April 2005

Friends of the Earth

Briefing

Corporate Accountability

Introduction

Environmental organisations like Friends of the Earth have campaigned against socially and environmentally destructive practices of companies for as long as we have been in existence.

The corporate sector's responses to campaigns by civil society (ethical consumerism and Corporate Social Responsibility - CSR) have failed to address the unprecedented social and environmental challenges faced by humanity this century. In particular, it fails to challenge the growth of unregulated corporate power. Friends of the Earth is calling for 'corporate accountability' that would legally bind companies to improve their environmental and social standards.

Friends of the Earth, 26-28 Underwood Street, London N1 7JQ
Tel: 020 7490 1555 Fax: 020 7490 0881 Email: info@foe.co.uk Website: www.foe.co.uk

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Corporate accountability can be defined as the ability of those affected by a corporation to control that corporation's operations. This concept demands fundamental changes to the legal framework in which companies operate. These include environmental and social duties being placed on directors to counterbalance their existing duties on financial matters and legal rights for local communities to seek compensation when they have suffered as a result of directors failing to uphold those duties.

Human rights, development and environmental organisations, trade unions, progressive think tanks and even some of the more enlightened sections of the corporate sector are now uniting behind the concept of corporate accountability. Instead of urging companies to voluntarily give an account of their activities and impacts, and voluntarily improving their social and environmental performance (if it also happens to make business sense), the corporate accountability "movement" believes corporations must be "held to account" – implying enforceability[1]. There must be fundamental changes to the legal framework in which companies operate. These include social and environmental duties being placed on directors to counterbalance their existing duties on financial matters, and legal rights for local communities to seek compensation when they have suffered because directors have failed to uphold those duties.

This briefing will briefly review how the concept of corporate accountability has come about and how it is fundamentally different to voluntary CSR. The mechanisms that could help deliver corporate accountability at the International level and European level will be outlined. Finally, it will explore in some depth how the principles and components of these mechanisms would be transposed and made to work within one jurisdiction in particular the UK.

From corporate campaigning to campaigning for corporate accountability

Friends of the Earth's first campaign action in the UK, shortly after if was established in 1971, was a mass "bottle-drop" outside the offices Schweppes to protest against their plans to start selling drinks in non-returnable plastic bottles.

Over the years, Friends of the Earth and other green groups have fought countless campaigns against companies over specific issues. We have forced companies to abandon plans to build roads, ports, mines, dams and pipelines in protected areas both here and abroad. We have bullied some high street banks into begrudgingly developing some limited expertise in environmental matters after we exposed how investors had been unwittingly financing rainforest clearance, human rights abuses and polluting industries. We have cajoled certain oil and gas companies to withdraw from lobby groups set up specifically to stop governments from taking action on climate change.

Our consumer campaigns have persuaded hundreds of thousands of shoppers to buy recycled paper, peat-free compost, fair trade and organic coffee, tea, chocolate and bananas, GM-free food, timber that has been certified as sustainable by the Forest Stewardship Council (FSC), and so on.

We and other campaign groups have been able to expose the worst examples of corporate behaviour and indicate what kind of behaviour might be better. Green consumerism has shown that it is possible to make and sell products in an ethical way.

The Confederation of British Industry (CBI) recently said:

> *Commercial opportunities have arisen for businesses to meet customer expectation of higher environmental standards, either as a core part of their brand or through* ***discrete*** *parts of their product range.* ***For some****, the beneficial effects on image and reputation of being environmentally pro-active is also an important driver of behaviour.*[2]
>
> [Emphasis added]

The argument put by the CBI, and others, is that green consumerism and CSR have been so successful that a more regulatory approach is not necessary; the solution to environmental problems is the free market. Some, including Ministers, are clearly so content with this neo-liberal *modus operandi* that they have thanked NGOs for acting as the "whistleblowers and enforcers"[3] and urged us to continue with our fine work.

While some may seek to perpetuate the view that green consumerism and CSR are somehow going to deliver in an adequate manner, there are very few campaigning organisations that share this perspective.

