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# *The Impact of Environmental Law on Corporate Governance: International and Comparative Perspectives*

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## **Abstract**

*This article examines whether internationally agreed environmental principles and nationally applicable environmental liability regimes justify progressive change within corporate governance law. In other words, has environmental protection transcended its current place in the external legal framework governing the way companies behave to play a role within the internal regulation of the way companies are run? International trends in corporate environmental liability and environmental management systems are discussed to determine whether environmental considerations should now play a corporate governance role. Justification for the inclusion of environmental considerations is examined within the context of alternative corporate governance theories and their practical implications for company directors.*

## **1 Introduction**

Environmental law now regulates most aspects of a company's activities. Corporate strategies must integrate environmental considerations as well as implement environmental principles at all stages of innovation, raw material extraction, product fabrication, distribution, marketing, transportation and disposal.<sup>1</sup> In light of this corporate environmental reality, this article eschews merely describing the content of corporate environmental regulation. Instead, it examines whether environmental

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<sup>1</sup> See, for example, Devos, 'Industry Facing New Constraints', in S. Blackmer *et al.* (ed.), *New Liabilities and Challenges for Industry in Europe: Environment and Business, the Role of the Company Lawyer* (Proceedings from the Fifth European Conference of Company Lawyers, 20–21 October 1994, European Company Lawyers Association, Brussels/Antwerp) (1994) 15–49.

principles and norms developed by international law and applied in domestic jurisdictions justify the progressive reform of corporate governance law.<sup>2</sup> The task here is to ascertain whether, and if so how far, environmental protection has transcended its current position in the *external* legal framework governing corporate behaviour to play a role within the *internal* regulation of the way companies are run.<sup>3</sup> This line of inquiry is important because it is argued that corporate environmental protection cannot be fully achieved until it is successfully *internalized* within the corporate governance regime, rather than remaining as yet another *external* regulation to be complied with at the minimum level conducive to a company's balance sheet. As Parkinson notes, while external regulation helps to bring corporate conduct in line with social expectations, its scope for control is limited.<sup>4</sup> Thus, corporations, no less than human individuals, must increasingly consider the environmental implications of all their actions regardless of whether specific legal obligations requiring them to do so in fact exist. This article argues that the appropriate decision-making level for these implications to be considered is in the corporate boardroom as an important aspect of a company director's duties.

The following discussion examines the extent of the progressive *internalization* of

<sup>2</sup> Corporate governance has been defined as 'the system by which companies are directed and controlled' and concerns issues such as the composition and structure of boards of directors and the accountability of boards to shareholders. See (UK) Company Law Review Steering Group, *Modern Company Law for a Competitive Economy* (UK Department of Trade and Industry (DTI) Consultation Document) (1998) para. 3.5. More succinctly, Parkinson denotes 'corporate governance' as 'the means by which executive management is controlled and corporate objectives are set'. See J.E. Parkinson, *Corporate Power and Responsibility: Issues in the Theory of Company Law* (1994) viii.

<sup>3</sup> The underlying normative assumption of ensuring compliance through external corporate controls and internal corporate reform has already been noted by previous writers. Parkinson, for example, suggests that 'as well as using external modes of control to constrain particular types of conduct that are privately profitable but socially damaging or otherwise objectionable, the law should also be employed to modify corporate objectives to allow third-party interests to be given precedence over maximum profits in appropriate cases.' Parkinson, *supra* note 2, at 261. Stone notes that the 'internalization' of public (non-investor) interests within the company through reform of corporate governance law can be contrasted with the usual 'external' approaches employed for restraining corporate behaviour, namely, reliance on market forces, legal regulation in the form of corporate civil liability damages, and, finally, the imposition of criminal liability, through the imposition of fines. See Stone, 'Public Interest Representation: Economic and Social Policy Inside the Enterprise', in K. Hopt and G. Teubner (eds), *Corporate Governance and Directors' Liabilities: Legal, Economic and Sociological Analyses on Corporate Social Responsibility* (1985) 122–146, at 125. The present discussion also echoes a continuing debate within the social sciences and in particular, economics, in its attempt to internalize environmental costs that are currently external to overall economic calculations. As Bronk notes, 'pollution and environmental degradation are, in the economic jargon, "externalities"; the essence of externalities is that they entail costs (or benefits) which are not reflected in market prices'. See R. Bronk, *Progress and the Invisible Hand: The Philosophy and Economics of Human Advance* (1999) 146. A notable attempt to 're-measure' economic progress within the context of achieving 'sustainable development', and to formulate values for otherwise intangible environmental assets such as air quality and the biological diversity of species, can be found in the *Blueprint* series of books. See D. Pearce, *Blueprint for a Green Economy* (1989); D. Pearce (ed.), *Blueprint 2: Greening the World Economy* (1991); D. Pearce et al., *Blueprint 3: Measuring Sustainable Development* (1993); and D. Pearce, *Blueprint 4: Capturing Global Environmental Value* (1995).

<sup>4</sup> Parkinson, 'The Socially Responsible Company', in M.K. Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations* (1999) 49–62, at 56.

environmental values into corporate governance, beginning at the international level before moving to progressive developments in domestic legal regimes. However, the classical exposition of public international law as the law governing states presents an initial jurisdictional problem for the legal control of companies in the environmental field. This is mainly because companies are traditionally controlled at the national, rather than international, level of jurisdiction. Nevertheless, the growing influence of international environmental law, especially in respect of the development of environmental principles, cannot be denied. These trends in corporate environmental liability and corporate environmental management systems make a three-fold contribution to the progressive development of international environmental law. First, they constitute state practice and thus indicate the evolution of customary international obligations on these issues. Secondly, they represent an attempt to circumvent legitimacy problems in international environmental law<sup>5</sup> by finding a purchase in company law rather than environmental law. Finally, by implementing currently non-binding environmental principles and standards, domestic corporate governance regimes may be able to achieve the sustainable development objective that has so far eluded international environmental law. These principles have transcended their international origins to find their application in domestic environmental laws governing individual actions, whether they be natural or legal persons. It is submitted here that corporations are enjoined to implement these environmental principles in furtherance of their adherence to the substantive environmental laws governing their activities.

Part 2 discusses two main trends in international and domestic environmental laws that impact on corporate environmental responsibility: first, by expanding the scope and reach of corporate environmental liability, including strict civil and criminal liability on the part of company directors; and, secondly, by requiring the introduction of corporate environmental management systems to inculcate environmental values throughout the company organization. The implications of these developments for company directors' increasing collective and individual environmental responsibilities are considered in Part 3 where several theoretical questions will be discussed. These relate to whether environmental concerns should be included within the legal duties of company directors. If so, to what extent is corporate governance law open to reform in order to incorporate this newly recognized corporate 'stakeholder'? Should environmental concerns indeed play a role in corporate law, then further questions arise: are environmental concerns an altogether independent constituency required to be taken cognizance of by company directors? Or, are they instead to be incorporated within the traditional constituency interests that company directors are legally beholden to uphold? This last question highlights an unsettling tension within corporate governance law itself as to whose interests a company should function to uphold: the corporation itself, or its shareholders?<sup>6</sup> The final issue raised here is

<sup>5</sup> See Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law', 93 *American Journal of International Law* (1999) 596–624.

<sup>6</sup> See Leader, 'Participation and Property Rights', 21 *Journal of Business Ethics* (1999) 97–109, at 97–98.

whether the trends noted above will ultimately lead to reform of domestic company law regimes. This can be achieved either by taking into account the *environment* as a newly identified constituency that directors have a duty to protect, or by specifically including environmental considerations within the scope of shareholders' rights that directors are under a duty to uphold.

Whether or not environmental law has made inroads into corporate governance reform, it is certainly the case that environmental concerns and values have entered the corporate domain.<sup>7</sup> There are clear signs that the internalization of corporate environmental values is proceeding apace. Writing in the aftermath of the 1989 *Exxon Valdez* disaster, Zondorak noted that corporate environmental responsibility was merely compliance-oriented. Thus companies were motivated to be environmentally responsible only to the extent necessary to avoid liability under applicable environmental laws.<sup>8</sup> Less than a decade later, however, Prakash is able to state categorically that most large US firms are voluntarily adopting 'beyond-compliance' environmental policies more stringent than the requirements of the extant laws.<sup>9</sup> Paraphrasing Dine, the issue here is whether domestic corporate governance regimes should include a legal mechanism constraining company directors into ensuring that corporate activities not only abide by environmental laws but work for overall environmental protection.<sup>10</sup> This of course assumes that environmental protection per se is a legitimate interest for company board consideration in the first place.

Growing realization that the responsibilities of large companies in particular extend beyond merely increasing shareholder value has led to the emergence of a conceptual framework based on the notion of 'stakeholders'<sup>11</sup> within a company. 'Stakeholders' are defined as including all interest groups affected by the company's activities, i.e. not

<sup>7</sup> Salter, for example, notes that 'a substantial majority of corporations consider concern for the environment to be a significant matter for business'. See Salter, 'Corporate Strategies and Responses in Environmental Regulation', in O. Lomas (ed.), *Frontiers of Environmental Law* (1991) 24–36, at 24, citing the findings of a joint survey by PA Consultancy Group and the Confederation of British Industries (CBI): CBI, *Waking Up to a Better Environment* (1990). Parkinson, however, highlights certain discrepancies in this survey of corporate attitudes towards the environment; noting for example that the survey concluded that in general 'low priority [is] accorded to environmental responsibility as a valuable contribution to corporate image', despite the fact that nearly 40 per cent of companies regarded public perception of their environmental impact as a major problem. See Parkinson, *supra* note 2, at 289.

<sup>8</sup> Zondorak, 'A New Face in Corporate Environmental Responsibility: The Valdez Principles', 18 *Boston College Environmental Affairs Law Review* (1991) 457–500, at 457.

<sup>9</sup> A. Prakash, *Greening the Firm: The Politics of Corporate Environmentalism* (2000) xii.

<sup>10</sup> J. Dine, *The Governance of Corporate Groups* (2000) 162.

<sup>11</sup> The initial conception of the stakeholder approach apparently arises from the following quote: 'Determination of corporate purpose requires comprehensive information about the expectations of the firm's "stakeholders". (These are all groups — such as owners, employees, and suppliers — who have something directly at stake in the company's progress.)', in Stewart, Allen and Cavender, *The Strategic Plan* (Long Range Planning Service, Stanford Research Institute, 1963) 1. See also Donaldson and Preston, 'The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications', 20 *Academy of Management Review* (1995) 65. According to Plender, the stakeholder concept is essentially a set of ideas revolving around a critique of the traditional notion of the company as a bundle of property rights in which the various constituents — shareholders, managers, employees, customers and suppliers — conducted their relations through a nexus of private contracts, with the pre-eminent participants, i.e. the

merely shareholders, but also employees, creditors, suppliers, customers and even local communities where companies are situated.<sup>12</sup> Thus, a primary justification for corporate governance reform is the perceived need to widen the scope of corporate accountability to include within its remit all relevant 'stakeholders' identified as having interests in the company.<sup>13</sup> Within this context, the 'environment', or rather the protection thereof, has been identified as one of a number of relevant 'stakeholders'.<sup>14</sup> It should be noted, however, that, unlike the 'environment', all the other corporate 'stakeholder' groups identified above are anthropocentric. This distinction is a major stumbling block for the ability of the 'environment' to assert its stakeholding interest in a company. It also raises standing difficulties for non-governmental organizations that attempt to act on behalf of the 'environment'.

Thus, a major constraint on the potential impact of environmental law on companies relates to the 'stakeholder' problem within the legal subdiscipline of environmental law itself. This is the difficulty in properly defining the stakeholding constituency that environmental law seeks to protect. Whether environmental law is a viable legal subdiscipline is dependent on whether it is perceived to serve only the narrower constituency of the human environment, or whether in fact it has a wider, and therefore more complex agenda aimed at overall environmental protection, including aspects that may not have a direct impact on anthropocentric well-being per se, such as wildlife conservation and the maintenance of natural ecosystems balance. Macrory encapsulates this difficulty succinctly when he notes that 'one of the constant dilemmas of the language of rights in relation to the environment [is] to what extent can they be conceived of only in anthropocentric terms and thus largely confined to human health and welfare contexts, or can they extend to all areas of the environment whether or not individuals are affected — in which case who should be

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shareholders, delegating responsibility for running the business to professional managers. Stakeholder theory proposed instead a view of the managerial role which is closer to trusteeship, where the trustees' role was to balance the interests of various constituencies in the business and to recognize a wider responsibility to society. See J. Plender, *A Stake in the Future: The Stakeholding Solution* (1997) 16–17.

<sup>12</sup> Buckley, 'Multinational Business: Beyond Government Control?', in *Understanding Global Issues* (Understanding Global Issues Ltd, Briefing No. 11, 1997) 15. *The King Report on Corporate Governance* in South Africa attempts a classification of these stakeholder groups: 'Generally, it can be said that a stakeholder is any person, entity or interest group that has some association with the company. There are three classes of stakeholders: shareholders, parties who contract with the company and parties who have a non-contractual nexus with the company. An example of a contracting party is the employee and a non-contracting party is the State.' See *The King Report on Corporate Governance* (Institute of Directors in Southern Africa, 1994), chapter 12, 'Stakeholders and Stakeholder Communications', at 16, para. 2.

<sup>13</sup> In this respect, the present discussion on the legal extent of corporate environmental responsibility echoes earlier writings in arguing that a company's wider social responsibilities requires the provision of legal duties among its directors to this effect. See C.D. Stone, *Where the Law Ends? The Social Control of Corporate Behaviour* (1975). See also Krause, 'Corporate Social Responsibility: Interests and Goals', in Hopt and Teubner, *supra* note 3, at 95–121.

<sup>14</sup> As Burke and Hill note: 'The debate on corporate environmental responsibility is also taking place as part of a broader debate about corporate responsibility towards all the "stakeholders" in society.' See T. Burke and J. Hill, *Ethics, Environment and the Company: A Guide to Effective Action* (1990) 4. Other identified non-shareholding corporate stakeholders are employees, creditors, suppliers, local communities etc.

entitled to ensure their protection?’<sup>15</sup> Within the context of this article, the prevailing uncertainty over the scope of the constituency served by environmental law parallels the difficulties encountered with the attribution of corporate stakeholder status to the environment per se.

