

Towards Binding Corporate Accountability



**Friends of
the Earth
International**

FoEI position paper for the WSSD

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Summary

This paper examines the case for an effective legally binding international framework to deliver corporate accountability (including liability). This binding agreement would need to incorporate legal **rights** for citizens and communities affected by corporate activities incorporating the direct liability of ‘foreign’ multinationals; **duties** on corporations with respect to social and environmental matters; and rules to ensure improved **practices** wherever corporations operate. The approach recognises the development and inherent limits of voluntary codes such as the OECD Guidelines for Multinational Enterprises which cannot be seen as an alternative to a binding and enforceable framework. FoEI is calling on governments to commit to develop a framework (such as a convention or other mechanism) to secure corporate accountability (including liability) by 2005.

Part 1 The need for binding corporate accountability

Why is FoEI concerned about corporate accountability?

As an international confederation of 70 groups from many of the richest and poorest countries of the World, FoEI has a broad experience of corporate practices. Delivering sustainable development, securing environmental justice, recognising and acting on ecological debt and issues such as climate change will all require governments to ensure corporations play a responsible role. Given the commitment to action through communities outlined in Local Agenda 21; without corporations being accountable for their activities to the communities they affect, a fundamental pillar of action for sustainable development will be missing. In FoEI’s experience the establishment of clear rights for citizens and communities is the best way of securing a just outcome. Established rules of accountability and liability meeting the principles outlined in this paper may have helped citizens and governments address and perhaps even avoid crisis such as those experienced in Bhopal with the chemicals industry, in Nigeria with the fossil fuel industry, oil spills such as the Erika and Exxon Valdez and recent concerns over the diamond mining industry for example.

The present context of corporate accountability

One major failing of the 1992 Earth Summit was the abandonment of the UN Center on TNCs and of the UN Code on TNCs. The resulting lack of an international framework has been recognised in the decade since despite efforts to build up voluntary mechanisms as alternatives to binding rules. A number of fora have made progress on specific aspects of corporate accountability and responsibility. However, these do not yet amount to a coherent response to widespread public and governmental concerns over those elements of globalisation relating to corporations:

* The UNDP concluded in its Human Development Report 1999: “multinational corporations are too important and too dominant a part of the global economy for voluntary codes to be enough. Globally agreed principles and policies are needed for: human concerns - to ensure compliance with labour

standards and human rights; economic efficiency - to ensure fair trade and competitive markets; environmental sustainability - to avoid degradation and pollution.” The report also stated: “Multinational corporations are already a dominant part of the global economy - yet many of their actions go unrecorded and unaccounted. They must, however, go far beyond reporting just to their shareholders. They need to be brought within the frame of global governance, not just the patchwork of national laws, rules and regulations.”

* Following the adoption of the International Labour Organisation Declaration of Fundamental Principles and Rights at Work and its Follow-up in 1998, the ILO has devised the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy as a framework for action by governments, workers, employers, and multinational enterprises to address the labour and social difficulties that may arise in the context of foreign direct investment and the activities of corporations. It is backed by the Multinational Enterprises Department which can interpret the principles and conduct surveys.

* The UN Commission on Human Rights Sub-Commission on the Promotion and Protection of Human Rights is presently discussing Draft Fundamental Human Rights Principles for Business Enterprises which outline obligations for corporations and legal accountability for human rights abuses. It has identified a raft of conventions and international instruments where corporations have obligations, but the principles are being devised because these obligations have hitherto not been set out systematically enough to amount to a legal framework for corporate accountability on human rights matters.

* The UN General Assembly special session to review progress since the 1995 Copenhagen World Summit for Social Development identified the need to support corporate social responsibility by setting a legal framework. In General Assembly resolution S-24/2 of 1 July 2000 it called for: “encouraging corporate social responsibility by fostering awareness about the relationship between social development and growth, by providing a legal, economic and social policy framework to promote corporate social responsibility”.

* The 1999 Fancourt Commonwealth Declaration on Globalisation and People-Centred Development also considered that the private sector must be accountable stating: “Recognising that good governance and economic progress are directly linked, we affirm our commitment to the pursuit of greater transparency, accountability, the rule of law and the elimination of corruption, in all spheres of public life and in the private sector.”

* The EU is presently devising a liability directive to clarify some elements of corporate and other liability. This, however, is a regional initiative that would have the potential to be more wide reaching if it were part of an international liability framework. UNEP and a number of governments have also raised the idea of a framework convention on liability.

