

## Time to Get Real: The Necessity of Legal Accountability for Responsible Transnational Commerce

by Richard Reibstein

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*Editors' Summary: Guaranteeing a greener, more humane, transnational commerce will require new approaches from government, international bodies, civil society, and corporations. The challenges posed by national sovereignty, corruption, and the traditional business model have made greening the worldwide supply chain difficult to accomplish. In this Article, Richard Reibstein examines these challenges and proposes ways in which they might be addressed. Using the Bhopal, India, gas leak disaster as a case study, he explains the need for accountability and reasons why the current system is inadequate. He then offers specific proposals for governments and corporations interested in greener, more humane trade. He ends the Article with suggestions for new approaches to trade and a new model of corporate behavior.*

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### I. Introduction

The focus on voluntary reporting, norms, guidance, and the concept that companies can do well by doing good is laying a foundation for the evolution of a more humane transnational commerce and a greener worldwide supply chain. But this foundation will not be strong unless it incorporates legal accountability. Without the ability to enforce pledges of responsibility, promises remain mere promises, and those who have sincere intentions may not be distinguishable from those who do not. Without recourse to legal process, injuries will continue, and both prevention and compensation will remain rare. In an essentially anarchic system, the irresponsible may retain the competitive advantages that result from lower costs.

There is as yet no system of international law that effectively holds companies liable for harm they might cause in other countries. This situation presents an opportunity to corporations who wish to signal their commitment to responsibility. By willingly subjecting themselves to cross-border claims, corporations can prove the credibility of their socially responsible policies. Such actions will help foster the development of effective governance within and across national boundaries.

Voluntary methods are making the supply chain more environmentally responsible. But voluntary methods cannot ensure that corporate parents, partners, co-venturers, subsidiaries, and suppliers behave responsibly. If customers had perfect knowledge of the truth of corporate behavior and consistently cared enough about that behavior to pun-

ish bad actors in the marketplace—if able to afford to do so—then perhaps the marketplace alone would be adequate. Corporate policies, public reporting, and pressure from stakeholders can have great influence. But they cannot dictate results if there are countervailing pressures affecting the company's position in the marketplace. If an international system continues to prevail in which injured parties do not have effective cross-boundary access to courts, and agencies are not adequately monitoring and policing behavior in many locations, sincere intentions will be difficult to distinguish from empty promises. The potential market advantages from responsible policies will be minimal or evanescent.

### II. The Need for Accountability

Perhaps the best-known example of the failure of the international free market to deter or appropriately respond to harm was the 1984 release of tons of methyl isocyanate from the Union Carbide (UC) facility<sup>1</sup> in Bhopal, India, which killed thousands of people<sup>2</sup> and injured hundreds of thou-

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1. The facility was owned 50.9% by UC and 49.1% by UC of India, Limited. In February 2001, Dow Chemical acquired UC as a wholly owned subsidiary.

2. Exactly how many were killed and injured, immediately and over the years, is variously cited. For example, a 2004 Dow Investor Risk Report issued by Innovest Strategic Value Advisors noted that "over 14,000 deaths and 50,000+ permanent injuries have been attributed to the event and its aftermath by Indian government officials." In *Bano v. Union Carbide Corp.*, 361 F.3d 696, 702 (2d Cir. 2004), the U.S. Court of Appeals for the Second Circuit referred to "thousands" killed and "more than 200,000 others" injured. More than 570,000 victims have received some amount of compensation. *World "Failed" Bhopal Gas Victims*, BBC NEWS, Nov. 29, 2004, available at [http://news.bbc.co.uk/1/hi/world/south\\_asia/4050739.stm](http://news.bbc.co.uk/1/hi/world/south_asia/4050739.stm).

sands. Suits brought in the United States by Indian victims were dismissed on grounds of forum non conveniens,<sup>3</sup> and in 1989, UC settled cases brought in India for \$470 million. A *Los Angeles Times* piece noted in 2001 that victims claimed that the compensation payments, averaging about \$580 per person, “cannot even cover loans many took out to pay medical bills, funeral costs, and other expenses.”<sup>4</sup>

Some feel the Bhopal case proves that changes are necessary to bring about more effective accountability under international law. Ten years after the event, a Permanent People’s Tribunal on Industrial Hazards and Human Rights, convened by parties dissatisfied with the official outcome of the Bhopal cases, called for national and international organizations to “subject transnational corporations to binding rules of conduct, especially in the field of industrial hazards.”<sup>5</sup> The Tribunal, which included a former judge of the Bangladesh Supreme Court and environmental and legal experts, pronounced its findings on December 2, 1994, at the House of Commons in London, declaring that “the most dangerous industrial plants are managed by transnational corporations whose very nature requires the setting up and enforcement of international standards.”

House Resolution 503,<sup>6</sup> recognizing the 20th anniversary of the Bhopal disaster, noted that “international organizations and other independent investigators have concluded that Union Carbide’s inadequate technology, double standards in safety and emergency preparedness, and reckless cost cutting at the plant were the principal causes of the disaster.” It also noted that UC “refused to appear in court to face criminal charges,” becoming a “fugitive from justice,” and that “no substantive effort has been undertaken for environmental remediation of the area.”<sup>7</sup> The Resolution referred to the “polluter-pays” principle, stating that “international trade and ethical practices compel Dow Chemical [current owner of UC] to treat this matter seriously and to ensure that equitable treatment be afforded to the victims and their progeny.”<sup>8</sup>

In an article discussing concepts of corporate responsibility in the context of the Bhopal gas disaster, Upendra Baxi comments that “[i]n any event, talking human rights language to business remains a notoriously difficult enterprise, given the latter’s overwhelming concern with efficiency and profit.”<sup>9</sup> As the international discussion of corporate social responsibility proceeds—shaped and enriched by individual corporate examples—benchmarks such as the Equator

Principles,<sup>10</sup> negotiated standards such as the United Nations’ (U.N.’s) Principles for Responsible Investment,<sup>11</sup> resolutions such as the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises With Regard to Human Rights,<sup>12</sup> and voluntary reporting tools such as the Global Reporting Initiative<sup>13</sup> reporting mechanism receive too little focus.