Ethical Consumerism. The limits to green consumerism should be obvious. Greener products are often more expensive and often represent a niche market compared to those products that are merely produced as cheaply as possible. A more fundamental limit is that even the most ardent, the most caring, the most affluent green consumer, will never possess enough knowledge to buy ethically all the time. The average supermarket contains tens of thousands of product lines. Social and environmental issues are ever more complex and dynamic. How can we possibly expect consumers to keep abreast of all the latest developments and then have the time to work out for themselves what this mean for their shopping basket - in a world where people are increasingly time poor? How is an ethical consumer supposed to boycott a company – such as a mining company – which may be involved in the supply chain of thousands of products but their brand is on none? What if there is no ethical version of the product I need to buy?

CSR and Voluntary Initiatives. CSR involves companies voluntarily choosing to improve their social and environmental standards and so reduce their negative impacts on the environment. CSR has readily been taken up by business and political leaders as a great success towards sustainable development – yet the evidence is not good "…there are only a few cases where [vol. initiatives] have contributed to environmental improvements different to what would have happened anyway" OECD (2003) Voluntary Approaches for Environmental Policy

The limits of CSR should also be obvious – by essence it is a voluntary unregulated activity. There will never be enough NGO capacity to police the corporate world and run effective, inspiring campaigns to counter every type of corporate wrongdoing. The public, let alone the media, will never have the time or appetite for that number of campaigns. And what about those countless companies that are not brand sensitive, either because they are too specialist, or because they sell their products and services to other businesses, rather than to the public? What about those companies that see CSR as just another type of PR?[4]. Only 3% are currently reporting on their environmental and social impacts – and whether this even actually translates to real change on the ground is another question.

More importantly, such a focus on the consumer and on the individual company ignores the real issues of social and environmental justice.

Corporate Accountability

From a corporate accountability perspective, ethical consumerism and voluntary CSR places a focus on the consumer and on the individual company (all too often located in the global North) and ignores the real issues of social and environmental justice for communities (often located in the global South).

Is it right for workers on banana plantations to suffer if, actually, the majority of western consumers decide that having a cheap banana is more important to them than have a fairly-traded banana? Is it right for western governments to sit back and do nothing when indigenous communities get pushed off their land and rainforests cleared to produce cheap palm oil for British supermarkets? Is it right for social and environmental concerns to be ignored in circumstances where addressing them does not make short-term business sense? Is it right for governments to surrender their responsibilities to govern, and rely instead on NGOs and the free market?

When our society decided it was time to mainstream common standards on health and safety, employee or consumer protection, we did it through changes to the legal framework in which companies operate. We gave company directors new legal duties and gave employees and consumers rights that would allow them to hold companies and directors to account if they failed to uphold those duties.

If we, as a society, are serious about sustainable development, social and environmental justice, the time has surely come to mainstream common standards on social and environmental performance. The way to do it is through equivalent changes to the legal framework that would allow people to hold corporations to account for social and environmental wrongdoing; corporate accountability.

These changes are already being campaigned for at an international, EU and UK level. These campaigns differ in one crucial respect to those that have preceded them. Whereas, in the past, it was the corporations that were the target of the campaigners' strategies, the targets now are politicians and governments. This is because only politicians and governments can bring about the kind of legal changes advocated.

International frameworks for corporate accountability

The last five years have seen a steady stream of proposals for mechanisms to deliver corporate accountability. As recently summarised by the United Nations Research Institute for Social Development (UNRISD):

The emerging corporate accountability agenda includes proposals to establish institutional mechanisms that hold corporations to account, rather than simply urging companies to improve standards or to report voluntarily. Corporate accountability initiatives promote complaints procedures, independent monitoring, compliance with national and international law and other agreed standards, mandatory reporting and redress for malpractice.

The corporate accountability movement has put the spotlight on certain issues that have not figured prominently, if at all, in the mainstream CSR agenda but which are fundamental to the role of TNCs in governance and development: corporate power; perverse fiscal, financial and pricing practices; and corporate lobbying for macroeconomic policies that can have negative developmental impacts.[5]

Some of these focus on specific sectors, such as the Framework Convention on Tobacco Control. Others focus on specific aspects of corporate accountability, such as the International Right to Know Campaign's call for disclosure and transparency. While sector specific mechanisms will undoubtedly play a crucial role in delivering corporate accountability, there is a danger that they will only be developed for a handful of sectors.

