстиционных фондов. Взаимодействие подобных фондов с правительствами и негосударственными организациями часто осуществляется в форме пулично-частных партнерств. Исследование было направлено в том числе и на выявление препятствий к осуществлению доминирующих инвесторов в финансировании экорынков и создании частных фондов направленных на инвестиции в экологию.

Автор указывает на то, что в настоящее время инвесторы не обладают всей полнотой информации, касательно финансирования экорынков. Кроме того, более серьезной причиной является отсутствие связей и взаимодействия бизнеса и экосистем. При принятии решений инвесторы не учитывают ни тот факт, что разрушение экосистем и уничтожение живых видов напрямую влияют на возможность корпораций осуществлять свою деятельность, ни то, что возможность долговременного получения прибыли от бизнес инвестиций напрямую зависит от наличия неразрушенных экосистем.

العنوان: المسؤولية الاجتماعية للشركات

العناوين الفرعية

- **الأطر القانونية والشبه قانونية الداعمة للمسؤولية الاجتماعية للشركات**
- **التطورات 2000 – 2010 ودراسات الحالة**

المؤلف: تانيك إليزابث لامبوي

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نظرة عامة على الملخصات

مقدمة

اكتسبت المسؤولية الاجتماعية للشركات بسرعة موطئ قدم في مجال الأعمال التجارية، وفي العقد الأخير، قامت شركات عديدة بتطوير استراتيجيات "الكوكب، الشعب، الربح" وقامت بتطبيقها عملياً. دعت الحكومات والمجتمع المحلي أطراف فاعلة خاصة للمساهمة في حل المعضلات والصعوبات الخاصة بالحوكمة العالمية. يركز هذا الكتاب في المقام الأول على النواحي القانونية الخاصة بالمسؤولية الاجتماعية للشركات إلا أنه يتناول كذلك المسؤولية الاجتماعية للشركات في المنظور الأشمل لتقييم أفضل الممارسات. يتناول هذا الكتاب بالتفصيل التطورات الدولية في هذا المجال خلال العقد 2000-2010.

ترسم الفصول التمهيدية خلفية العولمة المتعلقة بالتنمية المستدامة، وبالتالي تحديد دور المسؤولية الاجتماعية للشركات ومقارنته بحوكمة الشركات.

يعرض الجزء 1 من الكتاب نظرة عامة ومناقشة عن الأطر القانونية وشبه القانونية التي يمكن أن تساعد منظمة تجارية في سياق أن تصبح شركة مسؤولة اجتماعياً. أمثلة على ذلك إضفاء الطابع المؤسسي للمسؤولية الاجتماعية للشركات في قانون حوكمة الشركات وإعداد التقارير السنوية عن المسؤولية الاجتماعية للشركات وإعداد برنامج لمكافحة الفساد لدعم عملية المراقبة الداخلية وجعل تقييمات أثر حقوق الإنسان جزءاً من استقصاءات العناية الواجبة للشركات والاستفادة من التنظيم الخاص وعلامات الاستدامة وتقديم معلومات عن منتج للمستهلكين.

يحتوي الجزء 2 على خمس دراسات حالة تظهر كيفية عمل المسؤولية الاجتماعية للشركات بشكل عملي. تركز اثنتان منهم على حالات النزاع فيما يتعلق بممارسات المسؤولية الاجتماعية للشركات (أحدهما يتعلق بصناعة النفط في نيجيريا والآخر يرتبط بصناعة النسيج في الهند وهولندا). تركز دراسات الحالة الثلاث الأخرى على التوالي على إدارة المياه من قبل الشركات والاهتمامات بالتنوع الحيوي لسوق رأس المال وكيفية استثماره في الطبيعة.

قامت تانيك لامبوي بدراسة القانون الدستوري والإداري والقانون الدولي في هولندا وقانون الشركات والضرائب الأمريكي في الولايات المتحدة الأميركية وتابعت الدراسة العليا في قانون الشركات والقانون التجاري في أكاديمية غروتيوس في هولندا. وبدأت عملها كمحامي شركات في إحدى شركات القانون الدولي في هولندا. وتشغل في الوقت الحاضر مناصب في جامعة Utrecht وجامعة Nyenrode.