We now live in a world of international commerce that has virtually no international body to which victims of torts and crimes by transnational entities (and those with whom they deal) can appeal. The U.N.’s Norms on the Responsibilities of Transnational Corporations stress that

[w]ithin their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups.<sup>14</sup>

This is an acknowledgement that the existing system is not adequate. The poor in many countries do not have access to

10. The Equator Principles are an international “benchmark for the financial industry to manage social and environmental issues in project financing,” formulated at meetings hosted by the World Bank Group’s International Finance Corporation. The risk management rationale for adopting the principles is that institutions that do so “ought to be able to better assess, mitigate, document and monitor the credit risk and reputation risk associated with financing development projects.” See The Equator Principles, <http://www.equator-principles.com> (last visited Mar. 19, 2007).
11. A voluntary and “aspirational” framework produced under the sponsorship of the U.N. Environment Programme (UNEP) Finance Initiative and the U.N. Global Compact, these principles provide investors with a way to publicly commit to the idea that environmental and social issues are relevant to corporate governance and investment analysis and decisionmaking. Signatories state that they believe adhering to the principles “will improve our ability to meet commitments to beneficiaries as well as better align our investment activities with the broader interests of society.” See Principles for Responsible Investment, <http://www.unpri.org> (last visited Mar. 19, 2007).
12. Adopted by the U.N. Sub-Commission on the Promotion and Protection of Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/L.11, at 52 (2003) [hereinafter Norms on the Responsibilities of Transnational Corporations], available at [http://www.unhcr.ch/Huridocda/Huridocda.nsf/\(Symbol\)/E.CN.4.Sub.2.2003.12.Rev.2.En?OpenDocument](http://www.unhcr.ch/Huridocda/Huridocda.nsf/(Symbol)/E.CN.4.Sub.2.2003.12.Rev.2.En?OpenDocument). The preamble states that

even though States have the primary responsibility to promote, secure the fulfillment of, respect, ensure respect of and protect human rights, transnational corporations and other business enterprises, as organs of society, are also responsible for promoting and securing the human rights set forth in the Universal Declaration of Human Rights.

It affirms that “transnational corporations and other business enterprises, their officers and persons working for them are also obligated to respect generally recognized responsibilities and norms contained in United Nations treaties and other international instruments.” It mentions scores of these instruments by name, including the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, a 1993 European agreement adopted in furtherance of Principle 13 of the Rio Declaration. This Convention states that “[t]he operator in respect of a dangerous activity . . . shall be liable for the damage caused by the activity as a result of incidents at the time or during the period when he was exercising the control of that activity.”

13. Global Reporting Initiative (GRI) provides “a common framework” for corporate reporting on sustainability. See GRI, <http://www.globalreporting.org/Home> (last visited Mar. 19, 2007).
14. Norms on the Responsibilities of Transnational Corporations, *supra* note 12, art. 1.

3. In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec. 1984, 809 F.2d 195, 17 ELR 20580 (2d Cir. 1987), *cert. denied*, 484 U.S. 871 (1987).

4. *Cloud of Despair in Bhopal*, L.A. TIMES, Aug. 30, 2001, at A6.

5. The Permanent Peoples’ Tribunal, Fourth and Final Session London, Nov. 28 to Dec. 2, 1994 (Via della Dogana Vecchia 500186, Rome, Italy), performs “a surrogate function for the lack or inadequacy of international tribunals and the inaccessibility of peoples, individuals and [nongovernmental organizations] to such courts which are exclusively empowered to adjudicate upon interstate litigations or under a strictly regulated mandate.”

6. H. R. Res. 503, 108th Cong. (2004). The bill was introduced by Rep. Frank Pallone (D-N.J.), on September 29, 2004, with 16 cosponsors.

7. *Id.*

8. *Id.*

9. Upendra Baxi, *The “Just War” for Profit and Power: The Bhopal Catastrophe and the Principle of Double Effect*, in RESPONSIBILITY IN WORLD BUSINESS, MANAGING HARMFUL SIDE-EFFECTS OF CORPORATE ACTIVITY 176 (Lene Bomann-Larsen & Oddny Wiggen eds., United Nations Univ. Press 2004).

courts, basic rights, education, clean air, or clean water. The norms state the obligation of corporations to fill the gap, and not to act as if gaps in governance or civil society are a license to ignore moral imperatives.

In addition, the patchwork quilt of national systems of law is not well-integrated. It is difficult to seek claims outside of one's country, or to order a foreign corporation to appear in one's own. The laws of countries may conflict, and the focus on free trade and the need to attract capital may weigh against the imposition of liability. Furthermore, legal processes to hold transnationals accountable may not be a priority for countries seeking to develop commerce. It is difficult to contemplate how to move forward, because opening the doors of a nation's courts to extranational entities or establishing an international body to which claims may be brought poses incalculable risks to a country's sovereignty. A strong international legal system that does not confine itself to universally agreed-upon principles could diminish the ability of each national government to effectively and appropriately determine the rules for behavior for its own citizens and visitors. But an exclusive focus on voluntary methods allows the rogues to violate environmental and other human rights and undersell responsible competitors. It fails to prevent the success of those who merely mouth or mimic responsible behavior, or to guard against changes in management policy.