The traditional corporate response to a tighter regulatory regime is to argue that the effect of market pressures, heightened corporate social responsibility and environmental awareness are a better route to achieving environmental protection.<sup>16</sup> This corporate response is not necessarily triggered by the relevant legislation itself. It is often the product of a combination of legal, economic, political and social influences.<sup>17</sup> In order to operate successfully, companies must be able both to engage and to manage all these external influences. Thus, voluntary environmental codes of conduct that set industry-wide standards may be instrumental in stimulating auto-poietic responses from companies towards an improvement of their previously poor or barely adequate environmental compliance records.<sup>18</sup> The latest example of such non-binding instruments is the OECD Guidelines on Multinational Enterprises,<sup>19</sup> which includes a section (V) on the environment. The European Community (EC) has even introduced a framework for the application of these types of self-regulatory instruments called ‘environmental agreements’, defined as agreements between industry and public authorities on the achievement of certain environmental objectives.<sup>20</sup> Corporate environmental audit is another method of attaching proper value to the environment, rendering its protection a vital factor in any corporate equation for success.<sup>21</sup>

However, the corporate emphasis on industrial self-regulation to effectuate the internalization of corporate environmental values has been criticized as at best

<sup>15</sup> Macrory, ‘Environmental Citizenship and the Law: Repairing the European Road’, 8 *Journal of Environmental Law* (1996) 219–235, at 220.

<sup>16</sup> Salter, *supra* note 7, at 26.

<sup>17</sup> See Kolk, van Tulder and Welters, ‘International Codes of Conduct and Corporate Social Responsibility: Can Transnational Corporations Regulate Themselves?’, 8 *Transnational Corporations* (1999) 143–180.

<sup>18</sup> On the concept of ecological self-organization of enterprises generally, see Farmer and Teubner, ‘Ecological Self-Organization’, in G. Teubner, L. Farmer and D. Murphy (eds), *Environmental Law and Ecological Responsibility: The Concept and Practice of Ecological Self-Organization* (1994) 3–13.

<sup>19</sup> Adopted by the governments of the 29 OECD member states as well as Argentina, Brazil, Chile and the Slovak Republic on 27 June 2000. See [www.oecd.org/daf/investment/guideline/mnetext.html](http://www.oecd.org/daf/investment/guideline/mnetext.html). These Guidelines are a revised version of Guidelines contained in a 1976 OECD Declaration on International Investment and Multinational Enterprises. See Karl, ‘The OECD Guidelines for Multinational Enterprises’, in Addo, *supra* note 4, at 89–106.

<sup>20</sup> See EC Commission, Communication on Environmental Agreements, COM (96) 561 Final, adopted in November 1996. For an in-depth analysis of the EC legal issues raised by these environmental agreements, especially in relation to other aspects of EC law such as access to environmental information and competition law, see Khalastchi and Ward, ‘New Instruments for Sustainability: An Assessment of Environmental Agreements Under Community Law’, 10 *Journal of Environmental Law* (1998) 257–290.

<sup>21</sup> See, for example, Power, ‘Constructing the Responsible Organization: Accounting and Environmental Representation’, in Teubner *et al.*, *supra* note 18, at 369–392.

opportunistic and at worst positively misleading.<sup>22</sup> As Choucri notes, '[m]anaging an inquisitive and possibly hostile public must be part of maintaining a positive image, but public relations without environmental action will surely backfire ... at some point the company will be called upon to show evidence of performance, not simply of intent'.<sup>23</sup> Therefore, underlying 'business as usual' approaches, supplemented by marginal changes designed to bring about incremental environmental improvement, have given way to recognition that fundamental reforms of corporate management structures and business decision-making processes are required.

This new corporate 'ecological' management imperative drives at the very heart of current corporate business culture and demands the internalization of a truly environmental approach in all aspects of corporate management, in order to arrive at the so-called 'transcendent' firm.<sup>24</sup> As Welford notes, '[o]ne of the challenges of sustainable development is for us to consider modes of industrial organization as well as the *internal organization of the firm* which will lead us towards a future which promotes environmental protection and equity'.<sup>25</sup> This in turn requires full corporate commitment to continuous environmental improvement in its performance, coupled with a willingness to consider new forms of corporate organization that address the competing objectives of different 'stakeholders'. Each of these identified interest groups has differing levels of corporate influence that need to be balanced against each other.<sup>26</sup> The following discussion will reveal whether this internalization process is in fact underway within the overall legal framework for corporate governance.

## 2 Trends in Corporate Environmental Liability and Corporate Environmental Management Systems

This part will first outline the development of general environmental principles and the paucity of an international environmental liability regime between states. It will then focus on contrasting progress in the *scope* of corporate environmental liability within several individual states. There is growing evidence that this trend in

<sup>22</sup> Falkner, for example, notes that 'any candid assessment of the situation must conclude that the pace of [environmental] reform is still too slow throughout business generally'. See Falkner, 'The Role of Business in International Business Governance', in M. Rolén, H. Sjöberg and U. Svedin (eds), *International Governance on Environmental Issues* (1997) 150–158, at 152. Parkinson affirms that company (social and/or environmental) codes are doubtless sometimes intended more as a public relations exercise than as a serious means of changing the organization's behaviour, and their language is usually vague, probably in part because of the risk of more specific guidelines creating a hostage to fortune. See Parkinson, *supra* note 2, at 284.

<sup>23</sup> Choucri, 'Multinational Corporations and the Global Environment', in N. Choucri (ed.), *Global Accord: Environmental Challenges and International Responses* (1995) 205–253, at 249.

<sup>24</sup> R. Welford, *Environmental Strategy and Sustainable Development: The Corporate Challenge for the 21st Century* (1995) 3 and 191–204.

<sup>25</sup> *Ibid.*, at 23 (emphasis added).

<sup>26</sup> *Ibid.*, at 11.

environmental liability is progressing beyond its current focus on the corporate legal personality *per se*. In several countries, it now implicates individuals directly associated with the company such as company directors, corporate officers or managers, and even (under US federal law) shareholders.<sup>27</sup> This trend is discernible in other common law jurisdictions such as the UK, Canada, Australia and Hong Kong. A related development is in the *nature* of corporate environmental liability. Specifically, this concerns the introduction of strict civil, and even criminal, liability upon company directors for corporate environmental damage, as opposed to more traditional forms of liability based on fault. This trend is especially evident in US domestic environmental law. In the UK too, environmental legislation and related case law have combined to withdraw the notion of fault-based liability and replace it with strict liability.

The first trend in the expansion of the *scope* and *nature* of corporate environmental liability can be contrasted with another trend prevalent among several continental European jurisdictions. This second trend consists of a legal obligation to establish some form of corporate environmental management system. This legal duty invariably includes the appointment of a company officer with responsibility for the overall corporate environmental performance. The second trend is present in at least four continental European countries, namely, the Federal Republic of Germany, Austria, Belgium and the Netherlands. The latter aspect of this trend, involving the legal requirement for the appointment of a designated corporate environmental officer, is also prevalent in US domestic environmental legislation.

These two *external* trends in corporate environmental liability and corporate environmental management systems have in turn generated pressure for the *internal* reform of traditional corporate governance law. Suggestions for reform include the incorporation of environmental concerns within the scope of directors' duties, either explicitly by legislation, or implicitly by the extension of existing fiduciary duties owed to the company.

## ***A Trends in International and Domestic Corporate Environmental Liability***

### *1 The Development of General Environmental Principles and the Paucity of an International Environmental Liability Regime*

International environmental law establishes generally applicable objectives and principles for environmentally conscientious behaviour among states. The two main international environmental instruments in this respect are the 1972 Stockholm Declaration on the Human Environment,<sup>28</sup> and its follow-up 20 years later, the 1992

<sup>27</sup> It should be noted, however, that shareholder liability in the context of the US Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) 1980 ('Superfund') litigation has nearly always involved only corporate shareholding liability, rather than individual shareholders.

<sup>28</sup> (1972) 11 *ILM* 1416.



Rio Declaration on Environment and Development.<sup>29</sup> While not legally binding in themselves, the principles embodied in these instruments nevertheless represent the explicit policy intentions of the vast majority of states. These Declarations also enjoined states to lay down specific rules and set enforceable standards through domestic laws aimed at achieving these general objectives and principles. Among the most notable and widespread of these principles, in terms of their application, are the preventive, and more progressively, the precautionary principles,<sup>30</sup> the polluter-pays principle,<sup>31</sup> and the integration principle.<sup>32</sup> Together, these principles arguably combine to lay down a path towards the primary aim or objective of all environmental laws: the achievement of sustainable development.<sup>33</sup> Several of these environmental principles are now prevalent in both general and specific international environmental treaties, as well as domestic environmental legal regimes. Significantly, these environmental principles also feature prominently within the qualifying criteria for the lending practice of various multilateral finance

<sup>29</sup> (1992) 31 ILM 874.

<sup>30</sup> Principle 15 of the 1992 Rio Declaration provides that: 'In order to protect the environment, the precautionary approach shall be widely applied by states according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.' Although separately conceived and developed, these two principles are increasingly applied together. For example, the first paragraph of Article 174 (Article 130R(2) in the old numbering) of the amended 1957 EC Treaty provides that: 'Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community. It shall be based on the precautionary principle and on the principle that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.' For a short discussion of the evolution and relationship of these two principles, see M. Sunkin, D. Ong and R. Wight, *Sourcebook on Environmental Law* (1998) 30–32. See also P. Sands, *Principles of International Environmental Law*, vol. I (1995) 194–197 and 208–213.

<sup>31</sup> Principle 16 of the 1992 Rio Declaration provides that: 'National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution with due regard to the public interest and without distorting international trade and investment.' It is also included in the second paragraph of Article 130R(2) of the 1957 EC Treaty (as amended). See also Devos, *supra* note 1, at 19–25 on the evolution and application of the precautionary and polluter-pays principles on industrial activities.

<sup>32</sup> Principle 4 of the 1992 Rio Declaration provides that: '[I]n order to achieve sustainable development, environmental protection shall constitute an *integral* part of the development process and cannot be considered in isolation from it' (emphasis added).

<sup>33</sup> The most widely accepted definition of 'sustainable development' is arguably that proffered by the World Commission on Environment and Development (WCED) and contained in the so-called Brundtland Report of WCED, which described it thus: 'Development that meets the needs of the present without compromising the ability of future generations to meet their own needs.' See World Commission for Environment and Development, *Our Common Future* (1987). Although 'sustainable development' is not purposefully defined anywhere within the Rio UNCED documents, at least two Principles in the 1992 Rio Declaration are directed towards its achievement, namely, Principle 1 which states that '[h]uman beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature'; and Principle 3 which provides that '[t]he right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations'.

institutions such as the World Bank and other regional development banks, such as the Inter-American Development Bank.<sup>34</sup>

Multilateral environmental conventions bind their state parties but, although their provisions may naturally be expected to impinge on the activities of businesses and companies throughout the world, these entities are not directly mentioned, or indeed provided for, at this level.<sup>35</sup> Moreover, international environmental regulation is generally sectoral and irregular in its approach. As Schrijver notes, '[environmental] law-making by treaty has been fragmentary rather than systematic'.<sup>36</sup> A 1993 UN report's observation that '[t]here is still no binding international legal instrument of global application which establishes general principles of law in relation to environmental protection',<sup>37</sup> remains valid today. The implementation of these general environmental principles also does not envisage a special role for companies. As Francioni notes, 'although it is true that environmental risks are mostly created by private parties involved in industrial and technological activities, it is also true that [state] control over such activities is retained'.<sup>38</sup> This is despite growing recognition of the continuing negative impact of commercial activities on overall environment quality. Therefore, in the absence of implementing national or EC legislation, companies can only be indirectly enjoined to apply the relevant environmental principles to their own activities. As Bodansky notes: 'Unlike the European Union, which is rapidly developing into a constitutional order, international environmental law remains rooted within the voluntarist tradition of international law'.<sup>39</sup>

These internationally agreed environmental principles do, however, provide the legal basis for environmental interests to be included within the corporate governance regime. As Choucri notes, '[i]n a broader global context it is now apparent that the international community has begun to frame a set of principles for the conduct of

<sup>34</sup> See Ahearn, 'Environmental Procedures and Standards in International Transactions: Multilateral Models and Private Lending Practices', 27 *International Business Lawyer* (1999) 419–423.

<sup>35</sup> For example, Gladwin lists several different forms of international cooperation that have emerged since the early 1970s which directly or indirectly bear on the environmental behaviour of multinational corporations (MNCs). He notes that the environmentally cooperative examples he lists have begun to shape multinational corporate environmental practices, in particular by reducing fragmentation and increasing unification in the approach of multinationals to environmental management. Ultimately, however, he concludes that it is difficult to gauge the real impact of these cooperative efforts on MNC environmental practices. This is mainly because many of these efforts have not been directly targeted at multinationals and there is usually a lengthy hiatus between cooperative efforts at the international level and their eventual translation into effective national or local action. See Gladwin, 'Environment, Development and Multinational Enterprise', in E.K.Y. Chen (ed.), *Technology Transfer to Developing Countries* (UN Library on Transnational Corporations, vol. 18, 1994) 438–467, at 456–458. Reprinted from C.S. Pearson (ed.), *Multinational Corporations, Environment, and the Third World* (1987).

<sup>36</sup> N. Schrijver, *Sovereignty Over Natural Resources: Balancing Rights and Duties* (1997) 234.

<sup>37</sup> Transnational Corporations and Management Division, Department of Economic and Social Development, *International Environmental Law: Emerging Trends and Implications for Transnational Corporations* (Environment Series No. 3, ST/CTC/137, United Nations, 1993) xii.

<sup>38</sup> Francioni, 'Exporting Environmental Hazard Through Multinational Enterprises: Can the State of Origin Be Held Responsible?', in F. Francioni and T. Scovazzi (eds), *International Responsibility for Environmental Harm* (1991) 275–298, at 276–277.

<sup>39</sup> Bodansky, *supra* note 5, at 598.

business worldwide . . . These are principles reflecting new norms that global business will be increasingly called upon to uphold.<sup>40</sup> Therefore, it is arguable that corporations are also required to achieve sustainable development in their business activities,<sup>41</sup> and the corporate pursuit of this objective provides the catalyst for the possible inclusion of environmental protection as a further consideration of corporate governance. According to Schmidheiny: '[B]uilding stakeholder involvement in the context of sustainable development extends the idea of corporate responsibility in time and space.'<sup>42</sup> For example, the recently revised OECD Guidelines on Multinational Enterprises<sup>43</sup> are recommendations addressed by governments to multinational enterprises. They provide voluntary principles and standards for responsible business conduct consistent with applicable laws. In particular, Section V on the environment enjoins enterprises to consider relevant international agreements, principles, objectives and standards in the conduct of their activities in order to contribute to the wider goal of sustainable development.

The most relevant environmental principle for corporate governance is arguably the principle of *integration* of environmental considerations into general policy-making and implementation. Significantly, in the European context, this principle can also be found in the 1957 Treaty of Rome (as amended).<sup>44</sup> While ostensibly directed at government socio-economic development policy- and decision-making processes, this principle has important implications for corporate governance. Its latest, most progressive incarnation serves to highlight its immense potential for 'horizontal' application, requiring the permanent and continuous 'greening' of all Community

<sup>40</sup> Choucri, 'Corporate Strategies Towards Sustainability', in W. Lang (ed.), *Sustainable Development and International Law* (1995) 189–201, at 195.