In the run up the 2002 World Summit on Sustainable Development (frequently referred to as the "Johannesburg Earth Summit"), Friends of the Earth International (FOEI) published proposals for a new international legally binding convention on corporate accountability and liability that sought to address problems common to the corporate sector as a whole. FOEI is the world's largest grassroots organisation, with member groups in 69 countries around the world. The proposal, developed involving groups based in the global north, south, east and west, would require signatory governments to:

1. **Duties:** Impose duties on publicly traded companies, their directors and board level officers to:
   - report fully on their social and environmental impacts, on significant risks and on breaches of relevant standards (such reports to be independently verified);
   - ensure effective prior consultations 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 social and environmental impacts of their activities fully into account in their corporate decisions making

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

3. **Rights of redress:** 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;
   - a legal aid mechanism to provide public funds to support such challenges

4. **Rights to resources:** 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;
   - to compensation or reparation for resources expropriated by or for corporations

5. **Standards:** Establish (and enforce) high minimum social, environmental, 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

6. **Introduce sanctions:** Establish national legal provision for suitable sanctions for companies in breach of these new duties, rights and liabilities (wherever breaches occur) such as:
   - suspending national stock exchange listing;
   - withholding access for such companies to public subsidies, guarantees, loans or procurement contracts; and
   - in extreme cases the withdrawal of limited liability status

7. **Extend the role of the International Criminal Court** to try directors and corporations for social, environmental and human rights crimes, perhaps involving a special tribunal for environmental abuses

8. **Improve international monopoly controls** over mergers and monopolistic behaviour by corporations

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

FOEI did not expect the Johannesburg Summit to result in a clear agreement to develop an international convention, let alone agree on its content. While our position paper contained some detail on how such a proposal would work in practice[6], it was not a draft convention.

The purpose of our proposal was to provoke debate around the possible solutions to corporate wrongdoing, to promote a southern agenda around community rights, as opposed to a northern corporate agenda on voluntary codes of conduct, and to reverse the pendulum swing away from corporate voluntarism towards corporate accountability.

The call for corporate accountability became a rallying call for environment, human rights, development and labour organisations in the run up to Johannesburg. Governments took note and a clear commitment was made at the meeting to develop new frameworks and mechanisms. This was summarised in the Final Plan of Implementation document which noted that "urgent action" was required "at all levels" to:

Actively promote corporate responsibility and accountability, based on the Rio Principles, including through the full development and effective implementation of intergovernmental agreements and measures, international initiatives and public-private partnerships, and appropriate national regulations, and support continuous improvement in corporate practices in all countries.[7]

Inevitably, different governments have differing opinions as to the meaning of this text. Governments from the G77 group of developing countries have consistently expressed their view that it calls for the development of new international frameworks. In contrast, the

closing session of the Johannesburg summit saw the United States declaring a formal "reservation" with respect to the paragraph in which they noted their belief that it only referred to the development of "existing agreements".

The realisation of an International Convention on Corporate Accountability and Liability is clearly still some way off, but a long and slow process towards its realisation may have begun. An international framework represents the ultimate solution for many in the corporate accountability movement and one that many campaign groups continue to work towards.

EU legislation for corporate accountability

The European Union is the world's largest single market and home to many of the world's largest corporations. If economic union is the *raison d'etre* for the EU, then surely this needs to be paralleled with the development of mechanisms that ensure those corporations act in the interests of people and the environment, and allow stakeholders to hold EU based corporations to account?

Over the last couple of years, NGOs campaigning at European level, that is the Green 8 group of NGOs (the coalition of leading environmental groups engaged in the EU policy process[8]) participated in a two year multi-stakeholder process on CSR facilitated by the European Commission that concluded in June 2004. At the end of this process, the Green 8 issued a dissenting statement noting that the bias in the final report towards voluntary CSR was the result of a process had been dominated by business interests.