* The Commission on Sustainable Development Sixth Session (22 December 1997 and 1 May 1998) Decision 6/2 on Industry and sustainable development stated that the foundation for sustainable development was good regulation: “The Commission emphasized that it was important for the achievement of sustainable development for Governments to develop and maintain an enabling policy framework based on a sound regulatory foundation complemented with a judicious mix of economic instruments, voluntary initiatives and agreements and public-private partnerships.”

FoEI believes that the WSSD must deliver on this ‘judicious mix’ of measures by making progress through the establishment of a ‘regulatory foundation’ in a framework convention on corporate accountability and liability or similarly robust mechanism. Drawing together initiatives such as the proposed liability convention with the Draft Fundamental Human Rights Principles for Business Enterprises would ensure coherence.

The need for accountability

Many governments have recognised the need to make globalisation support sustainable development. A legal framework for corporate accountability is a necessary pillar of such an approach. A number of changes, therefore are driving the demand for corporate accountability:

- * the growth of truly global companies means it has become more difficult for citizens and communities to seek redress where corporations are multinational (for example a multinational's legal 'home' may be uncertain);
- * there is a tendency for public interest constraints to be removed or relaxed in the course of removing non-tariff barriers to trade;
- * the growing scale of multinationals has consolidated their power and influence while greatly increasing distance between corporate leadership and the communities and lives that their activities affect;
- * corporations are increasingly taking control of industries and services previously run by governments, without taking on the wider public interest responsibilities governments have to address; and
- * the scale of corporate impacts is undiminished and those impacts are increasingly remote from both the owners and the customers of the company.

Yet presently corporations are only legally accountable to their shareholders.

FoEI recognises the potentially positive side to business - particularly small and medium sized enterprises that form part of local economies and are accountable to local communities. There are also 'sunrise' industries such as renewable energy where the skills and creativity of business are needed to deliver progress. But debate is growing over how corporate accountability to other stakeholders - as well as to shareholders - can be increased. The accountability corporations have to owners and shareholders is backed by detailed rules and regulations. FoEI believes new rules must spell out corporations' accountability to other stakeholders.

Corporate social responsibility?

Employees, communities, consumer and public interest groups are raising concerns about the performance and impacts of corporations on employment practices, pollution, genetic engineering, product safety, essential public services and many other matters. The most serious concerns tend to be over corporate practices in poorer countries, where governance and financial constraints have made it more difficult for legal, environmental, health and safety standards to match those in developed countries. For example, environmental or social impact assessments are often poorly conducted, if at all, and may not even be publicly available.

In the fossil fuel sector concerns have been raised about pollution, resource expropriation and human rights abuses. In the forestry sector, much trade is illegal - more than half the tropical timber entering the EU is likely to be illegally sourced. Logging on indigenous peoples' lands, corruption, and felling primary forests are all common concerns. In the garment and toy trades sweatshop conditions, poor health and safety and use of child labour have been documented.

Some corporations have made welcome improvements to their ethical performance. This has been supported by governments, some of whom even have ministers with duties to promote corporate social responsibility. However, such voluntary action is not common to all companies. Unless all corporations are made equally accountable for their environmental and social impacts there remains little incentive for a general improvement in behaviour. What is more, those corporations which want to become more socially responsible are being held back by competitors who can undercut them by continuing to externalise costs and by demonstrating no responsibility. There is an emerging ethical investment sector in some regions, but it remains small and many corporations report limited progress in becoming more socially responsible because they are not receiving support from mainstream investors. Substituting regulation with voluntary initiatives, therefore has failed to deliver sufficient

progress in practice.

Transnational solutions

Corporations are active across national boundaries, and often their production, sales and ownership are in different legal jurisdictions with inconsistent regulations. Corporations are often listed on stock markets or have a 'home' base in countries remote from where they operate and are 'hosted'. Changes in the legal framework in any one country can have real or perceived impacts on the short-term competitiveness of companies in that country. Some governments, to remain competitive in the international marketplace, have become reluctant to unilaterally introduce rules corporations might consider unattractive. It is sensible, therefore to devise a multilateral binding framework that provides a level playing field. A framework convention would allow signatory governments to deliver the agreement in the context of their own legal tradition.