<sup>41</sup> Schmidheiny, for example, notes that '[a]n increasing number of corporate leaders are convinced that it makes good business sense to secure the future of their corporations by integrating the principles of sustainable development into all their operations'. See S. Schmidheiny, *Changing Course: A Global Business Perspective on Development and the Environment* (1992) 84.

<sup>42</sup> *Ibid.*, at 86.

<sup>43</sup> *Supra* note 19.

<sup>44</sup> In fact, this principle has been amended successively by the 1992 Maastricht Treaty and the 1998 Amsterdam Treaty, respectively, and, more significantly, has been repositioned within the overall EC Treaty. The initial 1987 version of this principle formulated in Article 130R(2) of the EC Treaty by the Single European Act (SEA) provided as follows: 'Environmental protection requirements shall be a component of the Community's other policies.' It was then amended in the 1992 Maastricht Treaty to provide that: 'Environmental protection requirements must be integrated into the definition and implementation of other Community policies.' Finally, Article 130R(2) was renumbered as Article 174 by the 1998 Treaty of Amsterdam and rephrased as follows: 'Environmental protection requirements must be integrated into the definition and implementation of Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development.' Perhaps more importantly, this principle was also repositioned in Article 6 of the EC Treaty under Title I, Principles, thereby transcending its 'mere' environmental status and taking its place as one of the guiding principles of the whole European Union project.

policies.<sup>45</sup> Arguably this implies the integration of environmental concerns within the corporate, as well as merely government, decision-making processes. The integration principle therefore has a transcendental ambit, extending beyond purely environmental matters to insinuation within all government and possibly even corporate planning and decision-making structures. It thereby becomes a cornerstone of the whole European Union legal system and intrinsic to the fulfilment of the overall aims and objectives of the EU project itself. As Bär and Kraemer noted recently, '[a]lthough in legal terms the integration principle will not give priority to the environment, the changes are evidence of a strong political will to strengthen the integration of environmental aspects into other policy areas'.<sup>46</sup>

Taken to its logical conclusion, the integration principle would require the explicit consideration of the environmental impact of corporate activities at the boardroom level. Moreover, any negative impacts would need to be identified, rectified and prevented from recurring. Thus, the integration principle has the potential to be a fundamental justification for the inclusion of environmental considerations within corporate governance. The as yet unanswered question is the extent to which future EC and domestic legislation will provide for the incorporation of this principle within the corporate decision-making structure. In other words, is it merely to be applied at the operational or business end of corporate activities, or introduced at a higher, corporate management level, or indeed at the highest possible corporate level, to be included as part of the directorial duties of the chairperson and the board of directors. As Bär and Kraemer concluded, '[t]he degree to which . . . the integration principle will lead to environmental protection being taken into account in practice, remains to be seen'.<sup>47</sup>

This parlous state of affairs in terms of the lack of effective implementation of internationally agreed environmental principles on corporate behaviour is exacerbated by the fact that a significant aspect of international environmental law itself where agreement between states has not been forthcoming is the question of liability for environmental damage.<sup>48</sup> The prevailing concept of a state's territorial sovereignty under international law dictates that the regulation of corporate activities generally, whether in the environmental or other fields — human rights, for example<sup>49</sup> — is a

<sup>45</sup> Krämer notes that this repositioning in Article 6 has 'certainly further strengthened the importance of the integration requirement in environmental matters which is, because of its horizontal nature, probably the most important of all the different principles', pointing out that the integration clauses for culture (Article 128, now Article 151) and health (Article 129, now Article 152) were not similarly re-evaluated in the Treaty of Amsterdam. See L. Krämer, *EC Treaty and Environmental Law* (3rd ed., 1998) 71.

<sup>46</sup> S. Bär and R.A. Kraemer, 'European Environmental Policy After Amsterdam', 10 *Journal of Environmental Law* (1998) 315–330, at 319.

<sup>47</sup> *Ibid.*

<sup>48</sup> See, for example, Kiss, 'Present Limits to the Enforcement of State Responsibility for Environmental Damage', in Francioni and Scovazzi, *supra* note 38, at 3–14. One exception is the Convention on International Liability for Damage Caused by Space Objects 1972, 961 UNTS 187, UKTS 16 (1974), Cmnd 5551, in force 1 September 1972.

<sup>49</sup> See Woodroffe, 'Regulating Multinational Corporations in a World of Nation States', in Addo, *supra* note 4, at 131–142.

national rather than international competence. This impedes the potential for international environmental law to focus responsibility and consequent liability for corporate environmental damage on the individual corporate actor responsible for such damage,<sup>50</sup> as required by the polluter-pays principle.<sup>51</sup> While the principle of state responsibility and liability for environmental damage is undeniable, a settled international legal regime has yet to emerge.<sup>52</sup> The general lack of provision for international environmental liability is reflected in the conspicuous failure to include provisions for such liability in most of the major multilateral environmental agreements between states.<sup>53</sup> Even the EC has so far been unable to promulgate a Community-wide legal regime providing for general corporate civil liability for environmental damage.<sup>54</sup>

The gap in the allocation of individual corporate liability is particularly felt in the context of the environmentally damaging effects of multinational or transnational

<sup>50</sup> On the need to modify the traditional doctrine of territorial sovereignty and control in order to enhance the capacity of international law to hold states responsible for the damaging effects of MNEs, see Francioni, *supra* note 38, at 283–288.

<sup>51</sup> On the discrepancy which arises between an unadulterated application of the polluter-pays principle which requires that liability be visited upon the actual individual polluter, as opposed to the vicarious attribution of such liability upon the state where this individual is located due to the concept of state sovereignty and hence responsibility for actions which are clearly located within its territory and control, see Boyle, 'Making the Polluter Pay? Alternatives to State Responsibility in the Allocation of Transboundary Environmental Costs', in Francioni and Scovazzi, *supra* note 38, at 363–379, at 364.

<sup>52</sup> Note the continuing efforts of the International Law Commission (ILC) on this subject in the work of the Special Rapporteur, Julio Barboza: see J. Barboza, 'The ILC and State Responsibility for Environmental Damage', in P. Wetterstein (ed.), *Harm to the Environment* (1997). See also Tomuschat, 'International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law: The Work of the International Law Commission', in Francioni and Scovazzi, *supra* note 38, at 37–72. For an analysis of the continuing relevance of the doctrine of state responsibility and liability in respect of environmental damage incurred by private persons within their jurisdiction and control, see Handl, 'State Liability for Accidental Transnational Environmental Damage by Private Persons', 74 *American Journal of International Law* (1980) 525–565. For a similar perspective in respect of state responsibility and liability for transboundary nuclear damage in the aftermath of the Chernobyl disaster, see Handl, 'Paying the Piper for Transboundary Nuclear Damage: State Liability in a System of Transnational Compensation', in D.B. Magraw (ed.), *International Law and Pollution* (1991) 150–174.

<sup>53</sup> A recent exception is the Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal, adopted at the Fifth Conference of the Parties to the Basel Convention on 10 December 1999. See [www.basel.int/pub/Protocol.html](http://www.basel.int/pub/Protocol.html).

<sup>54</sup> Reid notes that the EC's Green Paper (EC Communication on remedying environmental damage (COM (93) 47 final)) paved the way for a proposed EC Directive on civil liability for environmental damage. See Reid, 'Civil Liability for Environmental Damage', in M. Swart (ed.), *International Environmental Law and Regulations*, vol. I (1996) 249–262, at 260–261. However, the progress was stalled for much of the 1990s and only recently revived with the recent publication of the Commission's White Paper on Environmental Liability on 9 February 2000: see COM (2000) 66 final. For an overview of the background and main features of the proposed EC environmental liability regime, see Rice, 'From Lugano

corporations (MNC/TNCs)<sup>55</sup> and their foreign subsidiaries.<sup>56</sup> As Ward notes, established corporate legal principles such as that which provides for the separate legal personalities of different companies within the same transnational or multinational group of companies prevent the imposition of corporate environmental liability on the whole group.<sup>57</sup> The general position under public international law does not appear to permit ‘piercing the corporate veil’ in order to attract the liability of company directors, individual shareholders, or parent companies for the corporate environmental liabilities of their subsidiaries.<sup>58</sup> Indeed, both international and national attempts at regulating the environmental practices of such entities have recently been described as ‘an illusory endeavour’.<sup>59</sup> The lack of even the semblance of a holistic international corporate environmental liability regime augurs poorly for the possibility that this issue is seen as an emerging and important aspect of a company director’s duties.<sup>60</sup> Thus, it is perhaps unsurprising to read that ‘while governments, public interest groups, and international organizations are searching for institutional innovation and adaptation in this area, global corporations, with few exceptions, have generally failed to develop a strategy for dealing with the environment’.<sup>61</sup>

Some mitigation of the lack of individual corporate liability for environmental damage at the international level is provided through the establishment of specific international civil liability regimes for certain activities deemed ultra-hazardous due

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to Brussels via Aarhus: Environmental Liability White Paper Published’, 8 *Environmental Liability* (2000) 39–45. See also Betlem and Brans, ‘The Future Role of Civil Liability for Environmental Damage in the EU’, *Yearbook of European Environmental Law* vol. II (2001 forthcoming).

<sup>55</sup> The World Investment Report 1992 noted that transnational corporations are extensively involved in the most pollution- and hazard-intensive industries, as measured by environmental costs. See *World Investment Report 1992: Transnational Corporations as Engines of Growth* (Transnational Corporations and Management Division, Department of Economic and Social Development, United Nations, 1992) 226, citing a UNCTC report, *Environmental Aspects of the Activities of Transnational Corporations: A Survey*.

<sup>56</sup> Gladwin, for example, notes that there does not yet exist a uniform or global concept of what a parent company’s responsibilities for their subsidiaries should be in the environmental arena, despite disasters such as Bhopal and their subsequent litigation in US courts. See Gladwin, *supra* note 35, at 446. This problem has recently re-emerged in the Romanian cyanide spill incident involving a subsidiary of an Australian mining company, Esmeralda: see Wight and Guzelova, ‘Cyanide Spill is Felt on Danube’, *Financial Times* (newspaper), 15 February 2000, at 10.

<sup>57</sup> See H. Ward, *Corporate Citizenship: International Perspectives on the Emerging Agenda* (Conference Report, Royal Institute of International Affairs, London, 2000) 5.

<sup>58</sup> See T. Scovazzi, ‘Industrial Accidents and the Veil of Transnational Corporations’, in Francioni and Scovazzi, *supra* note 38, at 395–427.

<sup>59</sup> P. Eaton, ‘The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment’, 15 *Boston University International Law Journal* (1997) 261–307, especially 271–283. The legal lacuna in respect of multinational corporate activities throughout the world also obtains in the human rights field, including the lack of provision for a substantive right to a healthy environment. See Joseph, ‘Taming the Leviathans: Multinational Enterprises and Human Rights’, 46 *Netherlands International Law Review* (1999) 171–203, at 196.

<sup>60</sup> In this sense, the perceived lack of multinational/ transnational accountability for environmental liability differs very little in its scope from the general problem of holding transnational firms accountable for their actions on a whole range of issues.

<sup>61</sup> Choucri, *supra* note 23, at 247.

to their pernicious and lasting effects, such as radioactive fall-out from nuclear accidents and marine oil pollution damage from supertanker spills.<sup>62</sup> According to Birnie and Boyle, '[c]ivil liability proceedings are the preferred method employed by the majority of nuclear states for reallocating the costs for transboundary nuclear accidents'.<sup>63</sup> A number of conventions exist providing for the strict, though not unlimited, civil liability of nuclear operators. These include the following: the 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy,<sup>64</sup> and the 1963 Vienna Convention on Civil Liability for Environmental Damage.<sup>65</sup> However, only the 1960 Paris Convention and its 1963 (Brussels) Supplementary Agreement, which was drafted by the OECD and applies to nuclear incidents within Western European member states, has attracted significant support among states with nuclear power. These conventions harmonize the international law on (civil) liability for nuclear accidents, providing for strict liability of the operators of nuclear facilities but within defined upper limits for total compensation claims, thus protecting the nuclear industry from unpredictable and unlimited exposure.<sup>66</sup> As Birnie and Boyle conclude, the nuclear liability conventions thus reflect an early recognition of the need for a stronger, more equitable system of loss distribution, appropriate to the serious risks of nuclear accidents.<sup>67</sup>

In the case of oil tanker spills, the 1969 Convention on Civil Liability for Oil Pollution Damage,<sup>68</sup> and the 1971 Convention on the Establishment of an International Fund for Compensation of Oil Pollution Damage,<sup>69</sup> as amended in 1992 by two Protocols,<sup>70</sup> govern the liability of ship and cargo owners for oil pollution damage.

<sup>62</sup> Another example of this general trend towards the imposition of strict liability in international conventions in the overland and (internal) maritime transport of dangerous goods, is the 1990 Convention on Civil Liability for Damage Caused During Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (CRTD).

<sup>63</sup> Birnie and Boyle, *International Law and the Environment* (1992) 371.

<sup>64</sup> In force 1 April 1968. Amended by the 1964 Additional Protocol, UKTS 69 (1968), Cmnd 3755, in force 1 April 1968. See also the 1963 Brussels Convention Supplementary to the Paris Convention, (1963) 2 ILM 685, in force 4 December 1974. Both Conventions were further amended by 1982 Protocols, UKTS 23 (1983), Cmnd 9052, in force 1 August 1991.

<sup>65</sup> (1963) 2 ILM 727, in force 12 November 1977; 1983 Protocol, not in force. Two other treaties deal with nuclear-powered ships and the maritime carriage of nuclear materials. These are the 1962 Brussels Convention on the Liability of Operators of Nuclear Ships, 12 ICLQ (1963) 778; 57 AJIL (1963) 100, which is not in force; and the 1971 Brussels Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material, in force. See IAEA, *International Conventions on Civil Liability* (1976) 55.

<sup>66</sup> See Boyle, 'Nuclear Energy and International Law: An Environmental Perspective', 60 *British Yearbook of International Law* (1989) 257–313, at 298. For a recent perspective on continuing unresolved issues in this field, see Pelzer, 'Focus on Nuclear Liability Law', 17 *Journal of Energy and Natural Resources Law* (1999) 332–353.

<sup>67</sup> Birnie and Boyle, *supra* note 63, at 372. See also Faure and Skogh, 'Compensation for Damages Caused by Nuclear Accidents: A Convention as Insurance', in M.G. Faure (ed.), *The Geneva Papers on Risk and Insurance*, vol. 17 (1992) 499–513.

<sup>68</sup> In force 19 June 1975; 973 UNTS 3.

<sup>69</sup> In force 16 October 1978; (1972) 11 ILM 284.

<sup>70</sup> Now collectively known as the 1992 Civil Liability and Fund Conventions. Entered into force 30 May 1996.