They called on the European Commission, the Council and the Parliament to work together to develop a regulatory framework that ensures:

- Mandatory corporate transparency on environmental and social performance and impacts
- Enforceable stakeholder rights to information, participation and accountability
- Public procurement and investment rules that discriminate in favour of companies whose responsible performance can be independently verified
- Clear standards and practices for the independent verification of corporate performance
- Tax reforms to internalise the environmental and social costs

The most obvious way in which such measures could be introduced into EU legislation would be through a European Union Corporate Accountability and Liability Directive.

UK legislation for corporate accountability

International conventions and, EU Directives must all be transposed into the domestic legislation of signatory/member states to come into force. To examine how such frameworks might work in a practical sense, it is necessary to explore in greater detail the technical and legal mechanisms that would facilitate their translation into national law.

In the UK, a coalition of NGOs, trade unions and think tanks known as the Corporate Responsibility Coalition (CORE)[9] has been developing proposals on how company law could be changed to hold UK companies to account. These proposals can be grouped under three headings:

1. Mandatory reporting and access to information

Legal requirements on companies to report annually on their financial performance form the basis of company law in most jurisdictions. A similar requirement on UK companies to report annually on their social and environmental performance is needed to form the basis of UK legislation for corporate accountability.

CORE would like to see a new legal duty placed on companies (or their directors) requiring them to report annually on the *significant* (see box) negative social and environmental impacts of their business operations, products, policies and procedures. There should be a requirement for these reports to be independently audited and for a range of Key Performance Indicators (KPIs) to be developed to facilitate comparisons between companies and sectors.

2. New legal duties on company directors

UK company law already places a fiduciary duty on company directors, requiring them to act in the interest of the company and shareholders. This should be counterbalanced with new duties requiring directors to take *reasonable* steps to reduce the *significant* (see box) negative social and environmental impacts of their business operations, products, policies and procedures, which have been identified through the mandatory reporting requirements. This new duty could be referred to as a "duty of care" to people and the environment.

3. New provisions for liability, including Foreign Direct Liability

Individuals or communities who suffer significant negative impacts because of the failure of UK companies (and directors) to have proper regard to these new duties, should be given the legal right to seek redress in a UK court, with legal aid. This would include negative impacts such as human rights and environmental abuses resulting directly from the operations, policies, products and procurement practices of UK companies or their overseas subsidiaries.

Under the approach adopted, it would be left for an aggrieved party or a prosecuting body to make a case in court that a company had failed to report on the "significant" negative impact of its business policies, products, operations and procedures, or had failed to take "reasonable" steps to reduce their negative impacts. The claimant would most likely point evidence such as; more progressive behaviour being practiced by a company's competitors; established and effective voluntary initiatives that the company had failed to participate in; expert witnesses; widely distributed research and materials meaning the company should have been aware of a particular issue and impact; correspondence between interested, expert or affected parties; and so on.

Business lobby groups argue that regulating CSR would create a culture of compliance rather than innovation and tie business up in red tape. But logically, this seems to represent the standard knee-jerk reaction of big business to anything resembling regulation.

The reality is that the approach being developed by CORE does not represent "red tape". It wouldn't specify exactly how a company should go about improving its social and environmental performance, merely that it should. In the vast majority of circumstance, the way in which a company would do this, is through a genuine CSR programme and/or by joining the relevant voluntary initiative and taking it seriously.

The CORE approach represents a statutory foundation for CSR, not a statutory straight-jacket and those companies that are genuine about improving their social and environmental performance would have nothing to loose and everything to gain.

Conclusion

Calls for mechanisms to deliver corporate accountability will continue to grow as the evidence mounts that voluntary CSR is failing to deliver the changes that are needed to deliver sustainable development, social and environmental justice.

The corporate accountability movement is far from having all the answers, but it has come a long way in a short time. Over the next few years, the debate and the campaigns will intensify. It is time for political parties, politicians and governments to join this debate and help develop the policies and mechanisms that will makes corporations fit for the 21st century.

So what is "reasonable" and what is "significant"?

Corporate accountability legislation in the UK would be able to utilise the flexibility that is inherent in the British system of common law whereby it can be left to courts to interpret, on a case-by-case basis, the meaning of legislative words such as "significant" and "reasonable".

It is an approach that is used effectively in a number of torts, such as the tort of negligence. The duty which an occupier owes to his lawful visitors, for example, is defined by the Occupiers' Liability Act 1957, s2(2) as "a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purpose for which he is invited or permitted by the occupier to be there".

