

Corporate Social Responsibility - Impact of globalisation and international business

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Introduction

Corporate Social Responsibility (CSR) is associated with the conduct of corporations and in particular whether corporations owe a duty to stakeholders other than shareholders. Whilst the phrase 'Corporate Social Responsibility' may be gaining momentum, the concept itself is not new. The question as to whether corporations owe duties to broader stakeholders has been debated at various times throughout the twentieth century.

The CSR debate has largely revolved around the conduct of multinational corporations (MNEs) and other large private companies which, due to their size, have the ability to significantly influence domestic and international policy and the communities in which they operate. Central to the debate is the perceived deficiency of national and international law remedies regarding corporate accountability, in particular the ability of available regulation to successfully regulate a corporation's conduct in jurisdictions outside the corporation's home state. Proponents of CSR argue that the efficient functioning of global markets depends on socially responsible business conduct.

There are a number of factors relevant to the current CSR debate, including:

- globalisation and the proliferation of cross-border trade by MNEs resulting in an increasing awareness of CSR practices relating to areas such as human rights, environmental protection, health and safety and anti-corruption;
- organisations, such as the UN, the Organisation for Economic Co-operation and Development (OECD) and the International Labour Organisation (ILO), have developed compacts, declarations, guidelines, principles and other instruments that outline norms for acceptable corporate conduct;
- access to information and media enables the public to be more informed and to easily monitor corporate activities;
- consumers and investors are demonstrating increased interest in supporting responsible business practices and are demanding more information as to how companies address risks and opportunities relating to social and environmental issues;
- recent high profile corporate collapses have contributed to public mistrust and the demand for improved corporate governance, accountability and transparency;
- commonality of expectations by citizens of various countries with regard to minimum standards corporations should achieve in relation to social and environmental issues, regardless of the jurisdiction in which the corporation operates; and
- increasing awareness of the inadequacy of current regulations and legislation with regard to CSR matters and the regulation of MNEs.¹

¹ Strategis Canada, 'An overview of Corporate Social Responsibility, Part 1',
<<http://strategis.ic.gc.ca/epic/internet/incsr-rse.nsf/print-en/re00120e.html>> at 14.06.06

Interestingly, the fundamentals of CSR are considered to be universal reflecting the globalisation of business and economies. The traditional ethos of maximising shareholder value without regard to other stakeholders is an outdated notion in today's global environment. CSR not only sits comfortably with the mantra of maximising shareholder value, sustainable CSR practices enhance shareholder value.

Definition

A single globally-accepted definition of CSR does not exist, as the concept is still evolving. The language used in relation to CSR is often used interchangeably with other related topics, such as corporate sustainability, corporate social investment, triple bottom line, socially responsible investment and corporate governance. However, various individuals and organisations have developed formal definitions of CSR, including²:

- 'The commitment of business to contribute to sustainable economic development, working with employees, their families, the local community and society at large to improve their quality of life' (World Business Council on Sustainable Development).
- 'Operating a business in a manner that meets or exceeds the ethical, legal, commercial and public expectations that society has of business' (Business for Social Responsibility).
- 'A set of management practices that ensure the company minimises the negative impacts of its operations on society while maximising its positive impacts' (Canadian Centre for Philanthropy).
- 'The integration of business operations and values whereby the interests of all stakeholders including customers, employees, investors, and the environment are reflected in the company's policies and actions' (The Corporate Social Responsibility Newswire Service).

It is important to differentiate CSR from charitable donations and 'good works', ie corporate philanthropy and human rights.

The debate

The CSR debate broadly focuses on whether a corporation's sole purpose is to maximise shareholder wealth (shareholder primacy principle), vs. the ability to consider a broader range of stakeholders in its decision making. The debate has been the subject of commentary throughout the twentieth century and continues to be relevant due to the size and power of MNEs and the globalisation of business operations.

The debate in each era has been triggered by different catalysts. Traditionally the debate focused on the power of corporations, particularly large national and multinational corporations, however the debate has evolved over time to consider broader social impacts such as the environment, employee and community rights. Areas of focus throughout the twentieth century included:

- 1930s – general debate as to the role and purpose of corporations, ie solely a shareholder focused vehicle or an entity with wider responsibilities;³
- 1950s - focused on the disproportional power of the US corporation compared to other nations;

² Australian Government, 'CSR –Defined' <http://www.partnerships.gov.au/csr/corproate_csr_defined.shtml> at 16 June 2006.

