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Energy Law and the Sustainable Company

Innovation and corporate social responsibility

Patricia Park and Duncan M. Park

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Energy Law and the Sustainable Company

What kind of decision making should multinationals engage in to create a sustainable company? There is substantial debate over why CEOs, senior management and boards of directors make the wrong decisions by not asking the right questions, with the result that not only is the company itself damaged, but all of the stakeholders find themselves at a detriment.

Focusing on innovation, technology transfer and the use of intangible assets, *Energy Law and the Sustainable Company* features case studies from the oil and gas sector, to illustrate how to develop a sustainable business. Considering corporate social responsibility from the perspective of international and national law, the book demonstrates how companies can be both profitable and ethical using the influences of psychology to encourage senior decision makers to make the right decisions. It is revealed that reputation is the main principle influencing decision making. The book also discusses how companies have reported on their sustainability strategy and considers how technology transfer and intangible assets may play a part in addressing global sustainability.

This book should be invaluable reading to students and scholars of Sustainable Business, Business Law, Corporate Social Responsibility, Environmental and Energy Law as well as Environmental and Energy Management.

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Contents

Preface

This book evolved as part of over 25 years of research and teaching corporate social responsibility to MBA students, philosophy in research to Ph.D. candidates, and international law specialising in the environmental and energy sector of one author; in addition to over 20 years of experience as an intellectual property professional both as an internal corporate advisor and consultant, and in private practice of the other author.

We have worked together for a number of years and had many conversations on how to influence both the decision makers of tomorrow, that is the post graduate students, on the one hand, and current decision makers, that is the senior managers in the energy sector, on the other. We were greatly influenced by the publications of a number of Nobel Laureates including James M. Buchanan, whose seminal work *Liberty, Market and State* introduced the thought that you cannot change people; they are as they are and you must take them as such. Colin Mayer's book, *Firm Commitment*, confirmed our line of thinking. But if you take Buchanan's thesis, how can anything be changed for the better?

We then started to discuss our thoughts with psychologists who introduced us to the concept of 'nudge theory'. This opened up a new line of research and so, based on nudge theory, we set up a number of interviews with high level decision makers. As our specialisation is in the energy sector, and we have high level contacts in major multinational oil and gas companies, we used these to interview and define what the most important factors were with regard to decision making. These interviews were used to inform the study, and the main point to come out of them was that reputation was of paramount importance with regard to the sustainability of the company.

Given that this was the strongest point to come from the interviews we used reputation as one of the main themes within the book. As the law is the basis of company sustainability, we considered both hard law and soft law in respect of whether the law should be changed. How state law is enforceable within the state and sometimes beyond; how soft law, in the form of guidelines and norms, can be enforceable. This includes intangible assets such as intellectual property and how these should be included in any strategic plan for a sustainable company.

The law can be interpreted in a number of different ways and sometimes people will interpret the law to their own advantage rather than that of the company or civil society. Firstly we considered Hofstede's research on cultural differences to decide if different cultures had different approaches to society, employment and decision making. With respect to differing interpretation of the law, at this point we brought in behavioural economics and here we are indebted to Fiona Butcher who gave unstintingly of her time and extensive knowledge and advice. We didn't realise that the psychology of law and decision making could be such fun.

We present our thoughts and findings as part of the discourse on the sustainability of multinational companies, particularly in the energy sector but these findings can be transferred to any multinational which may have an effect on sustainability and climate change in general.

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1 Energy law and the sustainable company

Introduction

This book will be part of the current discussion on why Chief Executive Officers (CEOs), senior management and boards of directors make the wrong decisions by not asking the right questions, with the result that not only is the company itself damaged, sometimes beyond repair, but all of the stakeholders find themselves at a detriment. Just as people will always be imaginative in creating new ways of making money legally, so others will devote their talent to doing so illegally. As Professor James M. Buchanan described in his seminal work, *Liberty, Markets and State*, people are as they are and we can only accept them as such. So how does society encourage them to make the right decisions in favour of both making the company sustainable and to the benefit of society? Alternatively, how can society make sure that the right questions are asked and the right checks and balances are in place to make sure that the answers reflect best practice for the creation of long term sustainable value? If that structure is subverted, it becomes too easy for the senior decision maker to succumb to the temptation of self-dealing.[1]

It was Adam Smith who pointed out in *The Wealth of Nations* that: 'It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest. We address ourselves not to their humanity but their self love.'[2]

We must remember that Adam Smith was not an economist as many people describe him, but a social philosopher, and his argument that the existence of selfish (or at least self interest) propensities suggests that those facets of human nature which incline man to the social state cannot of themselves be sufficient to sustain it in any degree of harmony or order. In other words, certain sources of control are required over the self-regarding activities of individual men/women; sources of control such as rules of justice and morality which must be known and observed by the members of any social group. This observation has been developed by others since Smith, but it is this fundamental discussion of the necessity and origin of those general rules that guide the activities of men which is of great importance, not least because it exposes one of the most characteristic features of his thought.