Daniel Yankelovich argues in *Profit With Honor*<sup>15</sup> that our cultural expectations must form the heart and foundation of whatever law develops to meet the needs of our new, interconnected economy. The current focus on the development of norms is therefore appropriate and crucial. It provides the foundation for a universal consensus on what worldwide standards should be. Without accepted expectations, the laws we develop will not be observed and will not have force or consistency. The U.N.'s Norms on the Responsibilities of Transnational Corporations are a set of recommendations—a mere articulation of expectations that have no force of law. But they refer to a context of legal principles, and they seem to anticipate the need for legal mechanisms. They state:

Transnational corporations and other business enterprises shall carry out their activities in accordance with national laws, regulations, administrative practices and policies relating to the preservation of the environment of the countries in which they operate, as well as in accordance with relevant international agreements, principles, objectives, responsibilities and standards with regard to the environment as well as human rights, public health and safety, bioethics and the precautionary principle, and shall generally conduct their activities in a manner contributing to the wider goal of sustainable development.<sup>16</sup>

Transnational corporations are expected to implement the Norms in their contracts and operations. Most strikingly, the Norms state that:

Transnational corporations and other business enterprises shall provide prompt, effective and adequate reparation to those persons, entities and communities that have been adversely affected by failures to comply with

these Norms through, inter alia, reparations, restitution, compensation and rehabilitation for any damage done or property taken. In connection with determining damages, in regard to criminal sanctions, and in all other respects, these Norms shall be applied by national courts and/or international tribunals, pursuant to national and international law.<sup>17</sup>

This seems a clear statement that the Norms should become enforceable.

If we do not codify these Norms and do the hard work necessary to develop a strong network of international law to provide for worldwide accountability, there is an ever-present risk, and arguably a probability, that guidelines and voluntary approaches will be overridden by the primary directive of business: to make money. The international discussion of responsibility must come to embrace the roles of government and legal process. Persisting in the current emphasis on voluntary cultural evolution is risking failure.

Bhopal is an excellent case in point. Immediately after the disaster occurred, Warren Anderson, chief executive officer (CEO) of UC, made a public statement accepting moral responsibility for what happened. But he was subsequently overruled by the mandates of business when UC adopted a strategy of denying responsibility, even to the point of claiming that the accident was caused by sabotage.<sup>18</sup> This avoidance strategy has not completely succeeded, and the purchase of UC by Dow Chemical has not protected Dow from what many see as a continuing responsibility. Cases seeking compensation through U.S. courts for injuries from contaminated water at the site have survived, on appeal, dismissals at the district court level,<sup>19</sup> and criminal cases against UC and its former CEO remain open in India.<sup>20</sup> Dow is currently resisting an international campaign by groups such as Greenpeace and the International Campaign for Justice in Bhopal to force the company to take greater responsibility for redressing the continuing harm caused by industrial operations at the site.<sup>21</sup>

17. *Id.* art. 18.

18. The website of the International Campaign for Justice in Bhopal notes that UC accepted moral responsibility in 1984 "but 'moral' responsibility has never translated into anything tangible." The site calculates, as of August 23, 2006, that compensation received by survivors averages 6.4 cents per day. See International Campaign for Justice in Bhopal, *Bhopal in the News Archive*, <http://www.bhopal.net/bhopalintheneews/archives/2006/02/index.html> (last visited Mar. 19, 2007); see also Letter of Frank Pallone et al., Members of Congress, to Manmohan Singh, Prime Minister of India (Mar. 23, 2006) (stating that "no one has been held accountable for the leak and its after-effects").

19. See *Bano v. Union Carbide Corp.*, 273 F.3d 120 (2d Cir. 2001), *aff'd*, 361 F.3d 696 (2d Cir. 2004) (affirming, in part, plaintiff's right to pursue property damage claims).

20. A request to reduce the charges against UC CEO Warren Anderson from culpable homicide to negligence was denied in 2002. "There is no sense in reducing the charges since Warren Anderson, who has been declared an absconder and against whom a permanent arrest warrant has been issued, has not appeared in any court," Chief Judicial Magistrate Rameshwar Kotha said. CNN.comWorld, *Bhopal Charges Stay, Indian Court Rules*, <http://edition.cnn.com/2002/WORLD/asiapcf/south/08/28/india.bhopal/index.html> (last visited Mar. 19, 2007).

21. Greenpeace's Toxic Hotspots campaign states that

[t]he survivors have never received adequate compensation for their debilitating illnesses and even 20 years after the disaster, the polluted site of the abandoned factory, bleeds poisons daily into the groundwater of local residents. Bhopal is an ongoing disaster and Union Carbide's new owners, Dow Chemicals, should pay to clean up the toxic mess.