They too established a strict liability and compulsory liability insurance system. The strict liability principle is subject to limits, which are in turn linked to the tonnage of the ship.<sup>71</sup> The implication of these industry-focused liability regimes for corporate decision-making processes in nuclear and oil companies is clear: the preventive principle becomes not merely a legal but also an economic imperative for these companies. Moreover, the polluter-pays principle is being applied directly at the international level, thus bypassing the usual systemic requirement for national or domestic implementation of internationally agreed rules.<sup>72</sup> However, despite the continuing success of these relatively comprehensive civil liability regimes, a recent appraisal of the international oil pollution compensation regimes concludes that there is substantial room for improvement.<sup>73</sup>

Thus, both here at the international level and also below at the comparative domestic level, we observe what Teubner notes is the development of a trend shifting liability away from the individual responsibility of single actors towards a new collective responsibility of risk networks.<sup>74</sup> Francioni, for example, suggests that 'a clear preference has emerged towards shifting the focus to the tort liability of the operator, leaving the state immune'.<sup>75</sup> Choucri affirms that 'there has been increased evidence of corporate liability for environmental harm'.<sup>76</sup> He further notes how numerous and regular corporate pollution incidents such as the *Exxon Valdez* are cumulatively serving as a 'hidden hand', thereby placing corporate activities under increasing public scrutiny and global business as a whole on the defensive.<sup>77</sup>

On the other hand, the narrow ambit of current international civil liability regimes merely serves to emphasize their limited utility for ensuring corporate compliance with applicable environmental norms and standards. The veracity of the preceding statement is illustrated by the continuing absence of any general international civil liability scheme providing for the compensation of corporate environmental damage beyond the narrow confines of recognized ultra-hazardous activities such as nuclear power stations and crude oil-carrying supertankers.

Moreover, the jurisdictional, evidentiary, causation and other litigation issues raised by claims for compensation for international or transnational environmental damage continue to dog efforts to provide for multinational corporate environmental

<sup>71</sup> International Oil Pollution Compensation Funds, *Annual Report on the Activities of the IOPC Funds* (1997) 11.

<sup>72</sup> For a fuller discussion of these and other improvements in the legal regime for environmental protection and its implications for the oil industry in particular, see Ong, 'International Legal Developments in Environmental Protection: Implications for the Oil Industry', in S.T. Orszulik (ed.), *Environmental Technology in the Oil Industry* (1997) 16–72.

<sup>73</sup> Gauci, 'Protection of the Marine Environment Through the International Ship-Source Oil Pollution Compensation Regimes', 8 *Review of European Community and International Environmental Law* (1999) 29–36, at 34.

<sup>74</sup> Teubner, 'The Invisible Cupola: From Causal to Collective Attribution in Ecological Liability', in Teubner *et al.*, *supra* note 18, at 18.

<sup>75</sup> Francioni, *supra* note 38, at 276.

<sup>76</sup> Choucri, *supra* note 40, at 195.

<sup>77</sup> *Ibid.*



liability. This is evidenced by the case law arising out of the 1976 Seveso (Hoffmann-La Roche),<sup>78</sup> 1984 Bhopal (Union Carbide),<sup>79</sup> and 1986 Rhine (Sandoz)<sup>80</sup> disasters. In the Bhopal litigation, for example, the question whether damage caused by a local, subsidiary company could be visited upon the parent company in its 'home' jurisdiction was answered in the negative.<sup>81</sup> The overriding legal difficulty here was due to the United States' courts reliance on the principle of *forum non conveniens*, to decline jurisdiction to hear Indian liability claims against the parent Union Carbide company in the US for the damage incurred by its Indian subsidiary.<sup>82</sup>

Recent developments in UK courts arguably herald a more progressive approach to tortious claims against a company from another jurisdiction. The House of Lords ruling allowing South African miners afflicted by asbestos-related diseases to sue the British mining company, Cape plc, in the English courts has potentially wide implications for multinational corporations based in this jurisdiction.<sup>83</sup> It means that English parent companies can be sued for negligence in the country where they are domiciled and not just in the countries where their subsidiaries operate.<sup>84</sup> It is important to note, however, that the principle of allowing workers of foreign subsidiaries to sue their parent companies on health and safety at work related issues will not necessarily extend to allowing environmental pressure groups to claim for ecological damage occurring in foreign countries.

## 2 Comparative Developments in Corporate Environmental Liability in Domestic Jurisdictions

The lack of an adequate international corporate environmental liability regime represents a major constraint in the ability of international environmental law to impose an environmental protection objective or goal on the corporate governance

<sup>78</sup> See T. Scovazzi, in Francioni and Scovazzi, *supra* note 38, at 397–403.

<sup>79</sup> For a synopsis of the litigation arising from the Bhopal incident, see Anderson, 'State Obligations in a Transnational Dispute', in W.E. Butler (ed.), *Control Over Compliance with International Law* (1991) 83–95, at 84–85. See also Muchlinski, 'The Bhopal Case: Controlling Ultrahazardous Industrial Activities Undertaken by Foreign Investors', 50 *Modern Law Review* (1987) 545.

<sup>80</sup> For a full discussion of the impact of the Sandoz disaster and the state and civil liability issues arising therefrom, see d'Oliveira, 'The Sandoz Blaze: The Damage and the Public and Private Liabilities', in Francioni and Scovazzi, *supra* note 38, at 429–445.

<sup>81</sup> Seward, 'After Bhopal: Implications for Parent Company Liability', in S.J. Rubin and D. Wallace Jr (eds), *Transnational Corporations and National Law* (UN Library on Transnational Corporations, vol. 19, Routledge, 1994) 300–312; first published in 21 *International Lawyer* (1987) 695–707.

<sup>82</sup> For an in-depth discussion of the negative aspects of the US interpretation of this principle, see Prince, 'Bhopal, Bougainville and Ok Tedi: Why Australia's Forum Non Conveniens Approach is Better', 47 *International and Comparative Law Quarterly* (1998) 573–598, at 577, citing *Re Union Carbide Corp. Gas Plant Disaster at Bhopal India in December 1984*, 634 F Supp 842 (1986).

<sup>83</sup> See *Lubbe v. Cape plc (No. 2)* [2000] 1 WLR 1545; [2000] 4 All ER 268; [2000] 2 Lloyd's Rep 383. See also Gibb and Dynes, 'African Asbestos Miners Win Right to Sue in Britain', *The Times* (newspaper), 21 July 2000, at 8.

<sup>84</sup> For an analysis of the implications of the *Cape plc* cases for English-based multinational enterprises (MNEs) with foreign subsidiaries, see Muchlinski, 'Corporations in International Litigation: Problems of Jurisdiction and the United Kingdom Asbestos Cases', 50 *International and Comparative Law Quarterly* (2001) 1.

agenda. Therefore, it is interesting to find that several domestic jurisdictions are far less coy about the imposition of both civil and criminal corporate environmental liability. Indeed, the relatively sparse efforts aimed at ensuring an adequate international corporate environmental liability regime can be usefully contrasted with numerous examples of national legislation providing for *strict* civil and even criminal liability for corporations, as well as individual company directors.<sup>85</sup> Examples include domestic legislation in the United States, the United Kingdom, Australia, Canada and Hong Kong, all common law jurisdictions; as well as Germany and Spain, which operate civil law systems. Arguably, they all reflect a general trend towards the imposition of strict, non-fault based, liability for corporate environmental damage. In the following analysis, the trend in civil liability of corporate and individual directors for environmental damage will be discussed first, before moving to criminal liability for the same type of offence.

The most far-reaching of these corporate environmental civil liability regimes is undoubtedly the 1980 US Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), more commonly known as the ‘Superfund’ Act.<sup>86</sup> This US federal legislation arguably allows the corporate veil to be pierced to inflict personal liability on both company directors and even shareholders for corporate environmental damage.<sup>87</sup> In particular, section 107(a) of CERCLA imposes strict liability in a manner that has been interpreted by some US courts to enable the corporate veil to be pierced so that company directors, corporate officers, and even lenders and shareholders are threatened by personal liability.<sup>88</sup> Yet another progressive development in US environmental law is the private enforcement of environmental laws and regulations through the provision of citizen suits, the bulk of which are filed against companies.<sup>89</sup> This provision authorizes private citizens to file a lawsuit against ‘persons’, which for this purpose includes corporations and partnerships that have violated statutory provisions, regulations, orders or permits.<sup>90</sup>

On the other hand, there are distinct signs that this US revolution has reached its

<sup>85</sup> Stone offers an interesting rationale for the successful utilization of civil and criminal liability as a legal technique for regulating corporate behaviour when he notes that, ‘of all the types of corporate bureaucracy that the law may seek to discipline, the business corporation is most appropriately suited to the technique of enterprise liability. Ideals of acceptable social conduct are conveniently transmitted in monetary signals that the business organization can translate, in turn, into its native tongue, the language of profits and losses.’ See Stone, ‘The Place of Enterprise Liability in the Control of Corporate Conduct’, 90 *Yale Law Journal* (1980) 1–77, at 76–77.

<sup>86</sup> US Pub. L. No. 96–510, 94 Stat. 2767 (1980) (codified as amended in several sections of 26 USC and 42 USC §§ 9601–9657 (1988), amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99–499, 100 Stat. 1613 (1986)).

<sup>87</sup> See Bakst, ‘Piercing the Corporate Veil for Environmental Torts in the United States and the European Union: The Case for the Proposed Civil Liability Directive’, 19 *Boston College International and Comparative Law Review* (1996) 323–351.

<sup>88</sup> See, for example, Hofstetter, ‘The Ecological Liability of Corporate Groups: Comparing US and European Trends’, in Teubner *et al.*, *supra* note 18, at 99–115.

<sup>89</sup> Belden and DiCintio, ‘The Role of Private Citizens in Enforcing US Environmental Law’, in M. Swart (ed.), *International Environmental Law and Regulations*, vol. II (1997) 61–78, at 61–62.

<sup>90</sup> *Ibid.*

high water mark and is now ebbing. It has resulted in the progressive extension of corporate environmental liabilities beyond the firm itself; such liabilities being visited upon shareholders, company directors and even corporate creditors and lenders. However, recent analysis suggests that US courts have not dismissed the general principles of corporate law, notably the difference between the legal personality of the company, as distinct from its owners (shareholders) and managers (directors).<sup>91</sup> While both the scope and nature of corporate environmental liability has undoubtedly expanded under CERCLA, US court decisions have generally proved consistent with traditional corporate law doctrine. Indeed, closer inspection of the fact patterns in many cases has revealed that despite their sometimes expansive language, US courts generally have not held corporate officers, individual shareholders, or parent corporations liable for clean-up costs based solely upon their status. The decisions suggest that the existence of a wrongful act and the actor's involvement in it is still the key to the imposition of liability.<sup>92</sup>

A further trend in the US case law is the development of a fact-specific standard for establishing corporate officer or shareholder liability called the 'Prevention Test'. This test focuses on whether an individual could have prevented or significantly abated the release of hazardous substances from a site. The court considers two factors in analyzing evidence of the individual's authority to control the corporation's waste-handling practices. First, the individual's ostensible capacity to control the environmentally sensitive activities: does the shareholder hold a management position within the corporation, such as officer or director? Secondly, the court examines the distribution of power within the corporation, including the shareholder's position in the corporate hierarchy and the percentage share of the corporation she owns.<sup>93</sup>

In Germany, the provision of compensation for environmental damage also exists on the basis of strict civil liability, albeit in a more restricted form. The German Environmental Liability Act<sup>94</sup> has improved the injured party's rights to compensation for damage by shifting the burden of proof from the injured parties to the operator of the installation.<sup>95</sup> Moreover, liability arises not only within the context of harmful effects caused by illegal discharges or emissions but also from permitted activities.<sup>96</sup> Strict liability under the Environmental Liability Act 1990, however, only

<sup>91</sup> Oswald and Schipani, 'CERCLA and the "Erosion" of Traditional Corporate Law Doctrine', 86 *Northwestern University Law Review* (1992) 259–330, at 329.

<sup>92</sup> *Ibid.*, at 330.

<sup>93</sup> Newton, 'The Prevention Test: Promoting High-Level Management, Shareholder and Lender Participation in Environmental Decision-Making Under CERCLA', 20 *Ecology Law Quarterly* (1993) 313–345, at 333–334.

<sup>94</sup> Also known as the Law on Environmental Liability, i.e. *Unwelthaftungsgesetz* or *Gesetz über die Umwelthaftung* (UmweltHG) of 10 December 1990. This Act entered into force on 1 January 1991.

<sup>95</sup> For an historical account of the 1990 Act, see Reuter, 'Non-Fault Liability in Germany', in P. Thomas (ed.), *Environmental Liability* (1991) 167–173.

<sup>96</sup> See Cremer and Fisahn, 'New Environmental Policy Instruments in Germany', in J. Golub (ed.), *New Instruments for Environmental Policy in the EU* (1998) 55–85, at 69, citing B. Bender, R. Sparwasser and R. Engel, *Umweltrecht* (3rd ed., 1995).

applies to damage arising from the activities of certain installations listed in its Annex. The strict liability test applied here further requires that there should also be harm to persons or property; therefore by implication, not just environmental damage per se. Thus, environmental damage per se is not a prerequisite of liability and pure ecological damage, i.e. impairment of the environment beyond harm to private property interests, is not recoverable.

However, causation is presumed in the German context if, in the circumstances of a given case, an installation is found to have been the likely cause of the damage in question. Thus, instead of having to prove causation, the plaintiff need only show that the alleged installation had the capacity to cause the damage, as shown by its listing in the Annex to the 1990 Act. If the plaintiff successfully meets this initial evidentiary burden, it is then up to the operator to prove that she has operated the installation in accordance with its intended purpose and any pertinent or special operational duties in order to prevent harm to the environment.<sup>97</sup> However, no personal directorial civil or criminal liability corresponding to the kind instituted by several of the common law jurisdictions noted below can be discerned in the German context.

On the other hand, recent Australian (state, as opposed to Commonwealth) environmental legislation imposes strict, criminal liability in the form of individual fines for directors and managers of offending corporations. Only clear evidence that the corporate officer concerned has used ‘all due diligence’ to prevent the commission of the corporate environmental offence is allowed as a possible defence. Moreover, the New South Wales Environmental Offences and Penalties Act is the first piece of Australian legislation to make directors or managers liable for imprisonment, in addition to any fines they have already incurred.<sup>98</sup>

Spanish company directors also face the possibility of individual criminal liability for corporate environmental damage as a result of amendments to the Criminal Code, which first established the offence of an ‘environmental crime’ (*delito ecológico*),<sup>99</sup> and later provided that certain conduct endangering or causing hazards to public health constitutes a criminal offence.<sup>100</sup> However, fault in the form of intention or serious negligence is the standard of conduct required for conviction in Spain, as opposed to strict liability.

