University of Edinburgh

School of Law

Working Paper Series

2009/03

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Doreen McBarnet

CORPORATE SOCIAL RESPONSIBILITY BEYOND LAW, THROUGH LAW, FOR LAW

DOREEN McBARNET

Professor of Socio-Legal Studies, University of Oxford
Visiting Professor
School of Law
University of Edinburgh

Edinburgh School of Law Working Paper Series
General Editor: Daniel Augenstein
University of Edinburgh

Abstract: The adoption of Corporate Social Responsibility (CSR) policies is no longer a matter of voluntary practice on the part of business. In one sense it was never really voluntary, being in most cases a response to market pressures and reputational risk. But increasingly CSR is also subject to legal pressure and legal enforcement, not necessarily in the form of conventional state regulation but rather through indirect state pressure and through the use of private law by private actors, sometimes through highly innovative uses of law. This paper analyses and critically assesses the market forces pressing for CSR. It then demonstrates the range of mechanisms being used to foster and enforce 'voluntary' CSR through law. However it also shows a two way relationship between CSR and law with market pressures being used to press for a new sense of responsibility in how business approaches legal compliance, with the emphasis on compliance with the spirit, not just the letter of the law. The paper demonstrates a widening range of governance methods being brought into play to form a new corporate accountability.

Keywords: Corporate social responsibility, company law, accountability, multinational corporations, regulation, compliance, non-governmental organisations, human rights, tax avoidance, law, socio-legal studies, contract supply chain

Corporate Social Responsibility beyond Law, through Law, for Law[1]

Corporate Social Responsibility (CSR) has now become a routine element in business and regulatory debate. Essentially CSR involves a shift in the focus of corporate responsibility from profit maximisation for shareholders within the obligations of law[2] to responsibility to a broader range of *stake*holders, including communal concerns such as protection of the environment, and accountability on ethical as well as legal obligations. It is a shift from 'bottom line' to 'triple bottom line',[3] as it is sometimes put, from 'profits' to 'people, planet and profits', or indeed to 'profits and principles', to cite Shell International's social reports. These broader concerns are not necessarily seen as in conflict with shareholder interests but as protecting them long-term. CSR is not philanthropy, contributing gifts from profits, but involves the exercise of social responsibility in how profits are made.

Typically, CSR policies involve a commitment by corporations, usually expressed in their statements of business principles or corporate-specific codes of conduct, to enhanced concern for the environment, human rights, fairness to suppliers and customers, and opposition to bribery and corruption. The range of issues involved is constantly expanding, with matters such as the promotion of 'diversity' in the workforce, ethical policies on the supply chain, responsible marketing, especially with regard to marketing to children, and even demand for a responsible approach in the food business in relation to obesity, recently added to the agenda. After Enron, CSR is also regarded as not only involving social and environmental issues but as going to the heart

[1] *The 2008 Edinburgh University Centre for Law and Society Annual Lecture*. The lecture was based on Chapter 1 of D McBarnet, A Voiculescu and T Campbell (eds) *The new corporate accountability: corporate social responsibility and the law*, pp 9-56, Cambridge University Press, 2007. I should like to thank the ESRC, which funded this research through its Professorial Fellowship Scheme, award number RES-051-27-0031.

[2] M. Friedman, 'The Social Responsibility of Business is to Increase its Profits', *New York Times Magazine*, 13 September 1970.

[3] J. Elkington, *Cannibals with Forks: The Triple Bottom Line of 21st Century Business* (Capstone, 1997).

of core business operations such as accounting and even tax policies, and has become an issue for corporate governance in the narrower sense of the term. The language of business ethics is also frequently brought into play, with environmental and social impact seen as part of a new business ethics. The trend to a shift of language in business from CSR to simply CR, corporate responsibility, reflects this. CSR has indeed become something of a portmanteau concept which incorporates a broad sweep of ethical concerns from saving the planet to demanding honesty and fairness in business dealings.