Beyond voluntary initiatives

Recent progress on corporate accountability has been dominated by the development of voluntary initiatives. The UN Global Compact has been established to create a process to support the voluntary socially responsible behaviour of corporations. The OECD has recently revised its more established mechanism the OECD Guidelines for Multinational Enterprises. The European Code of Conduct for European Enterprises Operating in Developing Countries is a further voluntary approach which incorporates a platform for public airing of cases. Many other bodies and industry groups have devised sectoral codes of conduct. So far these have failed to prevent continued abuses of corporate power. There are a number of reasons why:

- * they do not provide strong incentives for compliance to counterbalance the financial incentives for non-compliance - because for example sanctions are absent or weak;
- * they rely on the 'appearance of compliance' through 'self-regulation', without even independent verification let alone enforcement; and
- * they fail to empower citizens and stakeholders. Instead, even where 'stakeholder dialogue' approaches are used, they present the issue of corporate responsibility as 'top-down' - as defined by the company.

Accountability requires going beyond voluntary approaches and establishing mechanisms which provide adequate legal and financial incentives for compliance. It must also empower stakeholders to challenge corporations. Above all, while voluntary initiatives can in themselves be positive or deceptive, they can not be seen as a substitute for mandated rules which establishes a baseline of rights, duties and consistent behaviour.

The objectives of corporate accountability

A corporate accountability convention must:

- * establish mechanisms for adversely affected stakeholders to obtain redress through exercising **rights**;
- * establish social and environmental **duties** for corporations;
- * establish rules for consistent high **practices** of corporations;
- * create a market framework in which progressive companies can thrive, and governments respond fairly to the demands of their citizens rather than to the lobbying of corporations;
- * ensure the international direct liability of corporations;
- * establish sanctions;
- * ensure the ecological debt owed by corporations to the South is repaid; and
- * secure environmental justice for communities threatened with or exposed to environmental injustice - north and south.

FoEI advocates accountability for publicly traded corporations. Often it is the economic power of these corporations which drives smaller private companies to operate to lower standards - either to compete or as suppliers required to meet prices and timescales inconsistent with high operating standards. Furthermore, large corporations can more easily meet higher standards more quickly.

Securing accountability of publicly traded companies must therefore seek to ensure private companies improve their operating behaviour too. It also addresses the primacy of the legal duty to maximise shareholder returns which drives short term profiteering and the externalisation of costs onto the wider community.

Part 2 Elements of binding corporate accountability

A framework for binding corporate accountability would (directly or indirectly):

Introduce duties on corporations

1. Impose duties on publicly traded companies, their directors and board-level officers to:

- * report fully on their environmental and social impacts, on material risks and on breaches of environmental or social standards (such reports to be independently verified);**
- * ensure effective prior consultation with affected communities, including the preparation of Environmental Impact Assessments (EIA) for significant activities and full public access to all relevant documentation; and**
- * take the negative environmental and social impacts of their activities fully into account in their corporate decision making.**

Duties on corporations and directors

Including directors as recipients of specific duties ensures objectives can be delivered through existing mechanisms of corporate governance and there are directly responsible individuals to deliver them.

Reporting

Improved reporting supports developments such as the Global Reporting Initiative but add the important step of requiring independent verification. Robust reporting helps ensure investors are supplied with the same information as executives and ensures markets are based on 'real' values of corporations.

Prior consultation

EIA and prior consultation allow for improved participation of affected communities and a wider understanding of the mutual risks and benefits of investments. A useful precedent is the ILO Indigenous and Tribal Peoples Convention of 1989. Failure to undertake meaningful assessments and consultations should result in enforcement.

Taking account

At present directors of publicly traded corporations have a duty to account to shareholders and maximise financial returns. This new provision would require them also to account to other stakeholders such as communities, and to balance financial returns with the interests of these other affected stakeholders.

Extend liability of corporations

2. Extend legal liability to directors for corporate breaches of national environmental and social laws and to directors and corporations for breaches of international laws or agreements.

Directors' liability

Beyond new duties for directors outlined above, there are responsibilities relating to existing national environmental and social laws. Directors should be personally responsible for company compliance with applicable laws, including breaches thereof. Precedents include the Environmental Protection Act 1990 in the UK which holds directors liable for corporate pollution offences. Such liability must survive corporate mergers.

International agreements and laws

Extending directors and corporate liability to activities that breach international agreements is already

under consideration as a Framework Convention on Liability. A number of governments have raised this issue as a priority in the course of regional preparatory meetings for the WSSD. This would ensure that many existing agreements on the environment and human rights which currently apply only to states could now be applied directly to corporations.

Ecological debt

Liability questions must also address compensation for ecosystem degradation and restoration.