The US Congress has taken an equally aggressive stance in respect of the possible imposition of strict criminal liability for certain environmental offences. It has been noted that, in effect, there is no requirement for criminal intent to be demonstrated on

<sup>97</sup> Giesberts, ‘Emission Control of Industrial Installations in Germany’, in M. Swart (ed.), *International Environmental Law and Regulations*, vol. II (1997) 133–155, at 153. See also Scherer, ‘Environmental Regulation in the Federal Republic of Germany’, in T. Handler (ed.), *Regulating the European Environment* (2nd ed., 1996) 89–112, at 108–109.

<sup>98</sup> See Taberner and Gibb, ‘Emerging Trends in [Australian] Environmental Law — Non-Fault Liability’, in Thomas, *supra* note 95, at 175–182, at 179.

<sup>99</sup> Article 347bis, introduced in 1983. The Article punishes the emission of substances that are potentially hazardous to the atmosphere, wildlife, agriculture and human lives. See Merlino, ‘Spain’, in D. Campbell and C. Campbell (eds), *Liability of Company Directors* (1993) 611–632, at 628–629.

<sup>100</sup> Article 384bis(b), introduced in 1989. Article 15bis of the Criminal Code established the general basis for criminal liability of company directors. *Ibid.*

the part of the company or its officers before they may be found criminally liable.<sup>101</sup> Thus, the US is moving towards the imposition of strict liability for environmental crimes. For example, the US Clean Air Act Amendments of 1990 first developed the 'Responsible Corporate Officer' doctrine by requiring that each corporation designates a specific senior management person by name, who is to sign all permit applications and submissions to the appropriate regulatory authorities. Thereafter, this person is held responsible for any failure of the corporate environmental compliance system. It is important to note that the emphasis of this requirement to designate 'responsible' corporate environmental officers has less to do with the provision of an incentive to inculcate a corporate culture for environmental protection (unlike the corporate environmental management systems in the continental European examples considered below). Instead, it has rather more to do with the provision of a simpler, individual focus for US corporate environmental liability.

In Canada, public demand for accountability in respect of mounting evidence of increased corporate environmental damage has also resulted in the imposition of personal criminal liability on company directors and officers.<sup>102</sup> For example, the Canadian Environmental Protection Act (CEPA), which is the main federal statute on this issue, imposes criminal liability on both company directors and officers who direct, authorize, assent to, acquiesce in, or participate in the commission of a corporate environmental offence (section 122). Moreover, such liability may be incurred without the need for a full *mens rea* requirement. Thus, strict liability can be imposed if a director fails to prevent what she should have foreseen and the standard used is what the 'reasonable man' would have foreseen in comparable circumstances.<sup>103</sup> As such it has been suggested that section 122 of CEPA establishes a positive duty for directors to comply with the Act and prevent any environmental damage by their companies.<sup>104</sup> Moreover, there are a number of factors that may be taken into account in sentencing which directly implicate the company to which the individual offender is connected, such as the size of the corporation and the profits realized as a result of the commission of the offence.<sup>105</sup>

The UK Environmental Protection Act (EPA) 1990 and several other related pieces of UK environmental legislation<sup>106</sup> also provide that a director or other company officer given responsibility for the company's environmental compliance record can be made personally criminally liable for any environmental offences committed by the company. However, in contrast with the trend in US legislation, such liability is not strict. For example, section 157(1) of the EPA expressly extends any corporate liability

<sup>101</sup> Calland and Schliessner, 'Trends and Developments in Corporate Environmental Liability and Responsibility: A United States/European Union Comparison', in H. Enmarch-Williams (ed.), *Environmental Risks and Rewards for Business* (1996) 71–85, at 75.

<sup>102</sup> Horton and Ritchie, 'Canada', in Campbell and Campbell, *supra* note 99, at 137.

<sup>103</sup> *Ibid.*

<sup>104</sup> *Ibid.*

<sup>105</sup> *Ibid.*, at 138.

<sup>106</sup> For example, in s. 217(1) of the Water Resources Act 1991. See R. Burnett-Hall, *Environmental Law* (1995) 399.

for breaches of the Act to any ‘director, manager, secretary or other similar officer of the body corporate’<sup>107</sup> who consented to, or connived in, breach of the Act or whose neglect allowed an offence under the Act to take place. In other words, the criminal liability of directors under this Act is essentially fault-based.

Nevertheless, according to Burnett-Hall, given the high standards that UK courts now expect of companies, where a corporate offence has in fact been committed, it will be very difficult to avoid a finding of negligence on the part of one or more of the directors or other company officers, unless there is convincing evidence of the existence and efficient operation of sound and comprehensive corporate environmental management systems designed to ensure full compliance with the law.<sup>108</sup> Salter agrees with this view, noting that ‘there is an increasing tendency for legislation relating to the environment to create offences which are absolute and impose strict liability so that the prosecution does not have to prove that the accused had a guilty mind and the accused has no defence that he made a genuine mistake’.<sup>109</sup> Strict compliance with environmental law is now expected and British managers have to adopt a new attitude and approach towards dealing with day-to-day environmental issues to ensure they are not implicated in any corporate environmental offence providing for strict liability.<sup>110</sup> This trend implicitly provides for a corporate due diligence requirement similar to that established by Australian (state) legislation described above.

Domestic legislation in Hong Kong echoes the UK notion of directors’ criminal liability for their part in a company’s environmental offences. Under section 10A of the Water Control Pollution Ordinance (WCPO) for example, directors are specifically included within one of the three groups of ‘persons’ that are liable for offences under the WCPO, the other two groups being (a) the person who actually committed the offence, and (b) the occupier of the premises or owner of the vessel. These latter two groups are subject to a strict liability test in respect of any offence under the Ordinance. Section 11 clearly provides that a lack of intention, knowledge or negligence on the part of these two groups does not absolve them from potential criminal liability. Unlike these two other potentially liable groups of persons, however, a distinction is drawn in the case of directors and other corporate officers concerned in the management of the company. They will be held to have committed an offence only where the offence committed by their company was done with their consent or connivance, or was attributable to their neglect or omission.

This is a similar legal duty to that placed upon company directors in similar situations in the UK context. As Mottershead notes, this distinction appears to require some knowledge on the part of these people, or at least that they be in a position where they should or could have known. She points out that these provisions in the WCPO

<sup>107</sup> Emphasis added.

<sup>108</sup> Burnett-Hall, ‘Emerging Trends in Environmental Law: Non-Fault Liability: The United Kingdom’, in Thomas, *supra* note 95, at 149–165, at 163–164.

<sup>109</sup> J.R. Salter, *Corporate Environmental Responsibility: Law and Practice* (1992) 128.

<sup>110</sup> *Ibid.*, at 4.

nevertheless extend the liability previously imposed on directors and other company officers under the Interpretation and General Clauses Ordinance. Liability under the earlier Ordinance extended to these persons only where the offence committed by the company was committed with such persons' consent or connivance, and not by neglect or omission.<sup>111</sup>

These developments in the nature and scope of corporate environmental liability, both civil and criminal, in common law and civil law jurisdictions, have obvious implications for company directors' duties and by extension corporate governance as a whole. The possibility of strict civil, and even criminal, corporate and directorial liability for environmental damage requires that environmental protection become a corporate governance consideration. Sound corporate environmental management policy would therefore ascertain that company directors are not exposed to the risk of debilitating civil and possibly even criminal liability due to poor corporate compliance with environmental laws. This in turn requires the board of directors to ensure that corporate environmental protection transcends mere compliance with environmental law and becomes intrinsic to the overall corporate policy decision-making structure. In order to be able to internalize these currently external legal pressures, it is at least arguable that contemporary and certainly future corporate governance structures must include environmental considerations in their strategic decision-making processes.

The increasing provision of strict civil and even criminal environmental liability upon corporate directors by many different states also raises the question as to whether this trend is indicative of state practice articulating a new customary international rule requiring states to impose such liabilities. However, despite individual state practice on this issue, no specific duty to introduce civil or criminal environmental liability upon company directors can be inferred under general international law. As we noted earlier, even international legal provision for corporate civil liability is limited to certain treaty regimes governing ultra-hazardous activities. Such civil liability also does not extend to company directors. The possibility of criminal liability for directors is not even broached at the international level. There is presently no indication that individual states provide for such liabilities as a consequence of anything other than the usual domestic pressures to do so. Thus, the accumulated examples of state practice on the imposition of civil and criminal liabilities upon company directors noted above cannot crystallize into a customary rule requiring all states to act similarly, although they represent a clear trend among like-minded states.

### ***B The Evolution of Corporate Environmental Management Systems***

We can now turn to the second major trend in environmental law that has made a discernible impact on corporate governance. This is the growing influence of environmental considerations within all aspects of corporate management and

<sup>111</sup> Mottershead, 'Corporate Liability in Hong Kong for Environmental Damage', in Gary N. Heilbrom (ed.), *Environmental Law in Hong Kong: Problems and Prospects* (1993) 57–72 at 61.

strategy. The rise of corporate environmental management systems is a direct result of the imposition of environmental legislation<sup>112</sup> and environmental quality standards<sup>113</sup> upon companies. The recent OECD Guidelines for Multinational Enterprises, for example, enjoin enterprises to establish and maintain a system of environmental management appropriate to the enterprise that includes, *inter alia*, collecting data on its environmental impact, setting objectives and targets, and monitoring progress towards these.<sup>114</sup>

The drive to introduce corporate environmental management systems is also a by-product of increasing environmental consciousness on the part of the general public, who form the existing and intended market for most corporate products. Environmental activism, especially in the form of the rising stature of environmental non-governmental organizations (NGOs) as increasingly relevant actors in the public sphere,<sup>115</sup> coupled with 'green' consumer patterns,<sup>116</sup> have combined to wield a burgeoning influence in the global marketplace, thereby necessitating the requisite corporate response to their combined challenge. As Karliner notes in the context of multinational firms, '[t]he role that organized communities, environmental groups and others have played in compelling the transnationals to change their behaviour is an achievement that most corporate environmentalists fail to recognize'.<sup>117</sup> Consumer preferences for environmentally friendly goods also provide market incentives for firms to raise environmental quality standards.

These legal and economic factors driving the inculcation of environmental values throughout the corporate structure find their expression in a number of preferred methods, *inter alia*, the introduction of corporate environmental management systems, the undertaking of corporate environmental audits and the utilization of ethical accounting methods. Thus, although corporate environmental management systems are mainly introduced to protect the environment, they also perform other corporate functions, namely, protecting the company and its officers from potential environmental liability, enhancing the corporate image, achieving competitive

<sup>112</sup> As Welford notes, environmental legislation is increasingly plugging the gaps and thus not allowing profit-maximizing firms seeking short-term rewards to opt out and become so-called 'free riders' by assuming everyone else will be environmentally conscious and comply with environmental regulation such that their own pollution will become negligible. See Welford, 'Environmental Issues and Corporate Environmental Management', in R. Welford (ed.), *Corporate Environmental Management: Systems and Strategies* (1996) 1–12, at 9.

<sup>113</sup> See M. Gilbert and R. Gould, *Achieving Environmental Standards* (2nd ed., 1998).

<sup>114</sup> Section V, para. 1 of the OECD Guidelines, *supra* note 19.

<sup>115</sup> In both political and legal terms. Note, for example, the growing recognition by English courts of the important role major environmental NGOs such as Greenpeace, the World Wide Fund for Nature (WWF) and Friends of the Earth play in the public debate on environmental issues, through the grant of legal standing in judicial review proceedings brought by these environmental NGOs against government decisions. See *R v. Her Majesty's Inspectorate of Pollution, ex parte Greenpeace Ltd* (No. 2) [1994] 4 All ER 329.

<sup>116</sup> See Choucri, *supra* note 40, at 193.

<sup>117</sup> J. Karliner, *The Corporate Planet: Ecology and Politics in the Age of Globalization* (1997) 33.



advantages and acquiring strategic data for longer term business planning.<sup>118</sup> Indeed, it has been noted that '[t]he use of environmental management systems and of environmental auditing is now the traditional approach to corporate environmental techniques'.<sup>119</sup>

The EC and several continental European countries, including Austria, Germany, Belgium and the Netherlands, have taken the view that raising corporate environmental consciousness is better served through the inculcation of environmental values throughout the corporate structure. This policy has been specifically implemented through the legal requirement for the introduction of corporate environmental management systems applying the latest environmental management quality standards. The development of these domestic legal requirements for the implementation of corporate environmental management schemes has undoubtedly followed in the wake of the EC Council Regulation on the voluntary participation of commercial enterprises in a Community system for environmental management and audit.<sup>120</sup> This EC eco-management and audit scheme (EMAS) has as its primary objective the promotion of continuous improvements in the environmental performance of the industrial activities of the participating companies.<sup>121</sup> Companies which establish a corporate environmental management system in accordance with the EMAS Regulation must specify an environmental policy aimed at going beyond meeting all relevant environmental regulations.<sup>122</sup> Moreover, the corporate environmental policy, programme, management system, review and audit procedures have to meet the comprehensive requirements provided in the Annexes, which represent the core of the EMAS. The corporate environmental policy also needs to be publicized and thus introduces an element of transparency into the workings of the company for the benefit of non-corporate stakeholders and other interest groups.

Procedures must also be laid down to monitor compliance with all relevant environmental regulations as a part of environmental law management,<sup>123</sup> which is in turn part of the overall corporate environmental management system.<sup>124</sup> The corporate environmental law aspect of this management system should design, apply and maintain a running index of all relevant environmental regulations pertaining to

<sup>118</sup> See Frank, 'The Development of Environmental Law Management Systems and the Legal Compliance Audit as Part of the Eco Audit', in M. Swart (ed.), *International Environmental Law and Regulations*, vol. I (1997) 117–130, at 119–120.

<sup>119</sup> Welford, *supra* note 24, at 50.

<sup>120</sup> The full title is EC Council Regulation 1836/93 on the voluntary participation of commercial enterprises in a Community system for environmental management and the environmental management audit, adopted by the Council of Ministers on 29 June 1993, OJ 1993 L 10, which entered into force three days after its publication in the *Official Journal* (i.e. 13 July 1993). The scheme was opened for company participation in April 1995. For background and appraisal, see Taschner, 'Environmental Management Systems: The European Regulation', in Golub, *supra* note 96, at 215–241.

<sup>121</sup> Item 2(a) and Annex I A Z 3 of the EMAS Regulation 1836/93, *supra* note 120.

<sup>122</sup> For a discussion of corporate environmental policies in the UK context, see Brophy, 'Environmental Policies', in Welford, *supra* note 112, at 92–103.

<sup>123</sup> Annex I D of the EMAS Regulation, 1836/93, *supra* note 120.