15. DANIEL YANKELOVICH, *PROFIT WITH HONOR* (Yale Univ. Press 2006).

16. Norms on the Responsibilities of Transnational Corporations, *supra* note 12, art. 14.

It is not only the extraordinary cases that demonstrate the need for widespread legal accountability. In April 2006, the U.N. Special Rapporteur on toxic waste, Okechukwu Ibeanu, stated that regulation was “most urgent” to address the responsibility of transnational corporations for poisoning from the proliferation of products containing toxic chemicals and their improper disposal. Many of the cases brought to his attention involved allegations of irresponsible or illegal corporate behavior, he said, and “[s]uch behavior is too often met with impunity.” Ibeanu stated that “[t]he victims of human rights violations arising from actions or omissions by transnational corporations should be allowed to seek redress in the home country jurisdiction, and to ensure that transnational corporations domiciled in their countries be held to account for violating human rights standards.”<sup>22</sup>

### III. The Role of Government

The role of government is often acknowledged in the public discussion of corporate responsibility. For example, Mary Robinson, chair of the Business Leaders Initiative on Human Rights (formed to give careful consideration to the Norms on the Responsibilities of Transnational Corporations), commented in the foreword to the group’s third report that

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Greenpeace, *Toxic Hotspots*, <http://www.greenpeace.org/international/campaigns/toxics/toxic-hotspots> (last visited Apr. 6, 2007). The International Campaign for Justice in Bhopal, which includes several survivor groups, and is supported by the Association for India’s Development, Amnesty International, Friends of the Earth, and many others, subscribes to the following principles: (1) Polluter Pays—the idea that those responsible for polluting the environment and endangering our health should also be held responsible for cleaning up that pollution and preserving our health; (2) Right to Know—people should have easy access to information about potential or current threats to the quality of the environment and their lives; (3) International Liability—CEOs and corporations should not be allowed to abscond from legal proceedings levied against them in other nations; and (4) Environmental Justice—communities of poor, indigenous, and people of color should not be targeted with polluting facilities, dangerous technologies, and other threats to their health and community. See International Campaign for Justice in Bhopal, <http://www.bhopal.net/odsite/icjb.html> (last visited Mar. 19, 2007). Dow’s website, *Bhopal.com*, in its own words, “pays homage to the most important consequence of the incident: *the continuation of voluntary safety and environmental standards for the proudly self-regulating chemicals industry.*” See Dow, *Environment, Health & Safety Responsible Care*, <http://www.dowethics.com/bhopal.com> (last visited Mar. 19, 2007).

22. Press Release, Special Rapporteur on Toxic Wastes Urges Measures to Counter Harmful Effects of Chemicals Contained in Household and Foods, U.N. Doc. HR06031E (Apr. 7, 2006). At its 51st session, the U.N. Commission on Human Rights adopted resolution 1995/81, noting the “human rights to life and health of individuals” in countries experiencing toxic dumping, and gave a mandate to the Special Rapporteur to make recommendations and proposals on adequate measures to control, reduce, and eradicate the illicit traffic in, transfer to, and dumping of toxic and dangerous products and wastes in African and other developing countries. On June 2, 2006, the Special Rapporteur issued a statement that 50,000 tons of obsolete pesticides have been improperly disposed in various locations in Africa, and that the disposal of electronic wastes and the breakup of polluted ships, as well as trade in banned restricted and obsolete products, threaten the health and safety of citizens in developing countries. He stated that “industries and their lobbies try to prevent initiatives that might establish their responsibility and offer redress to victims. States are also unenthusiastic about investigating the claims of victims, as scrutiny may show that they have direct or indirect responsibility in exposing their nationals or foreigners to harm.” In January 2007, he reported on dumped pesticides, acid tars, and other wastes in Ukraine.

[we] must continue to be clear about the primacy of Governments as the duty-bearer for ensuring the fulfillment for human rights. That means putting the role of business and other actors in the proper context. The challenge is in determining how accountability can be ensured, not only in States where governance is weak or corrupt, but also in nations where the changing role of the State, such as through increased privatisation of public services, put questions of accountability in a new light.<sup>23</sup>

But the idea has met with resistance. A recent article by David Kinley, Justine Nolan, and Natalie Zerial notes that

neither industry based initiatives, such as individual corporate codes, nor multilateral initiatives, such as the Global Compact, involve the kind of concrete obligations that human rights, environmental, labour and other advocates believe are necessary to restrain effectively corporate misbehaviour. To the dismay of activists and the satisfaction of many transnational corporations (TNCs), a proliferation of codes, networks and standards has been helping to improve corporate reputations, while effectively keeping any discussion of effective international regulatory measures off the agenda.<sup>24</sup>

The authors term the response to the Norms a “furore” and comment that “their most polarising feature is their apparent attempt to impose obligations directly on companies, in addition to parallel obligations on states.”<sup>25</sup>

At a recent forum, John Ruggie, the U.N. Special Representative for Business and Human Rights, charged with taking the Norms to the next stage, said that he was “convinced that compliance efforts cannot fully succeed unless we bring governments back into the equation.” He noted that “you cannot achieve the needed scale and have systemic impact unless you bring governments back in.”<sup>26</sup> This author must mention his own personal experience of many conferences and meetings on the topic of corporate responsibility in which the focus has been exclusively on voluntary mechanisms. The comments he has heard from corporate attendees expressed a horror of government intervention and an expectation of inefficiency. Ruggie’s implication that governments have been out of the picture rings true.

Kinley et al. note that “the way forward will inevitably be through the international legal orthodoxy of State responsibility. International law must be the spine of any serious effort to reform this area.”<sup>27</sup> Despite the desire of businesses to have freedom of action, and concerns about government control and inefficiency, including the widespread belief that a free market functions best without interference, gov-

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23. BLIHR REPORT 3: TOWARDS A COMMON FRAMEWORK ON BUSINESS AND HUMAN RIGHTS 2. See Business Leaders Initiative on Human Rights, <http://www.blihr.org> (last visited Apr. 6, 2007).

24. David Kinley et al., *The Politics of Corporate Social Responsibility: Reflections on the United Nations Human Rights Norms for Corporations*, 25 COMPANY & SEC. L.J. 30 (2007). The authors note: “It may be necessary to incorporate some form of extra-territorial jurisdiction in a state’s internal regulations in order to properly address the TNC phenomenon. Alternatively, the possibility for some form of international dispute mechanism holds certain benefits.” *Id.*

25. *Id.*

26. Ruggie suggested lobbying for government procurement practices that ensure labor standards are met, and joining “NGOs to lobby for stronger labor standards in bilateral and multilateral trade agreements.” Delivered at the Forum on Corporate Social Responsibility, Fair Labor Association and the German Network of Business Ethics, Bamberg, Germany (June 14, 2006).