³ Andrew Clarke, *The Models of the Corporation and the Development of Corporate Governance* (2005) 1.

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- 1960s and 1970s - the corporation's role in relation to environmental degradation, minority rights and consumer protection;
- 1980s and 1990s - targeted the social impact of the proliferation of corporate raiders and hostile takeovers;⁴ and
- the current debate weaves all the elements of previous debates together from a global and community perspective and is focused on whether regulation should be expanded to encompass CSR matters.

The following quotes illustrate the consistency of thought over time with regard to corporations having social obligations:

- In 1932 American commentator, E Merrick Dodd argued 'companies, like individuals, should strive to be good corporate citizens by contributing to the community to a greater extent than is generally required' and therefore the corporation as an economic institution has a social service as well as a profit making function;⁵
- In January 1973 The Confederation of British Industry published the Watkinson Report 'A new Look at the Responsibilities of the British Public Company' which observed that there must be and be seen to be an ethical dimension to corporate activity and concluded 'companies must recognise that they have functions, duties and moral obligations that go beyond the immediate pursuit of profit and the requirements of law';
- In 2001 Robert Hinkley observed 'corporations... exist only because laws have been enacted to provide for their creation and give them licence to operate. When these laws were enacted... most corporations were small and their impact on society was insignificant... Today corporations are our most powerful citizens and it is no longer tenable that they be entitled to all the benefits of citizenship, but have none of the responsibilities⁶.'

The 'shareholder primacy' proponent argues that a corporation's sole reason for existence is to maximise shareholder wealth whilst obeying the laws of the countries within which the corporation operates. Economist Milton Friedman famously argued that because shareholders 'own' corporations, the only 'social responsibility of business is to increase profits'. Friedman's argument gained traction, especially after the publication in 1976 of an influential paper, 'Theory of the Firm,' which stated shareholders are 'principals' who hire directors as their agents to manage corporations, and the job of directors is to increase shareholder wealth through every means possible, short of violating the law.⁷

Proponents of CSR argue that, for a corporation's long-term success and profitability, its' directors must consider the interests of shareholders and other relevant corporate stakeholders such as employees, consumers and the communities in which the corporation operates. Current proponents of CSR maintain there is demonstrated evidence that corporations which implement relevant and sustainable CSR practices perform better and attain greater competitive advantage.

Despite the various arguments, much of the corporate industrialised world has attempted to find a balance with regard to the corporation's impact on a wider group of stakeholders, whilst also focusing on maximising shareholder wealth. A recent global survey of corporate executives revealed that,

⁴ Corporations and Market Advisory Committee, *Corporate Social Responsibility Discussion Paper* (November 2005) 7.

⁵ Andrew Clarke, *The Models of the Corporation and The Development of Corporate Governance* (2005) 3.

⁶ Kerrie Burnmeister, 'Corporate Responsibility – A Matter of Ethics or Strategy', *Blake Waldron Dawson* <http://www.bdw.com.au/publications/issues/articles/Issues1-Corp_Responsibility.pdf> at 11 June 2006.

⁷ Prof Lynn A Stout, 'Shareholders Unplugged', *UCLA School of Law* <http://www.legalaffairs.org/issues/March-April-2006/argument_Stout_marapr06.msp> at 18 June 2006.

overwhelmingly, executives embrace the idea that the role of corporations in society goes beyond simply meeting its obligations to shareholders.⁸ This view is also supported by a recent survey of global investment managers which recognised that environmental, social and governance matters may be critical to investment performance.⁹ Additionally, three quarters of the one hundred and fifty seven global corporate managers surveyed predicted that social or environmental corporate performance indicators would become mainstream investment considerations within ten years.¹⁰

CRS and the law

Corporate history provides many examples of company's pursuing profit without regard to relevant CSR matters, including:

- Nike factories in Asia were criticised for extremely poor working conditions and for employing young children;¹¹
- Nestle received criticism in relation to its' practices including unethical marketing and utilising a supply chain that uses child bonded labour;
- James Hardie has been criticised regarding its failure to provide adequate compensation to people affected by asbestos related diseases resulting from the company's building products;
- Ford Pinto scandal whereby Ford, although aware of a fatal design flaw, decided it would be cheaper to pay off possible law suits with regard to resulting deaths instead of recalling and fixing the affected cars;¹²
- Shell's joint venture with the Nigerian government where, in 1995, Ken Saro-Wiwa and eight others were executed largely due to leading a non-violent campaign against environmental damage associated with the operations of multinational oil companies, including Shell and British Petroleum. Shell was criticised for not using its power to intercede with regard to the executions.¹³; and;
- Enron manipulated electricity in order to maximise profits at the expense of Californian citizens.