<sup>124</sup> *Ibid.*, at Item 2(e).

the company.<sup>125</sup> Regular auditing of corporate environmental management systems necessitates internal environmental operations audits and external surveys. The objectives of environmental operations audits include, *inter alia*, establishing whether the company is complying with its environmental policy and relevant environmental regulations.<sup>126</sup> These audits are performed by independent experts, who check compliance with all EMAS requirements, in particular with reference to environmental policy, the functioning of the environmental management system, the environmental auditing procedure itself, the reliability of the data and information in the environmental declaration, and that all important environmental questions are covered in this declaration.<sup>127</sup> If the audit result is positive, the environmental declaration is rendered valid and the company site can be entered in the EMAS list. It should be noted, however, that EMAS provides sparse information on *how* the environmental management system should be structured in the legal area and the detailed conduct of the legal conformity audit.<sup>128</sup> Nevertheless, as Taschner notes, corporate environmental performance will by necessity become a matter for the board of directors as a result of the implementation of the EMAS.<sup>129</sup> Indeed, a representative of the highest management level has to be in charge of the environmental management system and responsibility must be clearly attributed.<sup>130</sup>

In Austria, the Environmental Assessor and Site Index Act 1995<sup>131</sup> (also known as the Eco Audit Act) provides for the eco-auditing of companies to establish their compliance with applicable environmental laws and established environmental management standards such as the EC's EMAS scheme and International Standards Organization's ISO 14001 standards.<sup>132</sup> For example, regular legal compliance audits assess implementation and compliance with applicable Austrian environmental regulations using the framework of internal audit and external evaluation under EMAS, or the external certification assessment under the ISO 14001 regime.<sup>133</sup>

In Germany, operators of installations subject to licensing requirements are obliged

<sup>125</sup> *Ibid.*, at Annex I B Z 3.

<sup>126</sup> *Ibid.*, at Annex II A.

<sup>127</sup> *Ibid.*, at Annex III B Z 1.

<sup>128</sup> See Frank, *supra* note 118, at 123.

<sup>129</sup> Taschner, *supra* note 120, at 217.

<sup>130</sup> *Ibid.*, at 218.

<sup>131</sup> UGSTVG BGBl 622/1995.

<sup>132</sup> See Frank, *supra* note 118, at 119. The ISO 14000 series is an international standard for environmental management. It is based on the premise that economic development can only happen in a healthy environment. It standardizes worldwide environmental management systems (EMS) and tools in the areas of environmental auditing, environmental labelling, environmental performance evaluation, life cycle assessment, terms and definitions, and environmental aspect of product standards. The ISO 14000 series therefore provides the appropriate quality management standard for companies whose materials, processes or products impact on the environment. See 'The ISO 9000 Network', at [www.isonet.com](http://www.isonet.com).

<sup>133</sup> In this respect, since the ISO standard aims to be of worldwide validity, it stipulates fewer detailed rules regarding the legal conformity of national environmental standards than EMAS which is only European Union-wide in its remit. Nevertheless, Frank predicts a closer alignment of the legal management systems and legal compliance audits of these two environmental management systems. See Frank, *supra* note 118, at 125.

to inform the competent authority which person on the company's board performs the duties of the operator, according to the Federal Emissions Control Act and regulations issued under its auspices.<sup>134</sup> Furthermore, in order to preclude civil and criminal liability, a company must arguably show due diligence in its compliance with the relevant environmental laws. The operator must notify the competent authority of its efforts and the measures it has introduced in compliance with the environmental regulations covering the installation in question.<sup>135</sup> In short, a comprehensive view of the internal organization of the company in order to ensure compliance and prevent, or at least reduce, environmental liability must be shown.<sup>136</sup>

In addition to these due diligence requirements concerning the internal organization of certain German companies, specific environmental compliance personnel appointments also need to be made under the relevant German environmental laws. For example, operators of installations subject to the licensing requirements are required to appoint an emission control officer and even a hazardous incident officer (if the type and size of the installation raises concerns over potentially hazardous incidents) under the Ordinance on Emission Control and Hazardous Incident Officers.<sup>137</sup> The emission control officer shall advise the operator and the staff members on all matters that are deemed relevant for emission control. The hazardous incident officers shall advise on any matter that may be significant for the safety of the installations.<sup>138</sup>

These officers are entitled to submit their proposals or objections directly to the executive management if they are unable to reach agreement with the plant manager in charge and if they consider a decision by the executive management imperative in view of the particular importance of the matter at issue.<sup>139</sup> Moreover, the operator must obtain the emission control officer's opinion before taking any decisions regarding the introduction of processes and products as well as any investment, if these are deemed to be relevant for emission control.<sup>140</sup> Furthermore, the emission control officer may not be discriminated against on grounds arising out of the performance of the duties entrusted to her.<sup>141</sup> Indeed, if she is an employee of the operator, a summary dismissal is not permissible unless there are sufficient facts entitling the operator to terminate such employment for cogent reasons without complying with any period of notice.<sup>142</sup> Similar rules apply to the hazardous incident officer.<sup>143</sup> The possible impact on corporate governance of these special personnel requirements for ensuring corporate environmental compliance is significant for our purposes. Reports of emissions control and/or plant safety problems brought to the

<sup>134</sup> Giesberts, *supra* note 97, at 151.

<sup>135</sup> Section 52a of the Federal Emission Control Act 1990. See also Giesberts, 'Environmental Liability for Installations in Germany', 20 *International Business Lawyer* (1993) 14–19.

<sup>136</sup> Giesberts, *supra* note 97, at 151.

<sup>137</sup> *Verordnung über Immissionsschutz- und Störfallbeauftragte*, 5. BimSchV.

<sup>138</sup> Giesberts, *supra* note 97, at 151.

<sup>139</sup> *Ibid.*, at 151–152.

<sup>140</sup> *Ibid.*, at 152.

<sup>141</sup> *Ibid.*, at 152.

<sup>142</sup> *Ibid.*, at 152, citing ss. 53–58 of the German Federal Emission Control Act.

<sup>143</sup> *Ibid.*, at 152, citing ss. 58a–58d of the Act.

attention of the board members of a company can arguably be construed as sufficient knowledge on their part to incur individual professional responsibility to the company and its shareholders, as distinct from any corporate liability for environmental damage actually caused by such problems.

The drive to induce corporate environmental responsibility by means of establishing environmental management systems is also evident in Belgium.<sup>144</sup> In the Flemish region, a Decree on Environmental Policy contains a section on 'Environmental Management Within Companies'.<sup>145</sup> In contrast to the EMAS Regulation, however, the Flemish corporate environmental management system regime has been criticized as being only a partial, as opposed to a complete, integrated system.<sup>146</sup> Due to concerns about its lack of implementation, the Flemish scheme was limited to six elements: the appointment of an environmental coordinator;<sup>147</sup> the drafting of an environmental audit; the measurement and registration of immissions and emissions; the drafting of an annual environmental report; the elaboration of a company policy in order to avoid serious accidents and reduce their negative consequences for people and the environment; and, finally, the obligation to notify and warn the authorities in case of accidental emissions and other environmental disturbances.

In Flanders, operators of Category One-type hazardous installations are required to appoint at least one environmental coordinator. This environmental coordinator reports to the company management and has the following responsibilities: (a) to contribute towards the development and installation of environmentally sound production methods and products; (b) to supervise compliance with the relevant environmental legislation; (c) to supervise the measurement and recording of plant emission levels; (d) to ensure that the waste register is kept up to date and to comply with the relevant notice requirements; and (e) to contribute towards the internal and external communication of the overall environmental impact of the installation, its products and its wastes, including measures taken or proposed for the mitigation of this impact.<sup>148</sup>

With respect to this last function played by the environmental coordinator, it may be argued that she has a wider responsibility, or at least accountability, for the environmental management of the plant than is owed to the operating company alone. This may be discerned, for example, by the requirement that information on the environmental implications of the plant operations, as well as its products and waste residue, needs to be disseminated widely, well beyond the confines of the company

<sup>144</sup> See H. Bocken and D. Ryckbost (eds), *Codification of Environmental Law — Draft Decree on Environmental Policy* (1996).

<sup>145</sup> Part 6 of Flemish Decree on Environmental Policy of 19 April 1995, in Belgium Official Journal, 4 July 1995, which is an addendum of the Flemish Decree of 5 April 1995 on Principles of Environmental Policy. See Deketelaere, 'New Environmental Policy Instruments in Belgium', in J. Golub, *supra* note 96, at 107–124, at 120–121.

<sup>146</sup> Deketelaere, *supra* note 145, at 120.

<sup>147</sup> Article 6.1.1, at § 2 of the Flemish Decree on Environmental Policy of 19 April 1995. See Bocken and Ryckbost, *supra* note 144, at 80–82.

<sup>148</sup> Article 6.1.2, at § 1 of the Flemish Decree on Environmental Policy of 19 April 1995.

itself. At the same time, the environmental coordinator has a right of access to the highest levels of corporate management and her opinion is required for any corporate investment plan that may have environmental implications.<sup>149</sup> Any concerns she has over the environmental performance of the company shall be communicated to the company management through the annual report she prepares on her activities.<sup>150</sup> This means that the board of directors is obliged to take cognizance and act upon any environmental compliance issues raised in these reports in order to discharge their due diligence duties in respect of the possibility of environmental liability being visited upon the company. As in Germany, in order to secure the independence of the environmental coordinator in this respect, it is specifically provided that the operator shall take all necessary steps to ensure that she is able to perform her duties properly,<sup>151</sup> and not suffer any disadvantage as a result of the performance of these duties.<sup>152</sup>

Under the Flemish Environmental Policy Decree, provision is also made for the implementation of both the EC Eco-Management and Audit scheme (EMAS),<sup>153</sup> and a compulsory environmental audit for certain categories of installations or activities, on a regular or once-only basis.<sup>154</sup> This eco-audit involves a systematic, documented and objective assessment of the management, organization and equipment of the installation or activity in question in the field of environmental protection.<sup>155</sup> In the UK, Salter has noted the prevalence of corporate environmental audits, defined as an impartial evaluation of corporate environmental procedures and practices, despite the lack of compulsory legal requirement.<sup>156</sup> A related trend is the introduction of so-called ethical accounting standards that attempt to measure a company's environmental and social impact.<sup>157</sup> Corporate social and environmental reporting provides a useful avenue through which to publicize the results of such new accounting mechanisms.

A related trend is the evolution of voluntary environmental covenants or agreements between companies and environmental authorities. Such 'environmental agreements' have been defined as 'agreements between industry and public authorities on the achievement of environmental objectives. They can also take the form of unilateral commitments on the part of industry recognized by public

<sup>149</sup> *Ibid.*, at Article 6.1.2, at § 2.

<sup>150</sup> *Ibid.*, at Article 6.1.2, at § 3.

<sup>151</sup> *Ibid.*, at Article 6.1.4, at § 1.

<sup>152</sup> *Ibid.*, at Article 6.1.5.

<sup>153</sup> *Ibid.*, at Article 6.1.6.

<sup>154</sup> *Ibid.*, at Article 6.1.8, at § 1.

<sup>155</sup> *Ibid.*, at Article 6.1.8, at § 2.

<sup>156</sup> Salter, *supra* note 7, at 28.

<sup>157</sup> See, for example, Day, 'Stakeholders, Sustainable Development and Shareholders', *Institute of Directors, Business Comment* (1999) 3–4. See also Power, 'Constructing the Responsible Organization: Accounting and the Environmental Representation', in Teubner *et al.*, *supra* note 18, at 369–392.

authorities.<sup>158</sup> These agreements reflect the need to secure the cooperation of industry in the enforcement of environmental regulations and standards. The utility of such agreements for the efficient implementation of EC directives has been endorsed by Community institutions.<sup>159</sup> These arrangements may or may not be legally binding.<sup>160</sup> Industry-wide self-regulating arrangements that are by their very nature non-legally binding also fall within this category.<sup>161</sup> Self-regulation in this manner is set to become the norm for corporate environmental controls.<sup>162</sup>

In the Netherlands, for example, this trend is coupled with an increasing emphasis on the introduction of corporate environmental management systems.<sup>163</sup> In response to industry initiatives, the Dutch Government is encouraging the development of Internal Company Environmental Management (ICEM) systems as an integral part of corporate management in order to strengthen corporate environmental compliance.<sup>164</sup> The hope is that industry will comply with environmental regulation faster and more easily once a company has *internalized* the ICEM system, i.e., structurally and culturally adopted the ICEM on a voluntary basis.<sup>165</sup>

Thus, external pressure for the establishment of corporate environmental management systems requires internal changes to corporate management structures. However, the question is *how* exactly has this internal corporate response manifested itself? Here, it is interesting to note that corporate environmental management systems are now considered intrinsic to the smooth and efficient running of a company,<sup>166</sup> quite apart from ensuring compliance with external environmental regulation that the company is subject to. Indeed, the voluntary inculcation of

<sup>158</sup> See EC Commission Communication on Environmental Agreements, COM (96) 561 Final, adopted in November 1996. See Khalatschi and Ward, 'New Instruments for Sustainability: An Assessment of Environmental Agreements under Community Law', 10 *Journal of Environmental Law* (1998) 257–290, at 259.

<sup>159</sup> *Ibid.*, at 260.

<sup>160</sup> As Khalatschi and Ward note, '[t]he conclusion that environmental agreements implementing such directives must be legally binding as a matter of Community law is not immediately apparent'. *Ibid.*, at 271.

<sup>161</sup> See Rehbinder, 'Self-Regulation by Industry', in G. Winter (ed.), *European Environmental Law: A Comparative Perspective* (1996) 239–268. For a comparative discussion of US, Japanese and German practice in such environmental agreements, see Rehbinder, 'Ecological Contracts: Agreements Between Polluters and Local Communities', in Teubner *et al.*, *supra* note 18, at 151–165.

<sup>162</sup> For a critical appraisal of these agreements, see Biekart, 'Negotiated Agreements in EU Environmental Policy', in Golub, *supra* note 96, at 165–189.

<sup>163</sup> See Aalders, 'Regulation and In-Company Environmental Management in the Netherlands', in B.M. Hutter (ed.), *A Reader in Environmental Law* (1999) 249–271 (originally published in 15 *Law and Policy* (1993) 75–94).

<sup>164</sup> *Ibid.*, at 262–263.

<sup>165</sup> *Ibid.*, at 264 (emphasis added). See, for example, the Dutch practice of instigating industry-wide consultations leading to the establishment of environmental covenants involving both the relevant industry and its corresponding regulatory authority, setting targets for waste and emission reductions or timescales for recycling percentages to be achieved, in Koppen, 'Ecological Covenants: Regulatory Informality in Dutch Waste Reduction Policy', in Teubner *et al.*, *supra* note 18, at 185–205. See also Liefferink, 'New Environmental Policy Instruments in the Netherlands', in Golub, *supra* note 96, at 86–106, at 92–97.

<sup>166</sup> See Welford, *supra* note 24; and Welford, *supra* note 112.

corporate environmental management systems has arguably transcended the need for mere compliance with the governing environmental legal framework. They now find their justification in terms of overall corporate efficiency, both in management and increasingly even in economic performance terms.