الفصل 1 مقدمة

يبين هذا الفصل علامات الدراسة المتضمنة في هذا الكتاب. تركز الدراسة على وضع الشركات في إدراك العولمة المستدامة. ووفقاً للمنظمات العالمية والحكومات والمجتمع المدني والشركات، يمكن للمسؤولية الاجتماعية للشركات المساهمة في العولمة المستدامة. يتبنى مفهوم المسؤولية الاجتماعية للشركات فكرة مفادها أن الشركات متعددة الجنسيات ينبغي عليها العمل بطريقة مسؤولة اجتماعياً وأنه ينبغي عليها التقرير علناً بشأن السياسات والسلوك الخاص بها لضمان أنه إمكانية محاسبتها من قبل المجتمع المدني. ويمكن كذلك اعتبار انخراط أصحاب المصالح والوساطة بدلاً من التقاضي كجزء من سلوك الأعمال المسؤول.

يوضح هذا الفصل أنه تم تعزيز المسؤولية الاجتماعية للشركات من قبل الحكومات عن طريق التشريع ومن قبل المنظمات الدولية والمجتمع المدني عن طريق تقديم قوانين تشتمل على قواعد وقيم أخلاقية، ومثال على ذلك، وثيقة المجتمع المدني – ميثاق الأرض وإرشادات إعداد تقارير الاستدامة الخاصة بالمبادرة العالمية لإعداد التقارير (GRI G3) وقواعد السلوك التي تم إصدارها من قبل الأمم المتحدة ومن قبل منظمة التعاون والتنمية الاقتصادية (OECD) كما وساهمت الشركات بنفسها بشكل إيجابي في قبول المسؤولية الاجتماعية للشركات خلال العقد الأخير، ولقد قامت بوضع طموحات ملموسة تعنى على سبيل المثال بالاستخدام المستدام للمياه، واتفقت على قواعد السلوك الخاصة بالصناعة وعلامات الاستدامة، بالتعاون في أغلب الأحيان مع ممثلي المجتمع المدني، قد قامت بتنفيذ برامج لمكافحة الفساد في منظماتهم وبتأسيس شراكات عامة – خاصة (PPP) للمساهمة في الأهداف الإنمائية للألفية (MDG).

تتم الإشارة في هذا الفصل إلى أن المسؤولية الاجتماعية للشركات تعتمد على وتتفاعل مع أطر قانونية وشبه قانونية معينة، مثل حوكمة الشركات وإعداد التقارير السنوية والمراقبة الداخلية ونظم المعلومات الإدارية والنظام الخاص وتقييمات العناية الواجبة وتقديم معلومات تُعنى بالمنتجات. يؤكد المؤلف أن هذه الأطر يمكن أن تدعم المسؤولية الاجتماعية للشركات، إلا أن على الشركات استخدامها بشكل فعال. وثمة جدل حول انه إذا قامت بذلك، فإن إدراج المسؤولية الاجتماعية للشركات في الممارسات العادية الخاصة بها سيعمل على تعزيز وضع الأعمال الخاصة بها بعدة طرق: من إدارة المخاطر بطريقة أكثر شمولية حتى امتلاك إمكانية الوصول بشكل مبكر لمنتج جديد وأسواق الخدمات. وفيما يتعلق بالمستوى الأساسي، ستعمل المسؤولية الاجتماعية للشركات على

المساعدة في حماية الرخص الخاصة بها للعمل وذلك لأنها تشجع الشركات على الانخراط بقوة مع المجتمعات التي تعمل فيها.

الفصل 2 المسؤولية الاجتماعية للشركات ومسائل حوكمة الشركات

تعتبر المسؤولية الاجتماعية للشركات وحوكمة الشركات تطورات دولية تجذب الاهتمام الكبير في حين التقاسم بخصائص مشتركة. ويكون كلا التطورين معنياً بالسلوك والإدارة الداخلية الخاصة بالشركات الكبيرة، التي غالباً ما تكون دولية. وقد تم حث مجتمع الأعمال الدولي للعمل على إدماج الوعي الأخلاقي وممارسات السلامة في الأعمال اليومية الخاصة به.

يقدم هذا الفصل تحليلاً عن التطورات في مجال المسؤولية الاجتماعية للشركات وحوكمة الشركات. وتتم مقارنة هذين المفهومين مع بعضهما البعض بناء على مسائل أساسية مثل الأسباب والأهداف الخاصة بهما وأصحاب المبادرة والأطراف المهتمة والمبادرات التي تم اتخاذها ومواصفات الأهداف والمعايير الطوعية مقابل الإجبارية والفروقات والمتوازيات.