Historically, a narrow view of corporate responsibility has been enforced whereby a corporation's responsibility extends only to maximising profits. In *Dodge v Ford Motor Co*¹⁴ the Michigan Supreme Court upheld the shareholders' claim that a corporation is carried on primarily for the profit of the shareholders and therefore the powers of the directors are to be exercised on this basis. The decision of the directors not to declare a dividend to facilitate the expansion of the business and increase the number of employees was considered to be inappropriate. However, subsequent cases have taken a more flexible approach. Decisions made to benefit consumers, the community, employees and the

⁸ 'The McKinsey Global Survey of Business Executives: Business and Society', *The McKinsey Quarterly* (December 2005), conducted the survey in December 2005 and received responses from 4,238 executives, more than a quarter of them CEOs or other C-level executives in 116 countries.

⁹ Mercer Investment Consulting, '2006 Fearless Forecast – What do investment managers think about responsible investment' (March 2006) at 11.

¹⁰ Ibid 11.

¹¹ Global exchange 2005, 'Nike Campaign' <<http://www.globalexchange.org/campaigns/sweatshops/nike/faq.html>> at 14 June 2006.

¹² <http://en.wikipedia.org/wiki/Ford_Pinto#Safety_problems> at 14 June 2006.

¹³ <http://en.wikipedia.org/wiki/Royal_Dutch_Shell#Nigeria> at 14 June 2006.

¹⁴ 170 NW 668 (1919).

environment have been considered as not breaching directors' duties where shareholders' interests have not been completely disregarded and emphasis placed on the corporation's future.¹⁵

In Australia, the traditional view is that case law and corporations legislation does not extend a directors' obligation to consider stakeholders other than shareholders (other than in respect of creditors when a company is or is likely to become insolvent).¹⁰ Acting in the best interest of the company has generally been interpreted by the courts as acting in the best interest of shareholders. However, laws relating to labour conditions, consumer protection and community matters such as environmental protection apply to corporations and therefore any decision by directors in breach of these requirements may potentially lead to a breach of directors' duties.^{16,17}

Recently the Parliamentary Joint Committee (PJC) on Corporations and Financial Services Inquiry into Corporate Responsibility and Triple Bottom Line Reporting (Committee) considered whether the legal framework, viz. the *Corporations Act*, should be amended to legally oblige directors to consider broader interests. On 22 June 2006, the PJC released their findings, pre-eminent amongst their findings is the recommendation that there be no amendment to the *Corporations Act* to require directors to consider the public interest, instead the PJC recommends a voluntary self regulatory approach. During the review, the PJC noted, inter alia:

- the *Corporations Act* permits directors to have regard to the interests of broader stakeholders;¹⁸
- many companies are voluntarily integrating the consideration of broader community interests into their core business strategies;
- the importance of balancing the long term view of a company's viability and profitability with the focus on short term returns;
- by international standards, Australia lags in implementing and reporting on CSR;
- CSR initiatives assist (i) maintain and build reputation and (ii) recruit and retain high quality staff;
- institutional investors have a strong influence on corporate behaviour and are more likely to take a longer view;
- support for the adoption of the UN Principles for Responsible Investment;
- overall reporting should remain voluntary as mandatory reporting would lead to a 'tick the box' mentality;
- a voluntary standardised reporting framework should be developed and advocated support of the Global Reporting Initiative; and

¹⁵ *Teck Corp v Millar* (1973) 33 DLR (3d) 28. Allens Arthur Robinson Corporate Governance Site, 'Directors' duties and corporate philanthropy' <<http://www.aar.com.au/corpgov/iss/corp/corpdire.htm?print=true>> at 4 June 2006.

¹⁶ Allens Arthur Robinson, Corporate Governance Site, 'Directors' duties and corporate philanthropy', <[http://www.aar.com.au/corpgov/iss/corp/cpmr\[dor.htm](http://www.aar.com.au/corpgov/iss/corp/cpmr[dor.htm)> at 4 June 2006.

¹⁷ Examples include: various state based environmental legislation, s 299(1)(ff) of the *Corporations Act* which requires companies to report on environmental performance, legislation regarding occupational health and safety as state and federal level, *Trade Practices Act* which promotes competition and fair trading to protect consumers.