Significantly, corporate environmental management systems require that 'every part of an organization must be involved in the implementation of the system and every person must recognize his or her responsibility for putting the system into practice'.<sup>167</sup> The question that arises is how far the notion of environmental protection can be discerned as an explicit, as opposed to merely implicit, concern of company directors in the daily running of their companies? In other words, how far have accepted environmental principles and norms, which to date have only been externally imposed upon corporations, engendered similarly progressive *internalization* processes within corporate governance? Given the overriding duty of company directors to achieve what is in the best commercial interests of their companies and, by extension, their owners (i.e., their shareholders), are company directors nevertheless developing the virtues of good environmental citizenship? If this is indeed the case, what exactly are the pressures driving them to do so? And how are these virtues of corporate environmental citizenship manifesting themselves? The answers to these questions are still awaiting the necessary empirical research and in any case may never be answered satisfactorily,<sup>168</sup> given the difficulty of obtaining an objective perspective on the success or otherwise of corporate environmentalism.

On the other hand, a growing perception of improvement in corporate environmentalism may lead us to the conclusion that the appropriate legislative environment has acted as a catalyst for such corporate action. However, one should caution against arriving at such an ostensibly simple causal connection for at least two reasons. First, there is insufficient empirical evidence in corporate management practice to corroborate the notion of causality between external environmental regulation and the introduction of internal corporate environmental management systems. Secondly, despite the existence of many examples of good corporate environmental management practice, disconcerting allegations from environmental NGOs abound. These allegations centre on the fact that a significant proportion of companies

<sup>167</sup> Wellford, *supra* note 24, at 52.

<sup>168</sup> For example, a 1990 UK survey of corporate environmental responsibility within 500 randomly selected businesses listed in *The Times* 1000 companies concluded that the level of response (only 82 full and five partially completed questionnaires were returned) was insufficient to give a definitive picture of the industrial performance as a whole. Nevertheless, the survey found that business attitudes towards the environment were increasingly positive and there were useful indications of this positive attitude in corporate practice. The survey concluded that a majority of the respondents (although only a small minority of the survey itself) were either taking or considering positive steps to improve their environmental performance. Furthermore, a significant number had not only taken the initial step of formulating a policy statement but were setting targets, instituting reporting procedures, introducing training programmes and putting in place other key elements of an environmental policy. On the other hand, while there was considerable agreement on what needs to be done, there is also an urgent need to match practice with intent, and to apply environmental policies more thoroughly and completely. See Burke and Hill, *supra* note 14, at 6 and 13.

apparently adopt corporate environmental management systems as either public relations exercises, with no intention whatsoever to implement them, or, worse, as smoke screens for their continuing degradation of the environment. It has been noted, for example, that '[t]he greening of some MNEs appears only skin-deep. Some companies have fine-sounding policies but continue to behave badly at local level — a problem complicated by the modern tendency to decentralize decision-making.'<sup>169</sup> Moreover, case studies of 'free-rider'-type companies abound in the literature.<sup>170</sup>

As in the previous section on domestic trends in corporate environmental liability, a further perspective that should be explored is how far the domestic requirement of corporate environmental management systems among several states is evidence of an evolving customary rule of international law requiring the same practice in all states. Here again, the response is in the negative despite the fact that these environmental management systems clearly implement the integration principle at the corporate level. International law does not currently prescribe these systems as a legal imperative although there is an undeniable trend towards their inclusion in domestic environmental laws.

### 3 Reform of the Corporate Governance Regime to Incorporate Environmental Concerns

The main question discussed here is whether environmental considerations can now be deemed sufficiently important to bring them within the scope of a company director's legal duties. The focus here is on the *internalizing* effects of the environmental law trends noted above, particularly in terms of their impact on the corporate governance regime. Are environmental concerns now an important interest group or 'stakeholder' within a company, either in themselves, or as a function of the company's or shareholders' interests? Either way, the argument for the expansion of traditional corporate stakeholders to include environmental interests represents a challenge to company directors. Their main duties would hitherto have been limited to the narrow goal of ensuring the well-being of the company itself, and its shareholders' interests.

There is presently no discernible evidence in terms of either international legal regulation, or comparative domestic legislation and precedent, confirming the inclusion of environmental considerations within the current scope of company directors' duties. This does not render the following discussion purely speculative. Indeed, the purpose of this part of the article is to show that there are sufficient international and domestic legal indicators, along with supporting doctrinal writing,

<sup>169</sup> Buckley, *supra* note 12, at 11.

<sup>170</sup> Greer and Bruno, for example, scrutinize the environmental claims of 20 transnational companies (TNCs) with headquarters in nine countries and operations on four continents to show that TNCs remain the primary creators and peddlers of dangerous and unsustainable technologies. See J. Greer and K. Bruno, *Greenwash: The Reality Behind Corporate Environmentalism* (1996).



to suggest that a normative case can be made for the incorporation of environmental interests within the overall corporate governance regime.

As Welford notes, environmental legislation worldwide is increasingly plugging the gaps that allow corporate environmental free-riding.<sup>171</sup> Trends in corporate environmental liability and corporate environmental management systems have already made an impact on corporate governance: first, by the imposition of environmental liability directly upon company directors, senior management personnel, and even (corporate) shareholders; and, secondly, as part of proposed changes to corporate management structures designed to reflect environmental values, which necessarily encompass the imperative role of directors in setting an example for the rest of the company. It is significant, however, that the legal scope of directors' duties under domestic company laws has not been explicitly expanded to include established environmental concerns.

What are the principal benefits and costs that can derive from the inclusion of environmental interests within corporate governance law? These are summarized as follows:

- 1 There will be greater scope for shareholder action to ensure directors' accountability. However, if shareholders do not take the responsibility to act, then it may prove difficult to hold company directors accountable for their actions or omissions, even when these are clearly not within the company's or even shareholders' interests.
- 2 The need to prepare environmental and social audit reports on the company's impact on the environment and society will increase company directors' reporting burdens. On the other hand, the company thereby obtains a better picture of its overall social and environmental impacts and is thus able to take steps to reduce these impacts, often to its own economic and public relations benefit.
- 3 The scope and extent of company directors' fiduciary duties will be increased but uncertain due to the inclusion of environmental considerations within the corporate governance matrix.

The really difficult question remains *how* such environmental concerns, even if accepted as legitimate interests to be taken into account in the corporate decision-making process, can be legally required of company directors as an important aspect of their corporate governance duties. There are several ways in which environmental considerations can be incorporated within the scope of the overall directorial burden. Express inclusion through legislative amendment of the relevant company law statute is presumably a possible, if unlikely, option. So are judicial decisions holding that corporate environmental performance is a relevant area in which a company director has a duty to exercise care and skill. Last but certainly not least, the interests of the company may be held to include its environmental performance and therefore subject to inclusion within the fiduciary duties of a company director. In respect of these latter

<sup>171</sup> Welford, *supra* note 24, at 10.

duties, it should be noted that a list of common breaches of directors' fiduciary duties would not traditionally include responsibility for corporate environmental damage. However, Dine notes 'the fundamental point that a director is under one overriding duty and that is to act *bona fide* in the interests of the company'.<sup>172</sup> She points out that the list of fiduciary duties that has grown out of the case law is in fact merely a list of situations where a director is most likely to be in breach of her fundamental duty to the company.<sup>173</sup> Any suggestion that only the scenarios contemplated in such a list can be deemed to be in breach of a fiduciary duty is misleading.<sup>174</sup> Therefore, should environmental considerations be accepted as a legitimate corporate interest, they can be included within a director's fiduciary duties.

This view is echoed elsewhere. Ueda, for example, notes that this argument implies that corporate directors who cause their companies to incur environmental liability due to their irresponsible conduct may be required personally to compensate their companies on the basis of their fiduciary relationship with these companies.<sup>175</sup> Moreover, shareholders may be able to bring derivative actions for compensation for damages arising from loss of corporate share value as a result of their directors' irresponsibility if the company itself fails to reclaim these losses from its directors.<sup>176</sup> This ensures the consolidation of environmental concerns into corporate management activities and corresponds more generally with increasing social consciousness towards corporate responsibility for environmental protection.<sup>177</sup> Salter notes that a general corporate reaction is to establish an environmental team led by a company director to show board-level commitment to the promulgation of the company's internal environmental policy.<sup>178</sup> On the other hand, although these new corporate structures are specifically established to deal with environmental issues, they are confined to internal management decision-making processes and do not as such incorporate wider notions of corporate governance accountability.<sup>179</sup>

According to Karliner, winning the fight against continuing corporate environmental damage can only be achieved by creating and implementing mechanisms for enhancing democratic control over corporations.<sup>180</sup> This democratization process involves redefining both the concept of corporate accountability and the concept of the 'corporation' itself. In particular, the notion of corporate accountability must be

<sup>172</sup> J. Dine, *Company Law* (3rd ed., 1998) 189.

<sup>173</sup> *Ibid.*

<sup>174</sup> See further Dine, *supra* note 172, at chapters 11 and 12.

<sup>175</sup> Ueda, 'Environmental Challenges for Japanese Corporations in the Twenty-First Century: Legal Aspects of Corporate Environmental Risk Management', in F. Macmillan (ed.), *International Corporate Law Annual*, vol. I (2000) 125–142, at 130.

<sup>176</sup> *Ibid.*

<sup>177</sup> *Ibid.*

<sup>178</sup> Salter, *supra* note 7, at 28. However, an EC consumer study and a Touche Ross Industrial Survey indicate that UK company directors are among the least active in minimizing the impact of their companies' activities upon the environment. See A. Warren, Director, Association for the Conservation of Energy, *The Telegraph*, 7 April 1990.

<sup>179</sup> Salter, *supra* note 7, at 28.

<sup>180</sup> Karliner, *supra* note 117, at 217.

divorced from simple notions of corporate responsiveness to investors, employees and the local community alike, which amounts to mere corporate self-regulation of its activities. Instead, it must be made to mean the strict accountability of companies to the laws of communities, governments and the overall international framework in which they operate.<sup>181</sup> At the heart of such notions of corporate accountability lies the concept that corporations do not have any inherent right to exist. They are merely granted this right by the citizenry and therefore should be answerable to them. Thus, 'the people', through a process of democratic political representation, should have the right to define 'the corporation', in terms of what it is and what it can or cannot do.<sup>182</sup> The sanction being that the public should be able to petition the relevant government to revoke a recalcitrant firm's charter and dismantle it by liquidating its assets.<sup>183</sup>

Such an approach is attractive but ultimately untenable. This is not solely because of its radical nature. There is a deeper, more intrinsic reason for its unworkability. This is due to its conceptual confusion over the corporate role, whether large, medium or small, within modern, mixed market economies. Within such economies, firms act to channel both financial and social capital towards certain predefined, usually materialistic goals or aims, agreed to either explicitly or implicitly by the majority of their populations. Companies are thereby the engine that drives human social and financial capital towards these materialist goals. The element of market competition completes the picture and serves to focus corporate endeavour efficiently. This description of the corporate role presumes its acceptance, for better or worse, by society. The corporate governance regime must therefore ensure fairness of treatment among its stakeholders rather than achieve wider social needs.

What is significant for our purposes here is the recognition that corporations are but a creation of society, albeit a very useful one, in order to achieve its goals, but *not* its needs. In this sense, they cannot possibly be made to substitute for the government role in attempting to cater for society's overall well-being. Companies can hardly be presumed to consider the needs of every part of society, all of the time. Nor should they be expected to do so. This is where the role of a democratically elected government becomes imperative: not merely to ensure society's needs are met, but also to vouchsafe the role of the company as a tool with which to achieve the explicit or implicit goals of society. Indeed, as Leader observes, there will be instances when wider social interests may not coincide with corporate interests.<sup>184</sup> It would thus seem to be the height of folly to attempt to constrain the 'internal' corporate governance decision-making process solely in order to serve some wider and usually uncertain social interest.

A better justification for legal restraints on corporate practice that impact

<sup>181</sup> *Ibid.*

<sup>182</sup> This view is a 'democratic' variation of the *communitaire* theory of the company, which holds that the company owes its existence to an exercise of state power and is but an instrument for the state to utilize towards its own ends. See Dine, *supra* note 10, at 17–21.

<sup>183</sup> Karliner, *supra* note 117.

<sup>184</sup> Leader, 'Private Property and Corporate Governance, Part I: Defining the Interests', in F.M. Patfield (ed.), *Perspectives on Company Law*, vol. I (1995) 85–113, at 88.

negatively on the environment is the public interest argument.<sup>185</sup> This approach denotes large companies as social enterprises in possession of social decision-making power.<sup>186</sup> Possession of this power is legitimated only if it is wielded in the public interest. Thus, corporate governance arrangements should ultimately benefit the general public but not necessarily its every need. As Parkinson notes, ‘the detailed rules of company law must be tested, not just to see how well they serve the interests of the shareholders, but also how well they serve the interests of society in having an efficient and productive economy’.<sup>187</sup> Similar sentiments can be seen to infuse the so-called ‘Third Way’ approach in contemporary political discourse. Giddens, for example, notes that: ‘While government intervention is necessary to promote sound environmental principles, it involves the active cooperation of industry — hopefully its willing cooperation, via the recognition that ecological modernization is beneficial for business.’<sup>188</sup> However, the difficulty here is in the determination of what the so-called ‘public interest’ is, and whether it changes depending on the individual company or wider industrial sector involved.

In any case, the explicit public interest aim of this approach is denied by other writers who argue that corporate activities are inherently beneficial to society and in any case such interference in corporate affairs is morally impermissible.<sup>189</sup> Supporters of this narrowly focused property-based approach to corporate theory see the direct providers of capital, namely, the shareholders, as the only legitimate interest group or stakeholders in the company.<sup>190</sup> A broader notion of the property model of the company includes other stakeholders such as employees, suppliers and local communities.<sup>191</sup> A logical, but not necessarily accepted conclusion of such an expansive conception of property would allow such non-shareholder stakeholders standing to enforce fiduciary duties owed to them by company directors.<sup>192</sup> However, the narrow, property-based perception of the corporate role in society presently pervades corporate governance laws. This puts into context the magnitude of the task at hand when attempting to expand the range of corporate stakeholders.

<sup>185</sup> Dine, *supra* note 10, at 29–35.

<sup>186</sup> Parkinson, *supra* note 2, at 23, citing R.A. Dahl, ‘A Prelude to Corporate Reform’, 1 *Business and Society Review* (1972) 17 at 17.

<sup>187</sup> Parkinson, *supra* note 2, at 24. An early forerunner of this view is the seminal work of Berle and Means, *The Modern Corporation and Private Property* (1932).

<sup>188</sup> A. Giddens, *The Third Way: The Renewal of Social Democracy* (1998) 57. In this respect, ‘ecological modernization implies a partnership in which governments, businesses, moderate environmentalists and scientists cooperate in the restructuring of the capitalist political economy along more environmentally defensible lines’. See J. Dryzek, *The Politics of the Earth* (1997) 145, as cited in Giddens, *ibid*.