The institutionalisation of CSR as a business issue has been demonstrated by the increasingly routine adoption of CSR policies in major companies. In 2001, 73% of the UK's FTSE100 companies had codes of conduct or statements of business principles. By 2004, this was up to 91%.[4] In the US, all of the Fortune 500 companies have introduced codes of conduct. The publication of CSR reports has increased with 83 of the FTSE100 companies reporting in 2005,[5] 90 of the top 100 European companies and 59 of the US top 100 producing CSR reports for 2005-06.[6]

The range of sectors adopting CSR policies has widened. The financial sector, which a decade before felt far from the frontline of social and environmental issues faced by the likes of oil and clothing companies, has acknowledged it too is affected by CSR just as much as its clients, and reporting there doubled in 2004-05. By 2005, even tobacco companies and arms manufacturers, sectors beyond the pale for many CSR advocates, were producing CSR reports. The number of 'ethics officers' in US corporations has been on the rise,[7] and company structures have increasingly included dedicated CSR managers and directors expressly responsible for CSR. Indeed,

[4] UK Institute of Business ethics survey, 2005.
[5] Context, *Directions: Trends in CSR Reporting 2003-04* (2005).
[6] Context, *Reporting in Context* (2006).
[7] *Ethical Corporation*, 26 July 2005.

making CSR a matter for board-level responsibility has become established practice among leading companies.

Companies are recruiting the services of CSR consultancies to produce CSR codes, write or verify CSR reports, train staff in CSR and market their CSR credentials. They are signing up to CSR initiatives and putting themselves up for CSR awards. In a survey in December 2005 by management consultants McKinsey, only 6% of the 4238 executives surveyed worldwide agreed with the Milton Friedman line that the sole purpose of business was to produce high returns for shareholders. 84% thought high returns had to be balanced with contributions to the broader public good.[8]

This paper examines the interface between CSR and the law. At first sight that may seem a contradiction in terms. The adoption of CSR policies is, after all, routinely characterised as voluntary – a matter of business going the extra mile beyond what the law requires. As Chris Tuppen, social and environmental programmes manager at British Telecom, put it in the company's first social report, 'The key issue is really what companies are going to do beyond mere compliance with the law'.[9] Ricoh, the digital office equipment company, markets itself under the headline 'Ricoh goes beyond compliance; we're going beyond the legal framework'.[10]

The UK government's major review of company law, reporting in 2001,[11] underlined this approach by opting to retain CSR as a voluntary matter rather than making it a direct legal obligation, and the theme has been reiterated since, with Stephen Timms, Energy and Corporate Responsibility

[8] McKinsey, 'Global Survey of Business Executives: Business and Society', *McKinsey Quarterly* 2 (2006), 33-9.
[9] 1999; and see S. Perrin, 'Show how much you care', *Accountancy* September (1999), 44-5.
[10] E.g., *Financial Times* special report on corporate governance, 15 December 2004.
[11] Department of Trade and Industry, Company Law Review Report 2001.

Minister, describing CSR as 'going beyond legal requirements'.[12] The Department of Trade and Industry's line is to 'see CSR as the voluntary actions that business can take, over and above compliance with legal requirements'.[13] The European Commission took the same approach in its Green Paper on CSR, defining CSR as 'a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis'.[14] The subsequent 'Communication on CSR' reported that business respondents to the Green Paper 'stressed the voluntary nature of CSR', with the Commission noting 'large consensus' that CSR is 'behaviour by businesses over and above legal requirements, voluntarily adopted'.[15] Indeed, it made 'recognition of the voluntary nature of CSR' the first principle of its framework for action.[16] The UN's Global Compact for business is signed up to on a voluntary basis.

The voluntary adoption of CSR by multinational corporations might seem rather paradoxical in a context where multinationals have been seen for some time as in many ways stronger than nation states, with consequent implications for the feasibility of effective governmental control over their practices. Why would business voluntarily commit itself to standards beyond the requirements of law? The reality is that describing CSR as voluntary is a little misleading. The adoption of CSR policies by business has taken place in a very specific context. If CSR is self-governance by business, it is nonetheless self-governance that has received a very firm push from external social and market forces. From the start, 'voluntary' CSR has been socially and economically driven.