¹⁸ The 'interests of the company' include the continuing well-being of the company. Directors must not act for motives foreign to the company's interests, but the law permits them to consider many interests and purposes, as long as there is also a purpose of benefiting the company. (See JD Heydon, 'Directors' Duties and the Company's Interests' in P Finn (ed), *Equity and Commercial Relationships* (Law Book Company, 1987) 135.)

Submission by the New South Wales Young Lawyers Pro Bono and Community Services Taskforce to the Corporations and Markets Advisory Committee, <http://www.lawsociety.com.au/uploads/files/1142226553639_0.5476435755609974.doc> at 7 July 2006.

- ASX Governance Recommendations should be expanded to incorporate CSR sustainability reporting guidelines.

Although the committee does not believe it is necessary to mandate either (i) consideration of stakeholders' interests or (ii) sustainability reporting, the committee is of the view that there is a need to ensure corporations consider these matters.¹⁹ The PJC commented that any hesitation on the part of corporate Australia in incorporating CSR matters into their business practices does not arise from legislative constraints of the Corporations Act. The PJC considers that the interpretation of the current legislation is the best way forward for Australian corporations on the basis that an effective director will realise that the wellbeing of the corporations comes from strategic interaction with outside stakeholders.²⁰

The ASX Corporate Governance council released an explanatory and consultative paper outlining the council's review of *Good Corporate Governance and Practice Guidelines* in November 2006. The paper considers, amongst other matters, recommendations of the PJC regarding CSR and outlines the Council's proposals regarding same. The major proposed changes relate to Principle 7 which deals with risk management. New commentary seeks to provide guidance on risk management and advises that risk management encompasses legal obligations and the expectation of stakeholders, and notes that an effective risk management involves considering factors that bear upon the company's continued good standing with its stakeholders and community.²¹ Further the commentary notes that stakeholders may include shareholders, employees, business partners, creditors, consumers, the environment and the broader community in which the company operates.²² The commentary advises that material risks may include operational, environmental, sustainability, compliance, strategic or external, ethical conduct, reputation or brand, technological, product or service quality and human capital, which, if not properly managed, will impact on the company.²³ The Council seeks feedback as to the role the council should undertake in assisting companies' reporting on risks relating to CSR matters.

US reform (like Australia) has focused predominantly on the integrity of financial information and as yet has not mandated CSR. As a result, a majority of US states have adopted, and still retain, 'corporate constituency' statutes, which permit directors to broaden the stakeholders they consider in corporate decision making^{24,25}. Typically the statutes allow the board, in discharging their duties, to consider the impact on employees, suppliers, customers and communities. Many argue that the introduction of prescriptive regulation with regard to CSR matters is unnecessary and would in fact result in directors being less accountable. Interestingly, although many argue that existing regulation allows corporations to conduct their operations in a socially responsible manner, there is less commentary as to how corporations are held accountable in the absence of prescriptive legislation where a corporation's domestic or international policy is not consistent with acting in a socially responsible manner.

A variety of European legislative and regulatory development (UK, France and Austria) has increasingly required the reporting of CSR, such as the *Nouvelles Regulations Economiques* introduced

¹⁹ Parliamentary Joint Committee on Corporations and Financial Services, 'Corporate Responsibility: Managing Risk and creating value' (22 June 2006).

²⁰ Parliamentary Joint Committee on Corporations and Financial Services 'Corporate Responsibility: Managing Risk and creating value' (22 June 2006) 37.

²¹ ASX Corporate Governance Council, 'Review of the Principles of Good Corporate Governance and Best Practice Recommendations – Explanatory and Consultation Paper' (November 2006) 18.

²² ASX Corporate Governance Council, 'Principles of Good Corporate Governance and Good Practice Recommendations – Exposure Draft of Changes' (November 2006) 30, 31.

²³ *Ibid* 30, 31.

²⁴ Corporations and Market Advisory Committee, 'Corporate Social Responsibility Discussion Paper' (November 2005) 7.

²⁵ *The Pennsylvania Act* (23 December 1983) was the first corporate constituent statute.

by France in 2001 and the UK's Operating and Financial Review effected in April 2005. Reform in the UK appears to be the most ambitious to date as it will require directors to consider the impacts of their business operations on, amongst other matters, employees, the community and the environment.²⁶ The UK Government has also committed to publishing advice on how directors' should interpret their duties regarding the consideration of social and environmental matters.²⁷ Other countries have not followed the UK's approach with regard to expanding directors' duties to incorporate the consideration of a broader group of stakeholders.