In deciding whether or not an occupier's duty has been breached, a court will consider all the circumstances of the case and will assess the reasonableness or otherwise of a defendant's conduct by assessing how "the man in the street", "the man of ordinary prudence" and, most famously, "the man on the Clapham omnibus" would have behaved in the same circumstances and how these mythical bodies would have defined words such as "safe" or "significant".

Negligence is then defined as "…the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do" (Alderson B, in *Blyth v Birmingham Waterworks Co* 1856).

Legislation to deliver corporate accountability could take a similar approach where by it would be the concept of the "reasonable man" that would be used to define what social and environmental impacts were "significant" enough to be subject to reporting requirements and what remedial steps would be considered "reasonable" enough that a company would be expected to undertake them when having regard to their new duty of care to society and the environment.

Why not define more precisely?

An alternative approach would be to try and codify (perhaps through lists or legal guidance) precisely what social and environmental impacts the legislation pertains to and exactly what remedial steps a company would be expected to take. Such an approach is rightly adopted for environmental regulations pertaining to very specific areas of commercial performance (for example, emissions of dangerous chemicals, where regulations may specify the exact parts per million limit that is considered reasonable).

Such an approach would be inappropriate for broad framework legislation designed to improve the social and environmental performance of the corporate sector as a whole because:

- It would be not be possible to foresee and list every possible form of negative social and environmental impact that could possibly be carried out by any company at any time (now and in the future), let alone then specify the precise nature of the remedial action necessary
- It is reasonable to expect that a particular "impact" may vary in its significance according to commercial sector, company size, geographical location and so on.
- It would be over prescriptive and place a bureaucratic burden on business, one that would also create a tick box culture of compliance rather than one of innovation and striving for constant improvement
- It would miss the point of broad corporate accountability legislation, which is not to "catch" well performing companies for making small errors when trying to improve their social and environmental performance – or even those merely acting "reasonably", but rather to "catch" those companies that are failing to take even the most basic steps to reduce their negative social and environmental impacts.

Of course, there will always be a role for regulations that prescribe specific levels of performance for particular sectors. It would also be appropriate for legislative guidance to set common approaches for mandatory social and environmental reporting (e.g. determining certain "Key Performance Indicators" or KPIs).

But the foundation for corporate accountability legislation must be as broad as possible if it is really going to change the behaviour of the corporate sector as a whole. Broad duties requiring *reasonable* actions would represent such a broad foundation.

References

1 Bendell (2003) “Corporate Accountability and International Regulation of TNCs”. Presentation summarise in *Conference News – Corporate Social Responsibility and Development: Towards a New Agenda?* Report of the United Nations Research Institute for Social Development (UNRISD) Conference 17-18 November 2003, Geneva.

2 *UK Environmental Regulation*, CBI July 2004

3 Stephen Timms, UK Government Minister for Corporate Social Responsibility in speech to WWF fringe meeting at 2002 Labour Party Conference.

4 A recent job advert for a CSR post at Virgin Group specified that knowledge and experience of marketing and PR was “essential”. In contrast, knowledge of social and environmental issues was not even mentioned. (Advert issued March 2004).

5 *Corporate Social Responsibility and Business Regulation* UNRISD Research and Policy Brief 1 www.unrisd.org

6 Towards Binding Corporate Accountability, Friends of the Earth International briefing paper. Available at www.foei.org

7 World Summit on Sustainable Development (WSSD) Plan of Implementation 2002. Available at www.johannesburgsummit.org Para. 45ter.

8 The Green 8 consists of; Birdlife International, The Climate Action Network Europe, European Environment Bureau, Friends of the Earth Europe, Friends of Nature, Greenpeace European Unit, Transport and Environment, WWF European Policy Office.

9 The Corporate Responsibility Coalition (CORE) is a broad grouping of over 100 UK based environment, human rights and development organisations, think tanks and trade unions including Action Aid, Amicus, Amnesty International (UK), CAFOD, Christian Aid, Friends of the Earth, Save the Children, New Economics Foundation (NEF), T&G Union, Traidcraft, Unison and Unity Trust Bank.