تعتبر قواعد السلوك فعالة بالنسبة للمسؤولية الاجتماعية للشركات وحوكمة الشركات. وبغية تحفيز حسن السلوك للشركات، ازدادت مساءلة الشركات وأعضاء مجلس الإدارة. وبالإضافة إلى ذلك، يقتضي التقيد بمعايير حوكمة الشركات أن تقوم الشركات بتقديم أسباب للحد من قوانين حوكمة الشركات. وقد تم كذلك زيادة شفافية الشركات بغرض تقديم معلومات كافية للأطراف المهتمة مما يسمح لها بالحكم على ما إذا كانت شركة ما قد تصرفت بشكل أخلاقي أم لا ووفقاً لمعايير حوكمة الشركات. إذا ساورت الأطراف المهتمة شكوكاً حول ذلك، فإن المعلومات التي تم تقديمها قد تكون بمثابة نقطة انطلاق لتناول المسألة مع الشركة المعنية. وقد سأصبح التواصل بين الشركات والأطراف المهتمة أكثر أهمية من أي وقت مضى. وإذا لم يكن بالإمكان حل المسألة عن طريق التواصل، فإنه يجوز للأطراف المهتمة البدء بإجراءات قانونية لفرض وجهة نظرهم المتعلقة بحسن السلوك أو المطالبة بالأضرار.

لم يتم حتى الآن تطور المسؤولية الاجتماعية للشركات وحوكمة الشركات إلى قواعد قانونية صارمة ولأجل ذلك الغرض سيكون من الصعب على الأطراف المهتمة فرض وجهة نظرهم بنجاح فيما يتعلق بحسن السلوك الخاص بالشركات أمام المحكمة. ويمكن للقاضي الأخذ بعين الاعتبار قواعد السلوك والتطورات في المجتمع عند تفسير القواعد القانونية المفتوحة. من المرجح أن مدونة لقواعد السلوك تم ترسيخها في القانون

وأقرتها الشركة في تقريرها السنوي، سيتم إيلائها اهتماماً أكبر من قبل أحد القضاة أكثر من مدونة لقواعد السلوك تم ترسيخها أو اعتمادها من قبل شركة على أساس طوعي.

الجزء 1: الأطر القانونية والشبه قانونية الداعمة للمسؤولية الاجتماعية للشركات

الفصل 3 إضفاء الطابع المؤسسي على المسؤولية الاجتماعية للشركات في قانون حوكمة الشركات. الاتجاه الجديد الخاص بالنموذج الهولندي

بناء على خلفية الأزمة المالية المعاصرة والحاجة إلى انتقال اعتباري نحو ممارسات تجارية أكثر استدامة، يكشف المؤلف الطريقة التي تم فيها مؤخراً إضفاء الطابع المؤسسي على المسؤولية الاجتماعية للشركات في قانون حوكمة الشركات الهولندي، أي، قانون Frijns، الذي أصبح نافذ المفعول في العام 2009. تقوم المسؤولية الاجتماعية للشركات بتعزيز خطط الأعمال طويلة الأمد واستيعاب التكاليف الخارجية والمساءلة أمام سلوك الشركات ومشاركة أصحاب المصالح وشفافية العوامل البيئية الاجتماعية والحوكمة (ESG). يبحث المؤلف خلفية ومحتوى النصوص الجديدة للمسؤولية الاجتماعية للشركات في قانون Frijns والتنقيحات ذات الصلة التي تمت مناقشتها بشكل أكثر عمقاً باعتبارات الجندر في تشكيل المجلس. وعلاوة على ذلك، يطرح المؤلف سؤالاً حول ما إذا كان بإمكان المستثمرين المؤسسين لعب دور أكثر فعالية في تنفيذ المسؤولية الاجتماعية للشركات. وتقوم بمقارنة إلى أي مدى تسمح وتوصي التقارير الهامة التي تم إصدارها من قبل UNEP F1 (التي تم إنتاجها من قبل Freshfields) وEumedion، لاعتبارات ESG للقيام بلعب دور في عملية الاستثمار وتقييم نصوص قانون Frijns ذات الصلة.