Globalisation

'Twenty years ago, environmental and social issues were for activists. Ten years from now, they are likely to be amongst the most critical factors shaping government policy and corporate strategy. Twenty years ago, we were a series of local states and countries, national and regional businesses that were partially connected. Ten years from now, we will be globally interdependent as individuals and organisations'.²⁸ International investment by MNEs is central to corporate globalisation, which inevitably will lead to a desire to harmonise laws and reporting practices. MNEs tend to be a focal point with regard to CSR due to their size and complexity and the fact that they operate in more than one jurisdiction either directly or via subsidiary entities or in alliances with other entities.

The most difficult issues arising with regard to CSR occurs in poor countries with weak and sometimes corrupt governments. Many MNEs are larger and more economically significant than the developing nations in which they operate. Whilst MNEs may facilitate the stimulation of a developing nation's economy, they also have the capability of abusing their power in host countries which are often either unable or unwilling to hold MNEs accountable for inappropriate conduct. Poorly regulated international investment in these environments distorts local development, fuels conflict and may contribute to abuses occurring.²⁹ Accordingly, strengthening cross border corporate accountability and more effective international regulation of MNEs is necessary. In addition, developing countries should be encouraged to strengthen their political and economic systems to enable their governments to more effectively regulate the private sector.

Historically international law remedies in relation to MNEs are considered weak. This weakness is exacerbated when domestic laws are incapable of holding MNEs accountable for inappropriate conduct in other jurisdictions. This issue is further complicated when the national law in the country where the inappropriate conduct occurred is either inadequate or the judicial system or government is not motivated to commence action against the offending corporation. These issues have led to a common criticism the MNEs operate 'outside the law' and therefore no forum capable of holding MNEs accountable for inappropriate conduct exists.

New national and international precedents are challenging the historical view. In the US, the Alien Tort Claims Act (ATCA) of 1789³⁰ is being used in a number of cases to sue MNEs for violations of

²⁶ <<http://www.governance.co.uk/current/2006/200611-ne1.htm>> at 3 December 2006.

²⁷ <<http://www.governance.co.uk/current/2006/200611-ne1.htm>> at 3 December 2006.

²⁸ PriceWaterhouseCoopers, 'Corporate Responsibility: Strategy, Management and Value', <<http://www.pwc.com/extweb/pwcpublications.nsf/docid/B4677BCF42BFBE5985257124002432FC>> at 22 June 2006.

²⁹ David Mepham, 'Beyond Corporate Responsibility – Rethinking the International Business Agenda' <<http://www.policy-network.net/php/article.php?sid=4&aid=282>> at 30 June 2006.

³⁰ *The Alien Tort Claims Act* is the only United States law permitting MNEs with significant assets in the US to be held accountable for their unethical behavior elsewhere in the world. Passed in 1789 by the First Congress of the United States, it enables victims of torture, slavery, ethnic cleansing, and other crimes against humanity to put the corporations that are responsible on trial in American courts. In recent history, plaintiffs have used it to

international law in countries outside the US. Following a number of cases in the UK, MNEs may now be legally liable for human rights violations abroad where access to local justice is restricted.³¹ Although lasting international precedent has not been established with regard to matters considered under either the ATCA or UK cases, the actions are a positive step towards corporate liability with regard to inappropriate conduct by corporations abroad.

During the last three decades there has been a growth in bilateral arrangements which have taken the form of investment protection and promotion treaties. These treaties reflect the desire of home country governments to protect the investment of companies abroad and the desire of host countries to attract foreign direct investment. Early treaties concluded with developing countries emphasised international trade and protection of citizens abroad rather than foreign direct investment. However, from 1960 onwards treaties have focused on foreign direct investment. A criticism of these treaties is that the treaties have marginal impact on the decision making of the MNE and host country.

Most attempts to regulate CSR have resulted from public international bodies and non government organisations (NGOs). Codes of conduct relating to CSR matters such as bribery, environment and human rights are voluntary and not legally binding, however, may represent subtle diplomacy by NGOs towards a consensus amongst governments which in turn may be embodied in national legislation or universally accepted standards. The trend in developed nations is to support the reporting of CSR without introducing legislation to mandate CSR practices, instead, governments appear to be content relying on initiatives introduced and championed by NGOs such as the OECD, UN and GRI.