Smith's argument, therefore, suggests that social order becomes possible by virtue of the restraints which individuals impose upon themselves[3] and, if not, then by society.

The MacKinsey Global Survey July 2014, states: 'Executives at all levels see an important business role for sustainability. But when it comes to mastering the reputation, execution, and accountability of their sustainability programs, many companies have far to go.' Many other examples were identified by Monks and Minow in the fourth edition of their book *Corporate Governance,* including:

> After working as a very successful CEO for three years without a written contract, the CEO asked the Board to provide him with one. This would not be considered unusual as about one third of Fortune 5000 CEOs had written contracts outlining the negotiated terms leading to their employment. What was unusual was that the CEO required an unprecedented clause in the contract which stated that a conviction of a felony was not grounds for the termination of the contract, unless the felony was directly and materially injurious to the corporation. Did any member of the Board ask "what was the need for such a clause and why now after three years of employment?" No, the Board of Tyco signed the contract.
>
> Another very successful company was presented with the concept of a "special purpose entity" that would allow the company to move some of its debt off the balance sheet. However, this would be a violation of the company's conflict of interest rules. Again did the Board ask any questions? No, the Board of Enron agreed to the waiver on three separate occasions.[4]

They ask the question 'What is wrong here?'

Globalisation

The globalisation of business means that companies must improve their awareness of the effects of their increasingly complex and diverse operations in a wide variety of geographical regions and cultures, some of which may be unfamiliar to management until recently. There are many books on Corporate Social Responsibility (CSR) but none consider the subject within the context of law and regulation. Also there is no published work on the use of intangible assets to develop a sustainable company and yet Intellectual Property Rights (IPR) and knowledge transfer are becoming more important under international treaties.

The purpose of this book is to develop ideas based on current legal requirements, both at international and state level. We will lay out a strong argument to identify how companies can be both ethical and profitable by encouraging CEOs to behave ethically in the interests of making a sustainable company. The starting point of the book is the development of corporate social responsibility and the modern version as a more systematic and integrated programme; we then go on to assess the environmental and social impact of business and how to manage it in a strategic and sustainable manner.

Many international treaties require technology and knowledge transfer which introduces the concept of how a company may develop technology and knowledge transfer to the benefit and sustainability of a multinational company. Multinationals must comply with not only the jurisdiction within which they operate but also public international law, which may impose more onerous standards than do local laws. The understanding of legal concepts, rules and process are essential to businesses which have limited liability, lender responsibility, and shareholder rights. Additionally the responsibilities of the parent company for subsidiaries are all central to understanding a company's responsibilities and liabilities.

Business activities are described, facilitated and confined by the law, and a fundamental of sound corporate governance policy is legal compliance with international minimum standards. Understanding the nature and impact of legal obligations on the business is a basic precondition to designing not only a workable but also a sustainable business strategy.

However, the proposed solutions to such problems are not always in the form of law. The threats to order and justice that emerge over time can give rise to a number of responses, of which legal regulation has become perhaps the most prevalent in the twentieth century. Laws reflect current needs and are inevitably responsive. For example, society demanded guarantees of a right to privacy only when technology threatened that privacy, and government intrusion necessitated a response. In the international arena, law is not the only form of social control or normative claim. Other forms of requirements of behaviour emerge from morality, courtesy, and social custom.[5] Compliance with such norms is expected and violations can be sanctioned. Like legal norms, they grow out of the understanding and values of society. The role of non-binding norms in the international legal system, UN Norms and Guidelines, and the commercial codes of the International Chamber of Commerce and International Accountancy and Sustainability Reporting all go to reputational value.

No challenge derails managers from the goal of sustainability more than understanding what it means for an organisation to really be sustainable. Some people think sustainability is all about environmental issues. Others see it in terms of the bottom line. And then, of course, there are people who use the term synonymously with corporate social responsibility and shared value.