<sup>189</sup> Parkinson, *supra* note 2, at 22. See also Friedman, ‘The Social Responsibility of Business is to Increase Its Profits’, *New York Times Magazine*, 13 September 1970.

<sup>190</sup> This approach is known as the *contractual* theory of company law: see Dine, *supra* note 10, at 3–17. See also E.W. Orts, ‘A North American Legal Perspective on Stakeholder Management Theory’, in F.M. Patfield (ed.), *Perspectives on Company Law*, vol. 2 (1997) 165–179 at 173, citing Macey and Miller, ‘Corporate Stakeholders: A Contractual Perspective’, 43 *University of Toronto Law Journal* (1993) 401.

<sup>191</sup> See Singer, ‘Jobs and Justice: Rethinking the Stakeholder Debate’, 43 *University of Toronto Law Journal* (1993) 475.

<sup>192</sup> See Millon, ‘Redefining Corporate Law’, 24 *Indiana Law Review* (1991) 223, at 255–270.

If we assume that, by their very nature, companies cannot incorporate every aspect of a society's interests within their corporate governance structures, then we must be able to explicate certain legitimizing criteria which would allow identifiable interest groups to lay claims for their inclusion within the legal duties ascribed to company directors. In this context, the 'constituency' approach to giving content to the interests of the company gains plausibility. This approach defines the interests of the company in terms of a subset of the interests of all the relevant groups. However, this raises the problem of defining the relevant interest groups/stakeholders/constituencies, some of whose interests are deemed relevant to, or at least susceptible of being conjoined with, the interests of the company itself. Another problem with the 'constituency' model as a means of widening the interest groups to which a company is beholden concerns the lack of any need on the part of these defined 'constituencies' to show a direct connection with the particular company. The fact that they fall within one of the designated interest groups is sufficient for their theoretical inclusion within corporate governance, even if this is not reflected in reality. Also, untoward consequences may occur as a result of the unwarranted over-emphasis on one constituency over another at any particular time, ultimately resulting in the possible neglect of the well-being of the company itself.

The situation becomes more complicated when we grapple with the relationship between the company and its shareholders, i.e. its ostensible owners. There is a continuing debate as to how far a company's interests are necessarily conjoined with those of its shareholders and *vice versa*. This lingering uncertainty as to the exact legal relationship between these two entities lies at the heart of modern company law. It is exacerbated when the consequences of the actions or omissions of the company create the potential for individual environmental liability on the part of its directors, and even its (corporate) shareholders. In the UK context, such liability, both civil and criminal, may be visited upon both the company and its directors. US law and practice on this front should alert both UK and continental European companies to the potentialities of even more far-reaching, corporate veil-lifting, tendencies of corporate environmental liability law. Thereby possibly affecting the very group of people whose interests are often deemed synonymous with those of the company, and to whom all company directors are beholden for their continuing positions, namely, the shareholders.

The implications of potential shareholder liability for corporate environmental damage acts to increase pressure from this particular constituency on company directors, forcing them to actively consider environmental concerns as an intrinsic part of their professional duties. In other words, quite apart from their individual liability for corporate environmental damage, company directors are arguably also responsible (in their professional rather than their legal capacity) for the potential environmental liability of the company's shareholders. The consequence of this is that a company director who neglects this key aspect of her duty towards shareholders may soon find herself out of a job!

Another potential consequence of such far-reaching implications of corporate environmental liability trends can be duly noted here. These trends may lead to an

excessive apprehension on the part of designated ‘environmental compliance’ corporate directors as to the likelihood of being visited by individual civil and even criminal liability. Such excessive apprehension may well result in overly cautious behaviour, and, in particular, the over-zealous implementation of excessively high environmental standards in relation to the particular corporate activity involved. Where such pre-emptive action goes beyond the established legal requirements for corporate environmental compliance, such that it incurs additional costs and reduced profit margins for the company, this exposes a company director to allegations that she has acted in breach of her fiduciary duties to the company itself. It may even be possible for an over-cautious company director to be accused of unduly fettering her discretion in such manner as to prove detrimental to the company’s interests.

These potentially unusual consequences resulting from the increasing exposure of corporate directors to individual civil and even criminal liability serve to highlight the continuing need for directors to focus on their primary duties to the company itself, as opposed to any particular one of the many different possible interest groups. As Leader notes, it is wrong to assume on the one hand that the company’s interest is totally independent of any single group of people, however much they may be affected by its activities, or on the other hand that a company is beholden to only one set of interested people, usually defined as the shareholders.<sup>193</sup> In other words, the only set of interests that company directors should take cognizance of, relate to the so-called ‘derivative’ interests in the company which are held by certain interest groups at any particular point in time. These ‘derivative’ interests consist of those desires or needs of natural persons which we can independently identify, apart from the company, but which a company must satisfy in order to accomplish its purpose.<sup>194</sup> As might be expected, these ‘derivative’ interests are the most problematic to define when considering their inclusion and position in the overall interests of a company. It is not possible to discern whether the company’s interests coincide with the interests of a certain defined group in every given situation.

Hence the emergence of the so-called ‘associative’ model of corporate governance law. This model does not purport to give any interest group a corporate governance stakeholding role simply because it is an *a priori* designated ‘constituency’. Instead, they need to show a direct connection with the company’s interests. As Dine notes, ‘[t]he great value of this (associative) model is that corporate governance roles are available to particular persons or groups when they can show that their interests should be considered as part of the company’s interests, rather than because they belong to a certain group’.<sup>195</sup> In other words, potential stakeholders must first prove that their interests are conjoined with the company’s interests at the material time and both were damaged by the company’s actions. The reforming zeal of this corporate governance model is also suitably muted in its approach, preferring a partial as opposed to full recognition of the derivative interests held by relevant consti-

<sup>193</sup> Leader, *supra* note 184, at 85.

<sup>194</sup> *Ibid.*, at 88.

<sup>195</sup> Dine, *supra* note 172, at 24–25.

tuencies in a company.<sup>196</sup> Full recognition would give these constituencies voting powers over the articles of the company and the appointment of directors. Partial recognition, on the other hand, gives the derivative interests of these constituencies a place inside the notion of the company's interest, this being central to corporate governance law, defined here as the law of the duty on directors to act *bona fide* in the interests of the company.

However, it is important to reiterate the difficulty noted earlier on in relation to environmental protection, in that it does not readily fall within the remit of any of the usual corporate interest groups such as the shareholders, employees or creditors. It is therefore difficult to propose environmental protection alone as a 'derivative' interest shared between the corporation itself and its major interest groups. In certain circumstances, the interests of different corporate stakeholders may be diametrically opposed to each other. Even if some method was found to surmount this difficulty, problems remain in respect of the articulation of this 'derivative' interest in environmental protection due to its non-anthropocentric nature.

#### 4 Conclusions

The provision for inter-state liability for environmental damage is currently limited in its application under customary international law and not included within the scope of many international environmental treaties. An alternative trend is for states to introduce civil liability regimes requiring corporate entities operating within their territorial jurisdictions to contribute directly towards the establishment of either an international compensation fund for environmental damage, or compulsory insurance schemes for such damage. However, even this trend is presently limited to environmental damage arising from ultra-hazardous activities such as the maritime transport of crude oil and the operation of nuclear power plants.

Balanced against the paucity of international law on this issue, domestic regimes have been bolder in their attempts to secure corporate governance consideration of environmental concerns. This is achieved mainly through the provision in several jurisdictions of strict civil and criminal liability that pierces the corporate veil to the extent that both directors and even (corporate) shareholders may be held liable for corporate environmental damage. The compulsory inculcation of corporate environmental management systems is the other main instrument utilized by many states to secure corporate environmental responsibility. These domestic trends in corporate environmental liability and corporate environmental management systems herald a new stage in the development of environmental law as it relates to companies.

However, the impact of such innovative legal trends in corporate environmental responsibilities is as yet unmatched by comparable strides in corporate governance law. The quest continues, both in theory and in practice, for the inclusion of environmental interests as a component of the overall interests of either the body corporate itself, or its shareholders, so that the protection of these environmental

<sup>196</sup> Leader, *supra* note 184, at 94.

interests becomes an explicit duty of company directors. While proposals for company law reform have touched upon environmental concerns, no serious attempt has been made to provide for the inclusion of these concerns within the overall scope of company directors' duties. Writing in 1990, Burke and Hill noted that: '[T]he key conceptual shift that needs to take place is from regarding the environment as a liability to acknowledging it as an asset, and this shift needs to take place at the highest level in the company.'<sup>197</sup> Currently, this paradigm shift is still not yet discernible.

In summary, proposed corporate governance reforms would manifest themselves in two main ways: first, by legally inducing progressive change within the company management culture in order to provide for the explicit incorporation of environmental concerns within their decision-making process. This may take the route of a statutory requirement to introduce corporate environmental management systems, possibly including the duty to appoint a corporate environmental officer, or even a company director with an explicit mandate to ensure better corporate environmental performance. The introduction of compulsory corporate environmental performance audits and reporting duties are alternative tools for ensuring consideration of environmental concerns at the highest corporate management level.<sup>198</sup>

Secondly, by reform of relevant company laws to incorporate an explicit reference to environmental considerations within company directors' duties. Extending the scope of directorial fiduciary duties to include environmental concerns may also achieve this objective. Attending to these concerns then forms part of the company directors' duties to the company per se and its shareholders, rather than being merely a question of compliance with external legal requirements. However, questions concerning the hierarchy of different interest groups or constituencies in the corporate boardroom will need to be considered. This picture is further complicated by the fact that even if a hierarchy of interest groups can be generally elaborated, this may be undermined by the publicity generated by the spontaneous actions of certain interest groups on a single-issue basis.

Finally, a tentative and as yet not fully empirically tested general hypothesis may be put forward regarding the comparative trends of domestic environmental laws as they pertain to companies. Several common law jurisdictions such as the US, the UK, Australia and Hong Kong, which this writer would associate with the espousal of *laissez faire* versions of neo-liberal economic policies and essentially non-interventionist approaches to business regulation, have sought to improve corporate attitudes

<sup>197</sup> Burke and Hill, *supra* note 14, at 6.

<sup>198</sup> For example, the (UK) Company Law Review Steering Group has proposed that the traditional directors' report be replaced in larger companies by a new mandatory statutory requirement to include an 'operating and financial review' (OFR) in the company's annual report. Among the proposed areas to be covered by such OFRs are '[E]nvironmental policies and performance, including compliance with relevant laws and regulations'. See the (UK) Company Law Review Steering Group, *Modern Company Law for a Competitive Economy: Developing the Framework* (UK Department of Trade and Industry, 2000) 180–185, paras 5.74–5.89. Following a consultation period, the Steering Group was able to report recently that their OFR proposal is supported by a large majority of respondents. See the (UK) Company Law Review Steering Group, *Modern Company Law for a Competitive Economy: Completing the Structure* (2000) 35, para. 3.7.



towards environmental responsibility mainly through expanding the scope and nature of corporate environmental liability. Specifically, this expansion of corporate environmental liability occurs through the imposition of strict liability on the part of company directors and the utilization of corporate veil-lifting methods to raise the prospect of extending corporate liability for environmental damage even to (corporate) shareholders. The increased exposure of shareholders thereby serves to galvanize their scrutiny of the discharge of corporate directors' duties in respect of the environment and thus adds a further dimension to the traditional concerns of corporate governance.

On the other hand, several civil law jurisdictions such as Austria, Germany, Belgium and the Netherlands, which are arguably wedded to a more regulatory, less free-market-oriented approach to the conduct of business, have generally responded to the challenge of environmental protection by requiring the establishment of corporate environmental management systems. These systems often feature the application of environmental management quality standards, such as the EC EMAS and ISO 14001 systems, and the appointment of specialist environmental compliance officers with specific duties in respect of corporate environmental performance. The introduction of corporate environmental management systems and independent corporate environmental officers serve to inculcate environmental considerations within the corporate decision-making structure, albeit mainly at the operational rather than at the strict corporate governance level. Nevertheless, such *internalization* of environmental criteria for corporate management consideration arguably constitutes a further legal restraint on the otherwise unfettered discretion of company directors to realise the corporation's best interests by sole reference to the increase in shareholder value.

Viewed in this way, it may be concluded that the legal methods and tools utilized by each group of countries in order to enjoin environmentally responsible corporate behaviour tend to mirror the general regulatory approach towards business favoured by each of these groups of countries.<sup>199</sup> While this perspective is somewhat obscured by the adoption of both these trends in common law and civil law jurisdictions, it may nevertheless be seen as an initial indicator of the type of legal tool favoured by different countries when confronted by the need to regulate corporate environmental impacts.

A further aspect of this comparative study of domestic trends in corporate environmental responsibility relates to their implications for the progressive development of international law in this area. Trends in domestic legal systems establishing

<sup>199</sup> There is a striking, if ultimately unproven, resonance here with the two forms of capitalism identified and developed by Albert, namely, the 'neo-American' model, practised in the US as well as the UK, and the 'Rhine' model, which operates in several European countries and also to an extent in Japan. See M. Albert, *Capitalism Against Capitalism* (trans. P. Haviland, 1993). Parkinson summarizes the main tenets of the two models in the following manner: 'At the centre of the first model is a belief in the benign effects of the pursuit of individual self-interest in unfettered markets. The other [model] in contrast places a greater emphasis on the advancement of collective well-being and provides a richer institutional framework to achieve that end.' See Parkinson, *supra* note 2, preface to the paperback edition, at ix.

company directors' environmental liabilities and implementing corporate environmental management systems are examples of state practice that may eventually crystallize into international customary rules binding all states to introduce similar requirements for companies incorporated within their respective jurisdictions. This is notwithstanding the present lack of treaty-based instruments on this issue. The establishment of international civil liability regimes for hazardous activities such as oil tanker spills and nuclear reactor meltdowns confirms the first trend towards implementing the polluter-pays principle directly upon polluting corporate entities rather than vicariously upon the states wherein they are situated. While the impact of the increased corporate environmental liability risk this trend engenders has not yet been felt within corporate governance law itself, no company boardroom can choose to disregard it.

The second trend of introducing corporate environmental management systems also strengthens international law as it relates directly to companies. It does so in at least two ways. First, previously non-binding international standards such as the EMAS and ISO systems are being incorporated into domestic legislation in many different countries. This trend in itself raises the question as to whether the establishment of such systems is now required under customary international law. Secondly, implicit in this state practice is the fact that these environmental management systems clearly implement the principle of integrating environmental considerations into decision-making at the individual company level, rather than the state level. Thus, a general principle of international environmental law has arguably transcended its limited application to states to become an implicit requirement of domestic corporate activity. In respect of both these trends, however, questions remain over whether the empirical evidence in the form of domestic legislation as an indication of state practice is augmented by accompanying evidence of *opinio juris sive necessitatis*, as required for the formation of binding customary international law. In other words, the presence of these two trends in domestic state practice has not crystallized into an international legal obligation to include environmental considerations within corporate governance law.