OECD Guidelines for Multinational Enterprises

The OECD Guidelines for Multinational Enterprises (the Guidelines), first adopted in 1976, are the longest standing initiative for the promotion of high corporate standards. The Guidelines contain voluntary principles and standards for responsible business conduct in areas such as human rights, supply chain management, disclosure of information, anti-corruption, taxation, labour relations, environment, competition, and consumer welfare. The Guidelines aim to promote the positive contributions of MNEs to economic, environmental and social progress.

sue government officials involved in human rights violations, such as former Philippine dictator Ferdinand Marcos and former Serbian war leader Radovan Karadzic. Most recently, the *Alien Tort Claims Act* has been used to file suits against multinational corporations complicit in egregious human rights abuses. For example:

- Burmese villagers have sued Unocal, whose corporate headquarters is just outside Long Beach, California, on charges that its partner—the Burmese military— murdered and raped villagers and forced them to work while assisting with Unocal's pipeline project.
- Nigerian villagers sued Chevron Texaco for its complicity in murders at peaceful protests at a Chevron oil platform and the related destruction of two villages.
- Eleven Indonesian villagers are suing Exxon Mobil for human rights abuses committed by its security forces.
- Subcontractors in Iraq involved in the torture and mistreatment of prisoners are being held accountable under the legal authority of the *Alien Tort Claims Act*.

<<http://www.uua.org/actions/immediate/04tort.html>> at 7 July 2006.

³¹ House of Lords' judgments in cases involving Rio Tinto in Namibia and Thor Chemicals and Cape plc in South Africa. In addition, a clause in the UK *Anti-Terrorism, Crime and Security Act 2001* has opened up the possibility that UK companies and nationals, including company directors, could be prosecuted in the UK for corruption offences abroad, regardless of whether they involve public officials or the private sector.

David Mepham, 'Beyond Corporate Responsibility – Rethinking the International Business Agenda' <<http://www.policy-network.net/php/article.php?sid=4&aid=282>> at 30 June 2006.

The Guidelines express the shared values of 39 countries consisting of the 30³² OECD members and 9³³ non-member countries. The adhering countries are the source of almost 90 per cent of the world's foreign direct investment and are home to most major MNEs.

While observance of the Guidelines is voluntary for companies, adhering governments make a formal commitment to promote their observance among MNEs. The most concrete expression of this commitment is the National Contact Point (NCP), often a government office, which is responsible for encouraging observance of the Guidelines and for ensuring that the Guidelines are well known and understood by the national business community and by other interested parties. Critics consider the NCP mechanism weak and ineffective. Accordingly, it has been suggested that the Guidelines and in particular the NCPs be strengthened. The Guidelines are part of a broader package of instruments, most of which address government responsibility and promote open and transparent policy frameworks for international investment.³⁴

Global Sullivan Principles

The Global Sullivan Principles (GSP) released in 1999 consists of eight principles. It is a voluntary code of conduct seeking to enhance human rights, social justice, protection of the environment and economic opportunity for all workers in all nations. The GSP originated with suggestions made by Reverend Dr. Leon Sullivan that a global code be derived from the original Sullivan Principles (which were instrumental in the fight to dismantle apartheid in South Africa). The GSP were developed in consultation with leaders of business, government and human rights organisations in various nations.³⁵

ILO Tripartite Declaration

The ILO, founded in 1919, is a specialised agency of the United Nations focusing on labour issues and has 178 member states to date. The ILO Tripartite Declaration (Declaration) also seeks to encourage the positive contribution of MNEs to economic and social progress and states, inter alia, that:

- MNEs should obey national laws, respect international standards, honor voluntary commitments and harmonise their operations with the social aims of countries in which they operate³⁶;
- governments should implement suitable measures to deal with the employment impact of MNE's; and
- in developing countries, MNE's should provide the best possible wages, conditions of work (including health and safety) and benefits to adequately satisfy basic needs within the framework of government policies.

Whilst the principles expressed in the Declaration are addressed to governments, employers and workers' organisations in both home and host countries, the principles are voluntary³⁷.

³² OECD countries are Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, Turkey, UK, US.

³³ The non OECD countries are Argentina, Brazil, Chile, Estonia, Israel, Latvia, Lithuania, Romania and Slovenia.

³⁴ 'OECD Guidelines for Multinational Enterprises' <<http://www.answers.com/topic/oecd-guidelines-for-multinational-enterprises>> at 25 June 2006.

³⁵ FAQs about the GSP <<http://www.unpri.org/files/pri.pdf>> at 29 June 2006.