الفصل 4 يمكن للتقرير السنوي توفير الشفافية حول المسؤولية الاجتماعية للشركات

تقوم الدول الأعضاء في الاتحاد الأوروبي منذ العام 2003 بتنفيذ نصوص توجيهات التحديث ومن بينها المعايير الجديدة الخاصة بالتقارير السنوية للشركات الكبيرة القائمة في الاتحاد الأوروبي. وتستلزم إحدى المعايير الجديدة، حيثما يكون مناسباً، تقديم المعلومات بشأن المسائل غير المالية مثل المسائل البيئية والمسائل المتعلقة بالموظفين، والمرتبطة بنشاطات الأعمال في شتى أنحاء العالم. وقد قام البرلمان الأوروبي بشكل متكرر بتوجيه الاهتمام السياسي إلى تطور المسؤولية الاجتماعية للشركات. وتبدو الشفافية والممارسات الاعتبارية في الاتحاد الأوروبي وخارجه مرغوباً فيها بالنسبة للمستهلكين والبنوك والمستثمرين المؤسسين.

يظهر مسحاً سريعاً للتقارير السنوية للعام 2006 بخصوص الشركات الكبيرة المدرجة يورونكست المسجلة في هولندا، أن الأغلبية تناولت المسائل البيئية والمسائل المتعلقة بالموظفين في تقاريرها السنوية. مع ذلك، تميل الشركات إلى استحداث المعلومات بشكل أسهل بخصوص المسائل المتعلقة بالموظفين، حيث أنها تفتقد إلى استحداث المعلومات الأساسية والواضحة بشأن مجالات أخرى غير مالية.

يشير المؤلف إلى أن عدداً من الشركات الرائدة متعددة الجنسيات تقوم بإعداد تقارير استدامة تتبع إرشادات GRI على أساس طوعي. وتتناول هذه التقارير النواحي البيئية والاجتماعية والأخلاقية الخاصة بعمليات ونشاطات الأعمال.

الفصل 5 الفساد وحوكمة الشركات: تتطلب "السيطرة على" برنامجاً لمكافحة الفساد

يشكل الفساد عقبة رئيسية أمام تحقيق الأهداف العامة. ويمتلك الفساد تأثيراً كبيراً على القطاع الخاص حيث أنه يعمل على تشويه المنافسة ويضيف كثيراً إلى تكلفة القيام بالأعمال. وللفساد جانبين: جانب عرض وجانب طلب. وحيث يحتل الموظفون الحكوميون بشكل تقليدي جانب الطلب، فإن القطاع الخاص عادة ما يكون دافع الرشوة. وقد تم خلال السنوات القليلة الماضية سنّ قوانين ومعاهدات عديدة لمكافحة الفساد تستهدف القطاع الخاص، ويمكن للإخلال بها أن يؤدي إلى الادعاء في ولايات قضائية متعددة وعقوبات كبيرة وحتى مسؤولية شخصية على أعضاء مجلس الإدارة. ويكون الإضرار بالسمعة وخسارة فرص العمل استكمالاً لصورة كيفية إمكان فضيحة الفساد أن تؤثر على شركة ما.

لا تعمل أنظمة مراقبة داخلية خاصة بشركة ما بشكل كاف إذا كان بإمكان موظفيها استخدام أموال الشركة لدفع الرشاوى. بحكم التعريف، فإن مصاريف معينة لا يتم حسابها في دفاتر الشركة، بالتالي فإن البيانات المالية ستكون غير صحيحة ولن يكونوا أعضاء مجلس الإدارة "مسيطرين". ويتم اعتبار ذلك إشارة إلى حوكمة رديئة للشركات. ويمكن مع ذلك منع الفساد عن طريق تنفيذ برنامج داخلي للتقيد بمكافحة الفساد. ويمكن القول في هذه المساهمة أنه وفقاً لذلك فإن "السيطرة على" تعني أن الشركة لديها برنامجاً في محله.

بتطور المسؤولية الاجتماعية للشركات، تتوقع الحكومات والمجتمع المدني سلوكاً وشفافية مسؤولة اجتماعياً من قبل الشركات، وكذلك بالنسبة لموضوع الفساد. ويمكن أن تتحقق هذه التوقعات عن طريق تقديم معلومات عامة حول جهود شركة ما لمنع موظفيها من التورط في ممارسات فاسدة. وتكون الخطوة التالية للشركة هي الانضمام إلى مبادرات العمل الجماعي بغرض توسيع النطاق لأفضل الممارسات وتعزيز مستوى القيمة على أساس تكافؤ الفرص بين الشركات.

وقد تم الدعوة في هذا الفصل إلى أن أي شركة تنخرط في أعمال دولية عليها أن تكون متنبهة إلى مخاطر الفساد وتستفيد من معالجة هذه المخاطر. يعتبر مركز الشركات وأدوات حوكمة الشركات نقطة محورية في هذا الفصل.