A good example of sustainability is the investment approach taken by Norwegian sovereign wealth funds, which put aside royalties from natural resources for future generations and deploy the interest to meet current needs. Unfortunately, most countries, including Canada and the United Kingdom (UK), spend royalties as they accrue, exploiting the wealth in the ground, leaving little for future generations.

The corporate social responsibility camp focuses on balancing current stakeholder interests. A socially responsible oil company would build local schools and hospitals to compensate communities for their resource extraction. But such measures do not always acknowledge the long-term impact on the communities. Keep in mind that schools and hospitals require staff and ongoing servicing. So CSR measures can actually impose long-term liabilities on affected communities, making good-intentioned actions unsustainable. So the question to be considered is: Should CSR remain a voluntary principle or should aspects of it be legislated for on a mandatory basis? Much of the accepted CSR agenda is already a requirement under both international and some national legislation. However, if there was legislation covering the full extent of CSR, business could grind to a halt simply by attempting to be in compliance with legislation on every statute book.

The book will argue that there should be sufficient legislation to create a level playing field which must apply to all corporations wherever they may be located. The main problem, however, would be one of enforcement. If it remains voluntary, as supported by the International Chamber of Commerce (ICC), how would CEOs and senior managers be persuaded to comply? This is the essence of the book and will be discussed within the context of the theories of James M. Buchanan and Colin Mayer's theories on trust to change senior managers' behaviour to create a sustainable company. The book concludes that the most effective and sustainable changes in behaviour will come from the successful integration of cultural, regulatory and individual change.

Imperatives of international law and norms

In his book *Globalization: A Very Short Introduction,* Steger states that: 'At its core…globalization is about shifting forms of human contact.'[6] However, Muchlinski[7] states that globalisation is in itself an ideologically contested concept. Nevertheless, these two approaches have influenced the developing concept of 'global consumerism' as discussed from the international corporate social responsibility perspective in Chapter 6.

Both scholars and judicial decision makers have characterised the international legal system as a system of equal and sovereign nation states whose actions are limited only by rules freely accepted as legally binding.

> International law governs relations between independent states. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these coexisting independent communities or with a view to the achievement of common aims.[8]

Brierly defines international law as 'the body of rules and principles of action which are binding upon civilised states in their relations with one another'.[9] Originally this state-centred system excluded any role for non-state actors and was based upon a belief in the factual as well as the legal independence of states.

Obligations were largely bilateral between two or more states and enforced by self-help with the subject matter of international legal regulation limited largely to diplomatic relation, the maritime sector, trade and extradition. Shelton notes that the international legal system has undergone tremendous changes recently inasmuch as historically being dominated by western states there are now more than four times as many states than existed at the beginning of the twentieth century. Additionally other communities have emerged, who now play an important role in the international arena. Intergovernmental organisations, non-governmental organisations, professional associations, transnational corporations, and mixed entities all contribute to the making of international norms. What is more, they are increasingly bound by these norms.

Subjects once deemed as private have now passed into the public sector and from there into issues of transnational concern.[10] The expanding management of the international commons is now regulated through complex multilateral agreements with supervisory organs established to implement, monitor, and enforce compliance. Technological change has also made possible communications and travel, which places new problems on the global agenda, such as human rights, where the duty is owed to those within the state rather than the state itself. The needs and approaches of international environmental law and the notion of the protection of the 'commons' requires state reporting as a supervisory mechanism and has become widespread in international instruments concerning environmental protection.

Hard law and soft law

The lines between law and non-law may seem blurred, and even more so the need for compliance. This is part of an increasingly complex international system which includes a varying form of instruments with a common purpose of regulating behaviour within a legal framework. Frequently hard law instruments can be identified by the internal provisions and final clauses, but these are becoming increasingly difficult to identify. For example the Commission on Sustainable Development supervises the implementation of Agenda 21. Whereas in other instances, states have been asked to submit reports on implementation of, and compliance with, declarations and programmes of action in a manner that almost duplicates the mechanisms utilised in treaties.

Many scholars have distinguished hard law by claiming that any breach will give rise to legal consequences; whereas the breach of a soft law norm gives rise to political consequences. However, the breach of a soft law norm will also go to due diligence. This may result in an unfavourable outcome if the breach becomes the subject of litigation. It seems that more often compliance with soft law cannot be separated from the issue of more active participation of non-state actors, such as the International Chamber of Commerce. Public participation is not only a goal but a reality in the development and implementation of international norms, and so soft law permits non-state actors a role that is rarely included in the more traditional hard law making process.