27. Kinley et al., *supra* note 21.

ernment is clearly essential. Commenting on the U.N.-sponsored discussion of the responsibilities of corporations, Klaus Leisinger, president and CEO of the Novartis Foundation for Sustainable Development, identified three distinct duties of governments: to create a clear and reliable legal framework and hence a level playing field, to enforce existing law, and to sanction violations consistently and coherently. He noted that “[t]hese duties cannot be delegated to any other organ of society.”<sup>28</sup>

Dara O’Rourke, in a recent report for the Corporate Social Responsibility Practice of the World Bank, reviewed a variety of actions governments can take to foster the development of corporate social responsibility reporting. Many are essentially part of voluntary schemes: working with trade associations, disseminating information, facilitating the development of methods, and providing technical assistance on best practices. But O’Rourke noted that governments can also tie performance to tax incentives and export promotion assistance or direct production subsidies, and that they can also support the public use of reporting data to “motivate laggards to improve performance.”<sup>29</sup> Most importantly, he discussed how governments can use enforcement powers. Governments can mandate reporting requirements in a variety of ways and monitor reports by comparison to physical inspections. They can require the use of third-party verification and establish quality assurance standards, hold the auditors responsible, and mandate sanctions for nondisclosure or false disclosure. O’Rourke framed his discussion by quoting Deborah Doane of the New Economics Foundation: “The market does not provide sufficient incentives for companies to report on their social and environmental impacts on a voluntary basis.”<sup>30</sup>

#### IV. The Role of Corporations

From a corporate perspective, a focus on voluntary approaches is understandable. Many governments do struggle with corruption.<sup>31</sup> In addition, governmental regulation can be overly strict and economically inefficient. However, the potential negatives of poorly executed governance do not change the fact that government can be used efficiently to great worldwide benefit. Business interests can participate in the development of good governance by resisting the encroachment of bad governance. Citizens and consumers have become accustomed to the idea that businesses typically oppose environmental regulations, would like to see enforcement decline, or would like to capture and control regulatory agencies. If businesses wish the public to have a different perception, they should adopt a very different posture concerning environmental governance. Businesses could be actively engaged in shedding their traditional positions toward government and assisting in the development of new rules that clearly serve the

public interest. This includes the adequate funding of enforcement agencies.

The above-mentioned Business Leaders Initiative on Human Rights demonstrates that some businesses understand the virtue, if not explicitly of active support of an effective transnational legal system, of the value of the Norms (which anticipate such a system), and of a deeply institutionalized adherence to the principles of respect for human rights. The organization terms itself “a business-led programme with 13 corporate members” (ABB Ltd, Barclays plc, MTV Networks Europe, National Grid plc, Novartis Foundation for Sustainable Development, Novo Nordisk, and The Body Shop International plc, are the original founders. In 2004, Gap Inc., Hewlett-Packard Company, and Statoil joined; in June 2006, Alcan Inc. and AREVA joined, and Ericsson and General Electric have recently joined).<sup>32</sup> The organization states that it has

worked to break down some of the barriers and uncertainties that have kept many responsible companies from realizing their role in supporting universal human rights. Our principal purpose is to find “practical ways of applying the aspirations of the Universal Declaration of Human Rights within a business context and to inspire other businesses to do likewise.”<sup>33</sup>

The organization’s *Guide for Integrating Human Rights into Business Management* identifies the following elements of a “business case” for recognition of human rights:

- Improved stakeholder relations;
- Improved employee recruitment, retention, and motivation;
- Improved risk assessment and management;
- Reduced risk of consumer protests;
- Enhanced corporate reputation and brand image;
- A more secure license to operate;
- Strengthened shareholder confidence;
- More sustainable business relationships with governments, business partners, trade unions, subcontractors and suppliers.<sup>34</sup>

Enforcement of sensible regulations is clearly in the interest of responsible businesses, because irresponsible businesses avoid the costs of compliance and thus gain a competitive advantage. It should be the mark of a sensible and responsible corporation that it takes action to support the full funding of adequate inspection and enforcement programs to combat violators. If such enforcement programs are not adequately funded and staffed, then competitors can operate at lower costs. The corporations that spend the money and time to properly manage their wastes and emissions and to research ways to make their products safer may have difficulty competing with those who do not bother to spend that money. In order for the external costs of pollution to be internalized in the operational costs of all companies, an adequate government inspection and enforcement program is necessary. This is how society as a whole can act to

28. On Corporate Responsibility for Human Rights, Basel (Apr. 2006). In October 2005, Leisinger was appointed Special Advisor on the Global Compact to U.N. Secretary-General Kofi Annan.

29. THE WORLD BANK, OPPORTUNITIES AND OBSTACLES FOR CORPORATE SOCIAL RESPONSIBILITY REPORTING IN DEVELOPING COUNTRIES 31-33 (2004).

30. *Id.*

31. See Transparency International, *Global Corruption Report*, <http://www.transparency.org/publications/gcr> (last visited Mar. 19, 2007). The latest, its sixth, focuses on corruption of judicial systems.