³⁶ Caux Round Table, International Labour Organisation, <<http://www.cauxroundtable.org/ILOTripartiteDeclarationofPrinciplesconcerningMultinationalEnterprisesandSocialPolicy.html>>, at 26 June 2006.

UN initiatives

(i) UN Global Compact

Introduced in 1999, the UN Global Compact (Compact) is a voluntary initiative based on 10 core principles relating to human rights, labour standards, the environment and anti-corruption. The Compact's 10 principles enjoy consensus across many jurisdictions and are derived from:

- The Universal Declaration on Human Rights;
- The International Labour Organisation's Declaration on Fundamental Principles and Rights at Work;
- The Rio Declaration on Environment and Development; and
- The United Nations Convention Against Corruption.

Critics argue that as adherence to the Compact cannot be enforced the Compact may be abused. The Compact itself states that a company's participation 'does not mean that the Compact recognises or certifies that these companies have fulfilled the Compact's principles'.

The Compact is considered to be the world's largest corporate responsibility initiative, with 3000 corporate participants and other stakeholders involved.³⁸

(ii) UN Norms

The UN Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights (UN Norms) attempts to establish a comprehensive legal framework for the human rights responsibilities of companies. The Norms which endeavour to standardise existing standards are based solely on existing international law regarding human rights and labour standards and deal with issues such as workers rights, corruption, security and environmental sustainability. The UN Norms state that MNEs have an obligation to 'promote, secure the fulfilment of, respect and protect human rights recognised in international and national law'. The UN Norms is not a formal treaty under international law and therefore is not legally binding.

(iii) Principles for Responsible Investment

The Principles for Responsible Investment (PRI), issued in April 2006, is a voluntary initiative which strives to identify and act on the common ground between the goals of institutional investors and the sustainable development objectives of the UN. The audience targeted is the global community, however the focus is on the eleven largest capital markets, with a goal of protecting the long term interests of fund beneficiaries³⁹. The PRI were borne from the perceived disconnect between corporate responsibility, and the behaviour of financial markets, which are often influenced by short-term considerations at the expense of longer term objectives⁴⁰.

The PRI, developed by leading institutional investors and overseen by the UN Environment Programme Finance Initiative and the UN Global Compact, includes environmental, social and

³⁷ Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, <<http://www.ilo.org/public/english/standards/norm/sources/mne.htm>> at 26 June 2006.

³⁸ The UN Secretary General Remarks at the launch of the Principles for Responsible Investment, New York Stock Exchange, 26 April 2006 <<http://www.un.org/apps/sg/sgstats.asp?nid=2006>> at 1 July 2006.

³⁹ UNEP Finance Initiative <http://www.unepfi.org/work_programme/investment/principles/index.html> at 1 July 2006.

⁴⁰ Principles for Responsible Investment <<http://www.unpri.org/files/pri.pdf>> at 1 July 2006.

governance criteria, and provides a framework for achieving higher long term investment returns and more sustainable markets. The UN Secretary General has stated 'it is my hope that the Principles will help to align investment practices with the goals of the UN, thereby contributing to a more stable and inclusive global economy'.⁴¹

Global Reporting Initiative

The Global Reporting Initiative (GRI), convened in 1997, was established to improve sustainability reporting practices, while achieving comparability, credibility, timeliness, and verifiability of reported information.⁴² The Guidelines, first released in June 2000, revised in 2002 with a revision due during 2006, seek to develop globally accepted sustainability reporting guidelines. These guidelines are also voluntary and are used by organisations in reporting on the economic, environmental, and social dimensions of their activities. The Guidelines are increasingly becoming a universally accepted method of harmonising CSR reporting in various jurisdictions. Approximately 1000 organisations worldwide incorporate the GRI's Guidelines into their reporting.

Conclusion

Globalisation and the significant growth and influence of the private sector have highlighted issues such as CSR and the regulation of MNEs. Whilst considerable progress has been made in holding companies accountable for their environmental performance, progress on social issues such as human rights, corruption, corporate transparency and labour standards has been more limited. Although there have been attempts to widen the scope of stakeholders directors may consider, for most companies CSR consists of voluntary initiatives designed to enhance the social impact of their practices, with some of these initiatives actively promoted by government. Many corporations have incorporated CSR into their codes of conduct, sought to work closely with NGOs in formulating corporate policy in undeveloped countries, subscribed to the UN Global Compact and other UN initiatives, and have incorporated GRI guidelines into their financial reporting. However despite these initiatives, there still remains a gap pertaining to legal accountability relating to CSR practices, particularly in relation to MNE operations in jurisdictions outside their home state.