International law in relation to multinational enterprises

The role of multinationals as special interest groups that seek to influence the development of the law in a manner conducive to the furtherance of their interests cannot be ignored. There is little doubt that multinationals lobby governments and international governmental organisations to ensure that normative development is business friendly.[11] They may not always be successful, as their failure in the Multilateral Agreements on Investment (MAI) or the adoption of investment rules by the World Trade Organization (WTO) may suggest. However, their influence on domestic legal developments may be considered to be more successful.[12] Another significant group of non-actors who influence the development of rules and procedures in the wider area of international business regulation are the non-governmental organisations (NGOs). Not only are they active in the area of human rights protection but NGOs have been increasingly active in the field of foreign investment, purporting to represent the voice of 'civil society' or public participation. It is together that multinationals and civil society groups may be seen as the informal initiators of regulatory actions while seeking to further their respective policy interests.

Much of the earlier legal literature on multinational enterprises and their investment in foreign countries has concentrated on the host state country along with the international relations literature.[13] However, more recently, this concentration on the host state has been questioned.[14] The bulk of international obligations have previously fallen to the host nations whilst the multinational investor companies and their home states have few. However, increasingly, attention is being paid to the duties of the multinational companies towards the countries in which they invest under the guise of 'international corporate social responsibility'. Additionally it is required that the home states undertake certain responsibilities. Given that the majority of the multinationals' home states are developed, whilst the host states are frequently underdeveloped or developing, it is becoming more relevant to impose certain duties on home states to provide incentives for technology transfer. It is the home state's legal and regulatory system which may be used to ensure that multinationals based there conform to certain standards of good corporate citizenship through sanctions within the home country legislation providing redress for claimants from outside the home country who are in dispute with the parent company for the acts of its overseas subsidiaries.[15] This discussion brings us on to considering areas of jurisdiction with regard to both the home and the host states.

Jurisdictional limits of regulation

The principal jurisdictional level for the regulation of multinational companies remains at the nation state. However, this creates a problem of extraterritoriality due to the international nature of organisation and management within the multinational company structure. We therefore need to consider the rules of public international law concerning state jurisdiction and state practice. In particular how the various bases of extraterritorial jurisdiction have been used in the fields of prescriptive, personal, and enforcement jurisdiction.

The legal regulation of state jurisdiction is covered by rules of public international law, which are based on the exclusive sovereignty of each state over the territory it controls. As all states are equal in the eyes of international law, this power is enjoyed by states without let or hindrance from any other sovereign state. Consequently each state has a reserved domain of domestic jurisdiction. However, this has as its corollary a duty of non-intervention on the part of other states.[16]

The idea that this principle of state jurisdiction be observed to the letter, however, would severely restrict any assertion of extraterritorial jurisdiction by a state's legitimate interest in the effective enforcement of its laws against multinational organisations. This would then raise the question of whether the territorial principle can be modified to justify a measure of extraterritorial jurisdiction. According to Brownlie,[17] international law is developing in the light of the need to modify the territorial principle. Therefore, alternative bases of jurisdiction (subject to the reservation that these must preserve a substantial and genuine connection between the subject matter of jurisdiction and the territorial base, and reasonable interests) are being sought by the state seeking to exercise jurisdiction.[18] Various exceptions have been put forward but three are of particular relevance to the regulation of multinationals: the principles of nationality, protective jurisdiction, and objective territorial jurisdiction.[19]

Nationality

It is accepted that in certain cases a state can assert jurisdiction over its nationals abroad.[20] According to this principle, the home state of a multinational could seek to justify jurisdiction over activities of an overseas subsidiary in a number of situations. For example, the managers of an overseas subsidiary, by reason of their home country nationality, could be subjected to home country legal requirements. Should there be no home nationals on the board of the subsidiary, or they are in the minority, then the home state could require the parent company to order its overseas subsidiaries to act in compliance with home country laws by reason of the nationality of the parent company as the principle shareholder in the foreign subsidiary. This will have the effect of disregarding the foreign nationality of incorporation of the subsidiary.[21] Alternatively, where the parent company operates abroad through unincorporated branches, these will retain the nationality of the parent and could be subject to the direct jurisdiction of the home country by reason of their corporate nationality.[22]

Protective jurisdiction

Almost all states accept the right of a state to exercise extraterritorial jurisdiction over acts done abroad which adversely affect the vital interests of the regulating state.[23] Under the 1982 United Nations Convention on the Law of the Sea a coastal state has the authority to create regulations over not only its territorial waters but also the extended economic zone up to 200 nautical miles. This is not only to protect the security of its coastline but also in order to protect the ecosystems therein, including fish stocks and, in addition, mineral wealth. Carrying this forward it is arguable that the exercise of this extra-territorial jurisdiction extends to multinational companies in areas of public governmental regulation. An example of this would be the control of tax avoidance by the parent company through the use of transfer price manipulation between itself and its foreign subsidiaries. However, this could only be argued in the genuine public interests of the regulating state and those designed to favour its commercial interests at the expense of other states.