الفصل 6 النظام الخاص: وضع المعايير

هل تم إثبات أن النظام الخاص بشكل عام أكثر نجاحاً من النظام العام في السيطرة على السلوك عبر الدول للشركات متعددة الجنسيات، يظهر النمو الأسي للأنظمة الخاصة الذي يهدف إلى التأثير على السلوك الاعتباري نتيجة للتوسع العالمي السريع للسوق – العلاقة الكاملة بطرح هذا السؤال. وفي ضوء المعايير الدولية الخاصة القائمة، يعمل هذا الفصل على تعريف وتحليل عناصر رئيسية معينة للنظام الخاص التي قد تؤثر على التقيد بالنظام الخاص، وهي: الجودة والمشروعية والسريان ونفاذ المفعول. يتم تطبيق هذه العناصر على ثلاث مبادرات خاصة تنظيمية يشار إليها بـ EP كنظام خاص وصل لمستوى معين من الاستحقاق: مبادئ الميثاق العالمي وإرشادات OECD MNE وإرشادات GRI. وتقييماً لخصائص هذه المجموعات الخاصة من القواعد، لوحظت بعض الإشارات المعنية إلى القواعد التي تم إعدادها بشكل خاص بواسطة النظام العام الحالي في مجال مسؤولية الشركات كروابط مع إنفاذ القواعد في الميدان القانوني "العادي". يبرز السؤال عما إذا كان إعداد القواعد الخاصة يعمل على تقوية أو إضعاف الأنظمة التنظيمية العامة. من ناحية أخرى، تطرح الدروس التي تم تعلمها من الأزمة الاقتصادية الحالية سؤالاً عما إذا كان ينبغي إناطة مسائل حيوية إلى أطراف فاعلة خاصة ليتم تنظيمها.

الفصل 7 العناية الواجبة للشركات كأداة لاحترام حقوق الإنسان

يطمح هذا الفصل إلى مساعدة الشركات ومحللي حقوق الإنسان في تحديد سبب ومتى وكيفية إمكانية دماج تقييمات أثر حقوق الإنسان في العمليات القائمة للعناية الواجبة للشركات. ويشرح بالتفصيل النهج الذي اقترحه البروفيسور روغي، ممثل خاص في الأمم المتحدة عن حقوق الإنسان والأعمال. يستند إطار السياسة الخاصة به، من بين أشياء أخرى، على "مسؤولية الشركات لاحترام حقوق الإنسان"، أي العمل مع "العناية الواجبة" لتجنب التعدي على حقوق الآخرين. يتم بحث أصل قانون الشركات وحقوق الإنسان وتطبيق "العناية الواجبة" في هذا الفصل. بالتالي، تتم مناقشة مفهوم العناية الواجبة حسبما تم تقديمه في إطار سياسة روغي ويتم تقديم الاقتراحات حول كيفية إمكانية تطبيق ذلك بشكل عملي في التعاملات التجارية. ويتم تحديد المعضلات.

الفصل 8 للمعرفة أو عدم المعرفة؟ حق المستهلك في المعلومات بموجب REACH وتشريعات أخرى للاتحاد الأوروبي

يتناول هذا الفصل حق المستهلك في المعلومات مقابل خلفية تشريع "REACH" الأوروبي والذي يلزم الشركات، من بين أشياء أخرى، لتزويد المعلومات للمستهلكين المعنيين حول ما إذا كانت مواد كيميائية معينة متواجدة في المنتج الخاص بالمستهلك. ويتم التقييم بشكل موجز لتوجيهات أوروبية أخرى معينة إلى المدى الذي تكون فيه ذات صلة في سياق حق المستهلك في المعلومات. وتبرز المعضلات المرتبطة بحق المستهلك في المعلومات في المناقشة السياسية الحالية في هولندا، حيث يقوم حزب العمال بإعداد مقترح تشريعي عن واجب الشركات في تزويد المعلومات للمستهلكين – الذين تم تحفيزهم بواسطة اهتمامات المسؤولية الاجتماعية للشركات. ويبحث هذا الفصل أسئلة من قبيل: (1) ماذا يستلزم حق المستهلك والعامل في المعلومات بموجب SEARCH؟ (2) هل يكون حق المستهلك في معلومات المنتج خاضعاً لتشريعات أخرى للاتحاد الأوروبي؟ (3) هل يمكن لمستهلك ما الحصول على معلومات حول مجالات المسؤولية الاجتماعية للشركات لمنتجات يعتزم بيعها؟ (4) هل تلتزم الشركات بتزويد المعلومات المطلوبة؟ (5) كيف تعمل هذه الحقوق عملياً؟