32. Business Leaders Initiative on Human Rights, <http://www.blihr.org> (last visited Mar. 19, 2007).

33. *Id.*

34. BUSINESS LEADERS INITIATIVE ON HUMAN RIGHTS, A GUIDE FOR INTEGRATING HUMAN RIGHTS INTO BUSINESS MANAGEMENT 6, available at [http://www.unglobalcompact.org/docs/issues\\_doc/human\\_rights/guide\\_hr.pdf](http://www.unglobalcompact.org/docs/issues_doc/human_rights/guide_hr.pdf).

favor the responsible companies—by ensuring that polluters and violators are not allowed to benefit from lower-cost operations resulting from lax enforcement.

Businesses may rightly fear that a new regime could be economically problematic for them. Others may fear that an international system might violate traditions of national sovereignty. (Preservation of national sovereignty can be critical to achieving international agreements.)<sup>35</sup> But it is standard for developed countries to have laws in place that punish acts that harm others, and a system of redress for such harm. All civilizations worthy of the name have recognized the need for justice and fairness. It should be possible, while respecting national contexts, to construct an international system that provides for compensation for injury, that prevents harm, and that punishes serious violations of rights—including the common interests in clean air, water, and land. Such mechanisms can and should be designed to be consistent with already existing systems for achieving justice and equitable relations between actors.

## V. Creating and Implementing New Approaches

When contemplating a world where the rights of each individual to a clean environment are respected, we must recognize that new approaches will be necessary to make the entire supply chain more responsible. There are two roads before us, which are not mutually exclusive. One road creates and empowers international bodies to act, and the other provides non-nationals with greater access to national systems.

International environmental law provides little recourse against individuals who transgress against nature. Internationally, there are sanctions against trade in endangered species<sup>36</sup> and prohibitions on releases of ozone-depleting substances,<sup>37</sup> but enforcement depends largely on national efforts, which are highly variable, and there is a lack of international bodies to which private parties can easily bring

claims. As noted by the Center for International Environmental Law, “only two international procedures exist that can directly scrutinize the degree to which companies are respecting human rights.”<sup>38</sup> Indirect liability can theoretically apply when a company has been complicit in offenses by a State. Direct liability for genocide and other crimes against humanity are not ruled out by existing treaties and are supported by the judgment at Nuremberg, which applied to individuals. But if, for example, someone wakes up one day to find the ground around her house flooded with oil, and she learns that her sorrows have been caused by a local company that is essentially captive to one that is headquartered in another country, her next move may not be to seek recompense under an international treaty. The best and perhaps only recourse at present is to try to sue the companies under the laws of either the home nation or the nation in which the dominant corporation is headquartered.

U.S. law allows such suit under the Alien Tort Claims Act, but it is not clear how effectively this law provides for international justice.<sup>39</sup> Courts have not definitively stated how this law is to be applied in the modern era,<sup>40</sup> and there is serious opposition to strong application.<sup>41</sup> It is not easy for the average foreign victim to sue an international company in the country in which it is headquartered if the harm occurred elsewhere, and especially if it is caused by an associated entity. It may be hard to gain a ruling that the law in the home country is applicable. A recent survey concluded:

Various attempts have been made within different countries to approach the issues: for example, Corporate Social Responsibility bills imposing extraterritorial obligations of varying types on TNCs under individual national laws have been sponsored, and rejected, in the USA and Australia; and the issue of the liability of corporations for activities overseas and of subsidiaries has been raised in connection with the UK Company Law Review, the proposed new offence in the UK of corporate manslaughter, and the OECD Convention on Bribery 1997 together with the reform in the UK of the bribery and corruption offences. There is no international

35. For example, before stating in Principle 2 of the Rio Declaration that States have “the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction,” it is stated that “in accordance with the Charter of the United Nations and the principles of international law, states have the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies.” Report of the United Nations Conference on Environment and Development, Rio de Janeiro (June 1992).

36. Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), <http://www.cites.org> (last visited Apr. 6, 2007).

CITES was drafted as a result of a resolution adopted in 1963 at a meeting of members of IUCN (The World Conservation Union). The text of the Convention was finally agreed at a meeting of representatives of 80 countries in Washington, DC, United States of America, on 3 March 1973, and on 1 July 1975 CITES entered in force . . . Although CITES is legally binding on the Parties—in other words they have to implement the Convention—it does not take the place of national laws. Rather, it provides a framework to be respected by each Party, which has to adopt its own domestic legislation to implement CITES at the national level.

*Id.*

37. The Montreal Protocols, which also reduce the production and consumption of ozone-depleting substances, such as chlorofluorocarbons and halons, came into force in 1989. See UNEP, *Ozone Secretariat*, <http://ozone.unep.org> (last visited Apr. 6, 2007).

38. The International Labor Organization’s Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, and the Organization of Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises rely on voluntary cooperation. See CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW, ONE SPECIES, ONE PLANET: ENVIRONMENTAL JUSTICE AND SUSTAINABLE DEVELOPMENT (2002), available at [http://www.ciel.org/Publications/OneSpecies\\_OnePlanet.pdf](http://www.ciel.org/Publications/OneSpecies_OnePlanet.pdf).

39. Passed in 1789 as part of the act creating the U.S. judicial system (28 U.S.C. §1350), the Act states that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” For a presentation of views for and against vigorous application of the Act, see Public Broadcasting Service, *Global Business vs. Global Justice*, at <http://www.pbs.org/now/politics/alientortdebate.html> (last visited Mar. 19, 2007).

40. For example, when Florida U.S. District Judge Jose E. Martinez ruled on a case involving the Act in September 2006, he “asked the 11th U.S. Circuit Court of Appeals to provide guidance to trial courts in handling cases brought under the Alien Tort Claims Act . . .” Martinez wrote: “There is a pressing need for clarification of these issues.” Julie Kay, *11th Circuit Asked to Clarify Corporate Liability*, DAILY BUS. REV. (Oct. 30, 2006), available at <http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1161939931304>.