Objective territorial jurisdiction

The modification of the strict territorial jurisdiction arises where the elements of a criminal offence are commenced in one state and are completed in another. This has given effect to the assertion by states of an objective territorial jurisdiction over offences initiated abroad and completed within the jurisdiction.[24] The Permanent Court of International Justice (PCIJ) accepted this 'objective' principle as a valid basis for the exercise of state jurisdiction in criminal matters in the case of *The Lotus*.[25] The Turkish courts had convicted, on a charge of involuntary manslaughter, the officer of the watch on a French ship that had collided with a Turkish vessel on the high seas, causing the death of a number of Turkish nationals on board the Turkish ship. The PCIJ held that Turkey was entitled to exercise its criminal jurisdiction on the basis that the effects of the offence were produced on the Turkish vessel. Under maritime law the Turkish vessel could be regarded as a place assimilated to Turkish territory, and that, therefore, the offence was committed within Turkish territory, even though the perpetrator was, at the time, aboard the French ship. The PCIJ held that states retained a wide measure of discretion in respect of the application of their laws and the jurisdiction of their courts to persons, property, and acts outside their territory.

Although the PCIJ did not clarify the limits of this discretion, later decisions of the International Court of Justice (ICJ) have stressed the need for a genuine connection between the subject matter of the claimed jurisdiction and the territory of the state seeking to exercise its jurisdiction.[26] However, the application of the objective principle gives rise to two main areas of dispute. Firstly, the activity involved may be criminal in the state where it is completed but not in the state where it was initiated.[27] Secondly, there is the problem of establishing a sufficient causal link or nexus between the initiation and completion of the crime to justify applying the objective principle.

Having considered these developments to the strict extraterritoriality principle in international law we will turn to consider how state practice has evolved in relation to the extraterritorial regulation of multinational companies.

Although there is a general presumption against the extraterritorial application of legislation, claims have also arisen in the context of economic issues when some states, and in particular the United States of America, have sought to apply their laws outside their territory, in a manner which may precipitate conflicts with other states.[28] When claims are founded upon the territorial and nationality doctrine of jurisdiction, problems do not often arise, but claims made upon the basis of the 'effects' doctrine have provoked considerable controversy. This goes beyond the objective territorial principle to a situation where the state assumes jurisdiction on the grounds that the behaviour of a party is producing 'effects' within its territory. This is claimed even though all of the behaviour complained of is taking place within another state.[29] For example, the US regards subsidiaries of US companies abroad as of US nationality even where such companies have been incorporated abroad, while the state of incorporation has regarded them as of its nationality and thus subject not to US law but to its national law.[30] The US has vigorously maintained the 'effects' doctrine particularly in the area of antitrust regulation.[31] In the case of *US v Aluminum Co. of America,* the court declared that

> Any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends.

This approach was reaffirmed by a series of later cases but was, to some extent, modified by the requirement of intention and the view that the effect should be substantial. Nevertheless, the wide-ranging nature of the approach aroused considerable opposition outside the US, as did American attempts to take evidence abroad under very broad pre-trial discovery provisions in US law and the possibility of treble damage awards.[32] In view of this considerable opposition by foreign states, the US courts modified their approach in the *Timberlane Lumber Co. v Bank of America*[33] and *Mannington Mills v Congoleum Corporation*[34] cases. In these cases the courts held that not only did the courts have to consider the effects test, but also a balancing test of 'a jurisdictional rule of reason'. This involved a consideration of other nations' interests and the full nature of the relationship between the actors concerned and the US. In the Supreme Court case of *Hartford Fire Insurance Co v California*[35] the majority judgment claimed that it was well established that the relevant Sherman Act 'applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States', but a dissenting opinion took the view that such exercise of extraterrestrial jurisdiction was subject to the test of reasonableness, with which the majority did not agree.