الجزء 2: دراسات الحالة

الفصل 9 شل في نيجيريا: من النزاعات على حقوق الإنسان إلى المسؤولية الاجتماعية للشركات

في أعقاب إعدام الناشط النيجيري كين سارو–ويوا، قائد الحركة من أجل بقاء شعب الأوغوني (MOSOP)، تم رفع دعاوى قانونية متعددة ضد شركة شل وشركاتها التابعة والحكومة النيجيرية فيما يتعلق بانتهاكات حقوق الإنسان والأضرار البيئية الناتجة عن استغلال النفط. يستعرض هذا الفصل القضايا والمشاكل الرئيسية ذات الصلة بخصوص المطالب للحصول على التدابير الانتصافية القانونية ضد الشركات متعددة الجنسيات فيما يتعلق، من بين أشياء أخرى، مفهوم "اختراق حجاب الشركات" والتطبيق الغامض لالتزامات معاهدات حقوق الإنسان للشركات. تعمل هذه الحالة على إثارة مسألة اعتبار ما إذا كان التطور الحالي للمسؤولية الاجتماعية للشركات، التي تتبنى كالعادة حماية حقوق الإنسان، يمكن أن تكون بمثابة استجابة بديلة ويمتلك تأثيرات إيجابية فيما يتعلق بتنظيم السلوك الاعتباري لصناعة البترول في الحالة الاجتماعية السياسية كتلك الحالة عن شعب الأوغوني.

الفصل 10 دراسة حالة النزاع والتوسط الدولي للمسؤولية الاجتماعية للشركات مسؤولية التزويد: الزبائن الغربيون وصناعة النسيج الهندي

قاد رئيس الوزراء الأسبق الهولندي السيد رود لوبرز في العام 2008 عملية وساطة للقيام بحل النزاعات التي نشأت بين منظمتين هولنديتين للحملات ومنظمات هندية متعددة غير حكومية واتحادات العمال ومزودي انترنت هولنديين وأحد منتجي الملابس الهنود وعلامة تجارية هولندية للجينز. حدثت الوساطة بناء على طلب الأطراف المتنازعين والحكومتين الهولندية والهندية. تتبع شركات النسيج معايير النزاع المتعلقة بالمسؤولية الاجتماعية للشركات. ومع ذلك فإنه يُعنى بالطريقة التي تتواصل فيها منظمات الحملات والمنظمات غير الحكومية فيما يتعلق بهذه القضايا. وقد كادت الحملات الخاصة بهم ضد منتج الجينز الهندي وزبائنه الغربيين أن تدفع الشركة الهندية نحو الإفلاس. ودفاعاً عن ذلك، بدأت الشركة الهندية برفع الدعاوى ضد منظمات المجتمع المدني الهندية والهولندية مما حفز مزيد من حملات الانترنت في شتى أنحاء العالم. وحيث أن بعض المنظمات تتسلم الأموال من الحكومة الهولندية، فقد تعرضت الحكومة الهندية كذلك للاستفزاز. وقامت بتقديم احتجاج إلى السُلطات الهولندية والأوروبية مدعية أن ممارسات تجارية غير شريفة قد تم استخدامها. أخيراً، ساهم التهديد الوشيك بأن 500 .5 موظف هندي وعائلاتهم سيصبحون ضحايا إغلاق المصانع، في إيجاد وتنفيذ حل هيكلي مدعوم من قبل جميع الأطراف.

كانت المعضلات الأساسية في هذه الحالة هي: (1) ما إذا كان رفع الدعاوى ضد منظمات المجتمع المدني طريقة فعالة لمواجهة الحملات العامة وتجنب الإضرار بالسمعة و(2) إلى أي مدى ينبغي ل منظمات المجتمع المدني أن تتحقق من مصداقية الادعاءات المتعلقة بانتهاكات حقوق العمل و(3) ما هو الدور الذي ينبغي أن يلعبه قانون العمل المحلي في متابعة سلسلة تزويد دولية مستدامة و(4) ما إذا كان الانخراط في معركة تتعلق بمعايير المسؤولية الاجتماعية للشركات تؤدي إلى ممارسات أفضل للمسؤولية الاجتماعية للشركات و(5) إلى أي مدى يمكن أو ينبغي على حكومة ما أن تطلب المساءلة من جانب منظمات المجتمع المدني؟