41. See, e.g., John E. Howard, *The Alien Tort Claims Act: Is Our Litigation-Run-Amok Going Global?*, <http://www.uschamber.com/press/opeds/0210howardlitigation.htm> (last visited Apr. 6, 2007) (urging repeal of the law because of the danger of unwarranted litigation posed by “pirates of the plaintiff’s bar”).

agreement requiring standards to be set more generally for the activities of corporations overseas.<sup>42</sup>

Even if one could gain the court's permission to sue in the country where the corporation is headquartered, the expense of traveling there for that purpose, transporting witnesses and evidence, and perhaps relocating for an extended period of time might make such suit impractical.

New approaches by corporations could take the form of execution of legal documents binding them internationally to principles they already accept when doing business at home. No other act can more powerfully bespeak commitment to responsibility. Such documents can be enforceable stand-alone covenants published as declarations to the public, or they can be incorporated into contracts. These instruments could state that those who are harmed by corporate actions are parties to the agreement. Corporations could waive the right to object to specified forums convenient to potential plaintiffs in locations where a business nexus exists. The instruments could specify the conditions by which the corporation will allow itself to be held liable, the processes to which they could be subjected, and the assets that would serve as concrete commitments to be held to legal standards. These legal declarations could designate international courts or arbiters to adjudicate disputes and could be written to commit persons and property to the outcome of their deliberations.

Principle 13 of Agenda 21, produced by the 1992 U.N. Conference on Environment and Development in Rio de Janeiro, proclaimed that

States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.<sup>43</sup>

States have not yet been able to resolve their traditional concerns with sovereignty and establish a working international order by which legitimate plaintiffs may seek effective redress for environmental harm. Corporations, however, can breathe life into Principle 13 by committing themselves legally, in all jurisdictions, to the same expectations of liability and legal process that they would expect to observe in their home countries.

42. MYFANWY BADGE, *TRANSBOUNDARY ACCOUNTABILITY FOR TRANSNATIONAL CORPORATIONS: USING PRIVATE CIVIL CLAIMS*, WORKING PAPER 1 (Chatham House 2006), available at [http://www.chathamhouse.org.uk/pdf/research/il/ILP\\_TNC.pdf](http://www.chathamhouse.org.uk/pdf/research/il/ILP_TNC.pdf).

43. Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/26 (vol. I); 31 I.L.M. 874 (1992), available at <http://www.unep.org/Documents/Default.asp?DocumentID=78&ArticleID=1163>; see also OECD, *PRINCIPLES CONCERNING TRANSFRONTIER POLLUTION* (1975), which states, in part, that:

Countries of origin should ensure that any person who has suffered transfrontier pollution damage or is exposed to a significant risk of transfrontier pollution, shall at least receive equivalent treatment to that afforded in the Country of origin in cases of domestic pollution and in comparable circumstances, to persons of equivalent condition or status.

The principles specify that: "From a procedural standpoint, this treatment includes the right to take part in, or have resort to, all administrative and judicial procedures existing within the Country of origin, in order to prevent domestic pollution, to have it abated and/or to obtain compensation for the damage caused."

Extending the expectation of enforceable liability to cross-boundary accountability provides a market opportunity. For example, in the United States, a company is clearly subject to principle-agent law, and expectations and norms concerning the responsibility of principles for agents are clearly backed up and enforced by the penalties and processes of law. There is little need to question whether a company's declaration that it stands behind its agents is dependable, because anyone can consult existing law and access courts to enforce that law. However, if that company's agent is in a far-away country, and someone there is harmed by the agent, will the company allow itself to be sued in the same way if the plaintiff were in the United States? Or would the company take advantage of the fact that the foreign plaintiff may have a difficult time forcing the company to appear in court? What if that company published binding documents to the effect that it willingly subjected itself, worldwide, to the same principle-agent law to which it is accustomed in its own country? What if it promised to appear in court—wherever it did business—to answer to legitimate charges for vicarious liability, and bound itself by the commitment of assets and the stipulation of process? It is possible that the attorney who recommended such a course of action to a client could be accused of failing in the duty of zealous representation. But to this charge the attorney should answer that the corporation could, by this action, powerfully assure responsible consumers and investors worldwide of its intentions, and thus position itself to conquer the market of responsible customers. The company could proclaim a belief in principle: that if its influence over a home-based supplier would subject it to liability in the courts of its own country, it should not do business with the expectation that that same liability would not apply elsewhere as well. By so proclaiming, the company could seek to attract the business of customers and investors interested in principled commerce.

No claims of responsibility should be considered credible if a company is simply taking advantage of the fact that world civilization has not yet developed effective methods of applying basic legal principles universally. Businesses who wish to be responsible—and be regarded as responsible—should take steps to fill the gaps that now exist in international law, and any corporation that does this will be able to powerfully distinguish itself from others who do not commit to responsibility in this way. The term "greenwashing" refers to the concept that corporations proclaiming their commitment to environmental responsibility are simply engaging in clever public relations. A corporation committing itself to worldwide legal process can claim that its policies are the opposite of greenwash. They have put their assets on the line. They can prove that when they say they believe in being responsible, it really means something. If they are at fault, they will accept the consequences. If business does not face the risk of financial consequences for the harms it may cause, the harms remain external, and the corporation will not take the actions to avoid them, as they would if such consequences were expected. Commitment to liability for self-caused harm is a guarantee of responsibility as opposed to a casual sentiment.