There are many factors as to why one solution addressing the issue of corporate accountability pertaining to CSR, particularly with regard to directors duties, may not be feasible, such as (i) the sovereignty of the many nations that make up the global community, (ii) diversity of legislation, regulation, culture and business practices of the various jurisdictions in which corporations operate and (iii) the significant uncertainty as to how to regulate the conduct of corporations in foreign jurisdictions. There is no easy solution, however this does not mean a workable solution concerning these matters is not possible or feasible.

It is increasingly apparent that in modern industrialised economies, profit maximisation is facilitated by a demonstrated approach to corporate responsibility. Paradoxically, focusing solely on the traditional view of shareholder value may have a negative impact on a company's ability to maximise shareholder value by placing too much emphasis on short term performance, whilst neglecting longer term opportunities and issues.⁴³ To maximise the benefits of international investment corporations must

⁴¹ 'Principles for Responsible Investment' <<http://www.unpri.org/files/pri.pdf>> at 1 July 2006.

⁴² Global Reporting Initiative, Guidelines, <<http://www.globalreporting.org/guidelines/2002/dannex1.asp>> at 26 June 2006.

⁴³ Chartered Secretaries Australia, 'Submission to CAMAC in relation to the discussion paper *Corporate Social Responsibility*' (24 February 2006) at 3.

operate within a clear framework of governance, underpinned at national and international level by law and regulation enforceable either by the company's home state or by a court of international standing, eg, the International Court of Justice. In addition national laws should be widened to enable corporations to be held accountable for inappropriate conduct, undertaken either by themselves or entities controlled by them directly or indirectly, in jurisdictions outside their home state. It may be naive to believe that a meaningful system of global norms could exist without formal deterrence.

Although most jurisdictions appear determined to keep CSR on a 'voluntary' footing, regulatory changes are focusing on encouraging higher standards on CSR at home and abroad.⁴⁴ In Australia, there is significant resistance from the corporate community and other interest groups regarding the introduction of prescriptive regulation regarding CSR practices and reporting. However, despite the arguments for and against prescriptive regulation regarding CSR matters, the threat of criminal or civil sanctions acts as a powerful deterrent. Robert Hinkley suggests that rather than adopt a prescriptive approach, corporate legislation can still be amended by imposing open-ended duties on corporate directors to ensure companies do not (i) damage the environment, (ii) abuse human rights, (iii) undertake actions that are detrimental to public health and safety, (iv) engage in conduct that is detrimental to the welfare of communities or (v) is detrimental to employees rights.⁴⁵ The UK reforms attempt to codify this requirement into directors' duties.

Although to date much regulation and law enforcement has been anchored in national economic systems, future international regulation may emerge from a gradual convergence of national practices⁴⁶ and the strength of initiatives undertaken by NGOs. Globalisation by its very nature should enable international dialogue and cooperation by various jurisdictions to facilitate the development of regulatory frameworks capable of transcending national boundaries.⁴⁷ The issue of accountability in a global context is complex and manifold. However, it may not be a 'huge conceptual leap' to extend state laws to require parent entities and home states to bear some responsibility for the foreign activities of entities controlled by those parent entities.⁴⁸ Considerable incentives exist for companies to conduct their operations in a socially responsible manner. The challenge is to implement a workable mix of public and private initiatives which are consistently enforced and capable of ensuring companies are encouraged to act in a socially responsible manner whilst being accountable in a legislative context for inappropriate conduct.

⁴⁴ Jennifer A Zerk, *Multinationals and Corporate Social Responsibility – Limitations and Opportunities in International Law* (2006, Cambridge University Press) 309.

⁴⁵ Robert Hinkley, 'Twenty Eight Words to Redefine Corporate Duties: The Proposal for a Code of Corporate Citizenship', *Multinational Monitor* Vol 2, Nos 7 & 8 (July / August 2002).

⁴⁶ OECD Secretary-General Donald Johnston 'Promoting Corporate Responsibility: The OECD Guidelines for Multinational Enterprises' *International Investment Perspectives* (2004).

⁴⁷ Jennifer A Zerk, *Multinationals and Corporate Social Responsibility – Limitations and Opportunities in International Law*, (2006, Cambridge University Press) 309.

⁴⁸ *Ibid.*