الفصل 11 المسؤولية الاجتماعية للشركات: الاستخدام المستدام للمياه

لم يعد النقص في المياه العذبة مقصوراً على الدول النامية في جنوب الصحراء الكبرى، وكذلك إمكانية الوصول إلى الكميات غير المحدودة للمياه العذبة في المجتمع الغربي غير مضمونة في جميع الأوقات. وثمة جدل – وتم وضعه في الكثير من الأنظمة القانونية الدولية – أن إمكانية الوصول إلى المياه العذبة يعتبر حقاً أساسياً للإنسان. ماذا لو هدد

استخدام الشركات للمياه العذبة بالتدخل في حق الإنسان هذا، لتوضيح ذلك، يسجل هذا الفصل حالات قليلة يكون فيها سوء إدارة الشركات لمصادر المياه على المحك. مع ذلك، يكون التركيز الرئيسي للدراسة هو بحث دور الشركات حالياً فيما يتعلق بالمياه العذبة. قامت الدراسة بتحديد ووصف عدداً من الأدوات التي تم إعدادها للاهتمام بهذه الحاجة لتقليل استخدام الشركات للمياه العذبة. على خلفية الإرشادات العامة لإعداد التقارير للمسؤولية الاجتماعية للشركات، تم تناول أدوات لإعداد تقارير مختصة بالمياه مثل أداة المياه العالمية لعام 2007 وطريقة حساب "بصمة المياه". بالإضافة إلى ذلك، للحصول على معلومات ملموسة، تم إجراء تحليل "مسحي سريع" على 20 شركة هولندية متعددة الجنسيات واستراتيجيات المياه الخاصة بهم، وتم إلقاء الضوء على ممارسات عديدة مبتكرة. يوضح هذا الفصل أنه يُتوقع من الشركات أن تتحمل المسؤولية عن تأثيرها على مصادر المياه، وعلى وجه الخصوص عندما تؤثر إمكانية الوصول العامة للمياه في المناطق التي يوجد فيها نقص بالمياه و/ أو حكومة ضعيفة. كان على سبيل المكافأة أن الدراسة أظهرت من جهة تطوراً في بحث وتطوير الشركات في الاستخدام المستدام للمياه ومن جهة أخرى الاتجاه الجديد بتطوير الشركات لمنتجات وطرق إنتاج أكثر اخضراراً، ويعود الفضل في ذلك إلى المسؤولية الاجتماعية للشركات.

الفصل 12 إدراج تأثير الشركات والاعتماد على التنوع الحيوي وخدمات النظام البيئي في قرارات الاستثمار

يعمل هذا الفصل على تحليل إلى أي مدى وكيف (يمكن) للمستثمرين المؤسسين إيلاء الانتباه إلى أداء شركة ما فيما يتعلق بالتنوع الحيوي وخدمات النظام البيئي (BES) في قرار عملية الاستثمار الخاصة بهم (P يعود إلى الكوكب و E النواحي البيئية – أحد عوامل ESG).

يمثل التنوع الحيوي تشكيلة من جميع أشكال الحياة، وتعمل النظم البيئية على الحفاظ عليه. ويعتبر التنوع الحيوي أمراً بالغ الأهمية لحياة كل كائن حي وتوفر النظم البيئية أساس الحياة ونعتمد جميعاً عليها، ولا تعتبر الأعمال استثناءاً.

يمكن أن ينطوي تأثير نشاطات إحدى الشركات على البيئة على مخاطر على الشركة من منظور مالي أو متعلق بالسمعة. إضافة إلى تأثيرات الشركة، يحتاج المستثمر كذلك أن يأخذ بعين الاعتبار اعتماد الشركة على خدمات النظام البيئي مثل تقديم منتجات طبيعية (الطعام، الخشب) أو المياه العذبة أو التربة الخصبة أو التلقيح بواسطة النحل، والتي هي مهددة بسبب الأزمة البيئية الحالية. ويعني الاعتماد على المخاطرة أن النشاطات التجارية الخاصة بالشركة لا يمكن لها الاستمرار أو تكون فقط بتكلفة عالية جداً. من

المناسب لمستثمر ما إبلاغه عن الروابط بين الشركات وBES حيث يمكن أن تكون أساسية في تحديد القيمة المالية لاستثمار ما.