The *Hartford Insurance* case gave rise to considerable criticism as it was considered that the court was reviving the 'pure effects' approach to extraterritorial jurisdiction that effectively diminished the comity based balancing process developed in earlier cases. It was considered that this could only harm US economic relations with major trading partners and allow for an exercise of US jurisdiction in all but the clearest cases of conflict. Nevertheless this approach was endorsed by the US Department of Justice Antitrust Enforcement Guidelines for International Operations in 1995. Additionally, more recent cases have extended the operation of the *Hartford* approach from private party civil cases to criminal suits brought by the US Government.[36] Latterly there have been few major disputes over extraterritorial application of US antitrust law due to the adoption by the US of bilateral antitrust cooperation agreements with major trading partners.

That the US has been the most assertive in claiming jurisdiction over subsidiaries of a multinational company is perhaps not surprising. Not only is it the most dominant political power in the international economy, but it also has a legal experience based upon the creation of a unified transcontinental economy that has influenced its legislators, administrators and judges towards an acceptance of extraterritorial jurisdiction in most forms. However, this has led to conflicts generated by the US assertions of extraterritorial jurisdiction and given rise to numerous attempts to minimise it. The effects of trying to minimise conflicting requirements being placed upon multinational companies is still open to question.

Corporate governance and disclosure

Governance and disclosure has become a highly important issue in the wake of recent corporate scandals involving multinational companies including both the energy and financial sectors. Additionally there are a number of non-governmental stakeholders,[37] notably investors, creditors, employees, and consumers, who need information from the company about matters of direct concern to their interests; this results in demand for increased disclosure which has given rise to significant developments in national and regional disclosure laws and has stimulated new policy proposals. This in turn has given rise to calls for the enhancement of a multinational company's accountability through changes in the international structure of the corporation.

Reasons for enhanced accountability and disclosure

Apart from the traditional recipients of corporate information such as shareholders, bankers, lenders, and creditors, those interested in disclosure and accountability now include employees, trade unions, consumers, governments, and the general public. This has resulted in calls for a wider conception of disclosure than that needed by the financiers of the company.[38] In response the Organisation for Economic Co-operation and Development (OECD) has produced a guideline on disclosure.[39] The guideline also offers a summary of responses to the various concerns underlying international corporation disclosure. The guidelines should also be read in conjunction with the OECD *Principles of Corporate Governance* which offer more detailed analysis of the terms used in the disclosure guideline.[40] The basic starting point for disclosure in the *Principles of Corporate Governance* is that 'the corporate governance framework should ensure that timely and accurate disclosure is made on all material matters regarding the corporation, including the financial situation, performance, ownership and governance of the company'. This is deemed central to shareholders' ability to exercise their ownership rights on an informed basis and thus to allow capital markets to operate efficiently. Apart from shareholder interests, the disclosure guidelines and the corporate governance principles both stress the need for a broad disclosure of company objectives, which cover not only commercial objectives but also policies relating to business ethics, the environment and other policy commitments, with the aim of better evaluating the relationship between companies and the communities in which they operate and steps taken to implement their objectives. Importantly, the information on key board members and their remuneration will assist in identifying conflicts of interest and monitoring the effects of remuneration schemes, such as stock options, and their relationship to company performance.

Under the corporate governance principles the issue of 'related party transactions' are described in more detail rather than the basic requirements of the disclosure guideline. Full disclosure of such transactions is necessary to ensure that the company is being run with due regard to the interests of all its investors. This should be done on an individual basis indicating whether the transactions in question have been made at arm's length and on normal market terms.

It is clear from the OECD approach to disclosure that it seeks to encourage greater openness and transparency by multinational companies for public policy purposes in addition to their existing national disclosure requirements, as a means of creating a more informed environment for policy responses to be formulated. The OECD, therefore, goes beyond disclosure aimed at mere investor protection. However, the OECD *Guidelines* and *Principles* are considered to be 'soft law' as the ultimate arbiter of disclosure requirements still remains the country in which the company operates.

The creation of soft law norms in international law

There is a strong link between the method of creating soft law norms and the identification of soft law authors. States may choose to create legal norms in binding or non-binding form, whereas non-state actors, including most international institutions, cannot choose the form or instruments they adopt because their legal status allows them to adopt only non-binding rules.

Creation of non-binding norms by states

The drafting of non-binding norms by states meeting in conferences is particularly important in the field of environmental protection. First, global conferences like the 1972 Stockholm Conference on Human Environment followed by the 1992 Rio de Janeiro Conference on Environment and Development