Companies could make concomitant financial investments that reflect a dedication to responsibility. In the example above, a corporation could show the world that they stand by their commitment to responsibility by creating a fund to pay for the travel costs of a legitimate plaintiff,

routinely agreeing not to contest plaintiffs' standing to sue, and stating in contracts that the applicable law would be the law of the State where they are headquartered.<sup>44</sup> A company contracting for hazardous operations could post a bond to ensure that cleanup funds would be available in case of an accident. Companies operating in areas with inadequate enforcement could pool funds to establish a third-party auditing function. Companies could establish transparent programs of ambient monitoring, opening them up for host company adoption, to further the development of environmental protection at the same time as they provide assurances of their own performance.

This all may seem counterintuitive to a business leader or corporate attorney. But any corporation taking such actions would merit the support of any responsible consumer or investor, and their claims of social responsibility would be credible. All they would be doing would be extending to another country the same standards they must observe within their own.

A good corporate attorney can devise statements that exclude frivolous claims. The agreements could be made contingent upon the certification of legitimate claims by a reputable third party. Protections against fraud and political interference would have to be developed. But any corporation that wishes the public to believe that it is not doing business in a less-developed country because it wishes to enjoy lowered standards has the opportunity to prove its intentions by creating a legal commitment to be liable in the same manner as it has traditionally accepted liability. To accomplish this, the corporation should make clear that it will accept service of process, and that it will not oppose appropriate assertions of applicable jurisdiction. The corporation should establish that it will observe the same rules of discovery as would otherwise prevail. The corporation should commit to the inspection of its facilities by objective auditors. Because shareholders or potential investors may fear that the managers of the corporation have lost their minds, (subjecting profits to potential erosion), the corporation should explain why it is willing to be held liable in this way: because it conducts its business responsibly and has no fear of such potential liability.

This is a new model of corporate behavior. It places the profitmaking enterprise squarely within the superior context of responsibility, making the mission of making money secondary to the mission of good corporate citizenship. It may be that only a new kind of investor would be willing to commit resources to such entities, and only a new kind of manager might be willing to devote themselves professionally to this kind of mission. But corporations may also ask, "What does it say if we are not willing to be held liable for aiding and abetting crimes? It says that we are willing to be accomplices to crimes, and we are not." Articulated in this way, there is nothing new in these concepts, unless we accept that our current system allows corporations to escape liabilities that they should not.

Subjecting oneself to liability before being forced to by law seems to be a dereliction of the fiduciary responsibility to shareholders. But if a corporation—a legal person—is not willing to be held liable, in the same way as it has always been, for breaches of duty that have foreseeable conse-

quences, that may also be considered abnormal or even amoral. This is especially so if a corporation expects to be held strictly liable in its home country for injuries from ultrahazardous operations, but are not willing to see the principle extended to the country where co-venturers engage in such operations. It is hard to imagine a stronger signal of integrity than providing consent to be sued for the same acts that may be litigated or prosecuted in the home country. If it is true that there is a consumer population that wishes corporations to be responsible, and can manifest those desires through selective purchasing, favoring responsible entities, then it is possible for a manager to justify voluntary liability as consistent with fiduciary responsibility. The existence of the responsible consumer justifies strategies for capturing the market for responsible actors.

Governments can create programs that favor such acceptance of responsibility. Tax credits could be used to incentivize the creation of the funds suggested above. Export assistance could be offered to companies providing such assurances. Government-supported insurance programs could help cover the expanded potential liabilities that would result, and home governments could also lend legal assistance in combating illegitimate claims and negotiating with host governments. Laws could clarify that fiduciary responsibility must be seen within the context of duties owed to society in general, and ensure that no shareholder derivative suit can succeed against a corporation that commits to international liabilities consistent with those faced at home. Purchasing preferences could be extended to corporations providing concrete assurances that they accept legal process involving international plaintiffs. These and other government actions could make the willing acceptance of international responsibility a desirable and indispensable feature of the world economy.

Corporations have generally ignored the opportunity to gain instant credibility by supporting monitoring and enforcement systems that provide the necessary assurances and integrity to the public, although supporting environmental enforcement and strict regulation that is well designed to favor responsible behavior provides a market advantage by reducing the competitive pressure from those who are less responsible. This may be because the public has not yet demanded that declarations of responsibility be backed up by tangible action. Corporations have similarly ignored the opportunity to reinforce claims of responsible intent by willingly submitting to the legal processes that provide compensation to victims (or by posting bonds to ensure sufficient funding for compensation in the event of injury). In an era when corporations are increasingly contracting with suppliers in countries lacking effective, impartial legal systems, these acts can strongly assure the public that these corporations are truly committed to responsible behavior.

## VI. Conclusion

Corporations need not wait for the development of international bodies that will adjudicate transnational claims, nor for the universal establishment of effective laws such as the U.S. Alien Tort Claims Act. When corporations allow themselves to be sued for improperly abetting the crimes of suppliers, or actions or inactions that negligently caused injury, their commitment to responsibility may be rightly credited.

44. Allowing for the application of the law in the state where they are doing business, as appropriate to the ends of responsible business practice.

Consumer and watchdog groups may take note, and spread the word, about corporations that have taken the extraordinary step of submitting themselves to the risk of losing money, for the sake of environmental justice. When a corporation seeking recognition for responsible policies provides in advance for the cleanup of land and the compensation of victims of pollution, and supports the adequate funding of local environmental enforcement, monitoring, and educa-

tion, then we will know that it has put its money where its mouth is.

If responsible business is indeed an essential core value, then it should be able to withstand the test of accountability. If the marketplace is not powerful enough to bring that accountability, then civil society, governments, international bodies, and corporations themselves must create a system that will ensure it.