يكون التركيز على الدراسة على السوق بخصوص "منتجات المعلومات" المرتبطة بالشركات وBES. أظهر البحث أن وكالات تصنيف ESG تقوم باستكشاف سبل لإنشاء منتجات معلومات كهذه وترغب ببيعها إلى المستثمرين المؤسسين. ويعتبر الاهتمام من جانب المستثمرين المؤسسين لبيع هذه المنتجات بمثابة تنبيه. إلا أن هذا السوق يعتبر بوجه عام غير ناضج حالياً. تقوم الدراسة بتحديد تسعة خصائص لهذا السوق، يشار إليها كذلك بـ "الحواجز" مما يوضح السبب في عدم عمل السوق بكامل إمكانيته. وفي نفس الوقت يمكن كذلك اعتبارها "فرصاً" لوكالات تصنيف ESG لأن بالإمكان تطوير منتجات جديدة. وحيث أن الخصائص مترابطة، كان من المقدّر أن العمل الجماعي من قبل أصحاب الموجودات ومديري الموجودات ووكالات تصنيف ESG والشركات والحكومات والمنظمات غير الحكومية لازم لتطور إضافي لسوق BES.

يركز الجزء الأخير من هذا الفصل بشكل محدد على عمليات التغيير ضمن إعداد أصحاب المصالح المتعددين. يتم تناول هذه المسألة حول كيفية إمكان استثارة عملية تغيير كهذه عن طريق تدخل خارجي. يناقش هذا الجزء أطر نظرية ذات صلة ويقدم انعكاساً منهجياً على ورشة عمل تم تنظيمها كمتابعة للدراسة. هدفت ورشة العمل إلى تحفيز المشاركين للمتابعة بفعالية لتبادل المعلومات عن روابط الشركات بالتنوع الحيوي (كل من روابط التأثير والاعتماد). استفادت ورشة العمل من عمل البحوث والتفكير بالأنظمة ورؤى إدارة التغيير. تظهر دراسة الحالة هذه تعقيد بدء عملية خاصة بتعاون أصحاب المصالح.

الفصل 13 الاستثمار الخاص في المحافظة على التنوع الحيوي والنظم البيئية

يمكن للمستثمرين المساهمة في المحافظة على الطبيعة ويمكنهم كذلك الاستفادة من تعزيزاتها. يعتبر الاستثمار في المحافظة على التنوع الحيوي أحد الطرق للمساهمة والاستفادة من المحافظة على التنوع الحيوي، والاستثمار في سوق BES هو المكان اللائق. يقدم هذا الفصل نتائج دراسة في أسواق جديدة مرتبطة بـ BES وفي فرص استثمار BES. وتقدم فرص استثمار ذات اهتمام وتساهم في نفس الوقت بالمحافظة على الطبيعة. أظهر البحث أن أسواق BES الناشئة يمكن تصنيفها على النحو التالي: (1) الحراجة المستدامة، (2) المحافظة على الطبيعة بما في ذلك برامج حراجة الأراضي الرطبة والتغيير المفاجئ في التنوع الحيوي، (3) السياحة البيئية، (4) إدارة تجميع الأمطار، (5) حجز الكربون خلال مشاريع زراعية وREDP (تقليل الانبعاثات من خلال إزالة الغابات

وتدهورها). تم إنشاء أموال استثمار عديدة لـ BES كأموال أسهم خاصة. وتتعاون في العادة مع سلطات محلية ومنظمات غير حكومية، غالباً كشراكات عامة وخاصة. تم تحديد وتناول حواجز وعوائق معينة تمنع المشاركة الكاملة لمستثمرين في القطاع الرئيسي، في تحليل أسواق وأموال BES.

أظهرت الدراسة أن المستثمرين هم على دراية قليلة بالخيارات القائمة للاستثمار في BES. ثانياً، وعلى مستوى أكثر جوهرية، هناك عدم فهم للروابط والاعتمادات الخاصة بالأعمال والنظم البيئية. لا يأخذ المستثمرون في القطاع الرئيسي عند اتخاذهم للقرارات بعين الاعتبارلحقيقة مفادها أن تدهور النظام البيئي وخسارة الأنواع ترتبط بشكل مباشر مع النشاطات التجارية "العادية" ولا أن الربحية طويلة الأمد لمعظم المستثمرين تعتمد على النظم البيئية الصحية.

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