Introduce rights of redress for citizens

3. Guarantee legal rights of redress for citizens and communities adversely affected by corporate activities, including:

- * access for affected people anywhere in the world to pursue litigation where parent corporations claim a 'home' are domiciled or listed;**
- * provision for legal challenge to company decisions by those with an interest; and**
- * a legal aid mechanism to provide public funds to support such challenges.**

Access to justice

Access to justice is essential for securing accountability. The proposal would ensure citizens, communities and affected third parties could pursue cases in a parent company's 'home' country courts where necessary - for example where they are listed on a stock exchange. The Cape asbestos case and others, for example, have identified the need for such a mechanism as corporations have been able to avoid accountability by claiming a particular court is not the relevant place to hear a case.

Challenge to decisions

If corporations and directors have new duties, rights are needed for those who have cause to challenge the decisions they have taken. This would give legal force to new duties and to corporate environmental and social reporting. Rights of legal challenge would need to prevent vexatious cases, while ensuring real concerns are not excluded by loopholes. Third party stakeholders might be expected to demonstrate an interest or show damage to be able to pursue a case.

Legal aid

Citizens in the developing World are daunted by the costs involved and most potential litigants by the risk of a corporation's costs being charged to them if a case is lost. Therefore a legal aid mechanism is necessary.

Establish community rights to resources

4. Establish human and community rights of access to and control over the resources needed to enjoy a healthy and sustainable life, including rights:

- * over common property resources and global commons such as forests, water, fisheries, genetic resources and minerals for indigenous peoples and local communities;**
- * to prior consultation and veto over corporate projects, against displacement; and**
- * to compensation or reparation for resources expropriated by or for corporations.**

Friends of the Earth has long advocated environmental rights and many governments have also raised the suggestion of launching a negotiation on an environmental rights convention at regional prepcoms for the WSSD. Control over resources is an elaboration of such rights. Useful precedents include the 1975 Land Rights Act in Australia which gives Aboriginal peoples right of veto over mining on their land. In practice, this has allowed them to set conditions relating to royalties, job provision and training. Also the 1997 Indigenous Peoples Rights Act in the Philippines which requires prior informed consent for corporate projects in ancestral lands and domains. The ILO Indigenous and Tribal Peoples Convention, 1989 (number 169) also requires respect for the rights of communities and local populations. Communities must be granted the right to apply the precautionary principle in exercising their rights and the burden of proof concerning the potential for harm must be placed clearly on the corporation involved.

Establish consistently high standards of behaviour

5. Establish (and enforce) high minimum environmental, social, labour and human rights standards for corporate activities - based for example on existing international agreements and reflecting the desirability of special and differential treatment for developing countries.

The focus of this proposed convention is on implementation mechanisms because of the imperative need to develop capacities - especially in poorer countries and communities - to ensure relevant standards of behaviour are implemented and enforced. Any standards should be based in existing and developing multilateral environmental and social agreements. The concept of 'special and differential treatment' for developing countries is well established. It may be appropriate to apply such an approach to this provision giving developing countries longer to establish standards and access to financial support. Standards of behaviour would also need to be more stringent, for example, in areas of high biodiversity value such as IUCN Category I to IV protected areas.

Introduce sanctions

6. Establish national legal provision for suitable sanctions for companies in breach of these new duties, rights and liabilities (wherever the breaches occur) such as:

- * suspending national stock exchange listing;**
- * withholding access for such companies to public subsidies, guarantees or loans;**
- * fines; and**
- * in extreme cases the withdrawal of limited liability status.**

A set of appropriate legal sanctions are needed. Governments can also control public financial support for corporations and therefore this also represents an opportunity for securing accountability. The principle of screening corporations must be established. There are precedents: some countries are considering with-holding export credit guarantee from companies in breach of the corruption convention or the OECD Guidelines for multinational enterprises. Also loans by international financial institutions such as the World Bank are screened.

Extend role of International Criminal Court

7. Extend the jurisdiction of the International Criminal Court to try directors and corporations for environmental, social and human rights crimes.

The International Criminal Court would provide an independent forum for hearing cases, perhaps including a special tribunal for environmental abuses. Eligibility for hearing or referral to this court would need to be defined.

Improve monopoly controls

8. Establish international controls over mergers and monopolistic behaviour by corporations.

This measure would need to reinforce national controls while providing a robust system to prevent the development of monopolies at any scale or over any market, national or international. Such measures would address concerns over the consolidation of economic power in corporations which has resulted in half of the world's 100 largest economies being corporations. Mergers are also important in terms of their impact on liability which would need to be addressed under any binding accountability and liability mechanism.

Establish an implementation mechanism

9. Establish a continuing structure and process to monitor and review the implementation and effectiveness of the convention.

An effective institutional structure, rigorous implementation and enforcement and an effective monitoring system are essential for a convention such as this to work.

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