[12] *Ethical Corporation*, September 2004, p. 13.
[13] www.UKcsr.gov.whatiscsr.
[14] COM (2001) 366.
[15] COM (2002) 347.
[16] COM (2002) 347, p. 8.

Part I of this paper sets out some familiar themes in the CSR debate, reviewing the social and market pressures that lie behind business's 'voluntary' adoption of CSR policies – the 'drivers' so often referred to in discussions of CSR in a business context – though it introduces some new perspectives too. It looks, in short, at the conventional concept of CSR as *beyond* the law, in the dual sense both of involving goals beyond the requirements of law, and of being driven by extra-legal forces – extra-legal forces that we might see as constituting a new corporate *social* accountability. It also examines the argument that CSR is *against* the law, contravening the legal duty of managers to owners, along with a range of wider criticisms of 'voluntary' CSR and, indeed, of social accountability.

Part II, however, moves the discussion on from the conventional understanding of CSR, by questioning just how voluntary CSR really is, or can remain, not only in social and economic terms but in legal terms. It analyses the many ways in which law is in fact being used to make business adoption of CSR policies much more of a legal obligation than the discourse of voluntarism – and indeed the current demands from many NGOs to supersede voluntarism with regulation – would suggest. It explores the interface between CSR and the law by analysing the growing phenomenon of CSR being brought about *through* law, though often in subtle, indirect and creative ways, and not necessarily through government action.

Part III explores the interface between CSR and the law in reverse, shifting focus from the role of law in CSR to the role of CSR in law. Calls for less emphasis on voluntarism and more on legal regulation of business, as the only effective way to secure a more responsible approach by business to its impact on society, may expect more of law than law can in fact provide. For a range of reasons, well rehearsed in many years of socio-legal research, law is not always as effective as

might be hoped in regulating business, partly because of compromise in the substance of law and problems in enforcement, but also because of the attitude to law and compliance taken by business itself.

Business is extremely adept at finding 'arguably legal' ways to circumvent regulatory control, using the art of 'creative compliance'[17] to simultaneously escape legal control and any threat of penalty for doing so. The pervasive nature of such an approach to law in business suggests the need for some further, extra-legal driver not only to secure a commitment in business to socially responsible policies *beyond* the law, but to secure business's responsible compliance *with* the law. It may be that we need to look not only to law to enhance the effectiveness of socially and economically driven CSR, but to socially and economically driven CSR to enhance the effectiveness of law. Part III explores this issue of CSR *for* law.

The paper concludes by observing the multiple sources and interweaving forms of corporate governance – legal and extra-legal – which are coalescing under the banner of CSR, and considers their potential as the basis of a new, multi-faceted corporate accountability.

I CSR beyond the law

Discussions of business adoption of CSR policies routinely present it as the product of a number of external drivers, notably the role of civil society, particularly activist non-governmental organisations (NGOs) focused on business activities, the facilitation of campaigns against business as a result of the new technology (notably the internet), along with trends in business itself such as

[17] For the development of this concept, see McBarnet, collected essays, 'Crime, compliance and control' (Ashgate, 2004).

outsourcing and branding making it more vulnerable to CSR critique, and the growth of a socially responsible consumer and investment market. To this we might add the impact of Enron and related scandals, the role of the CSR industry itself, the response of business to new opportunities, and the strategic use of an ideology which could meld new CSR demands and traditional business interests in the 'business case' for CSR.[18] Corporate social responsibility emerges as the product of a new level of social accountability for business which is, however, seen by many as inadequate without the development of further legal accountability too.

New pressures, new vulnerabilities: civil society, the new technology and trends in business

In the McKinsey survey of business executives, only 8% thought companies were motivated to champion social or environmental causes out of genuine concern.[19] Certainly business was, at least in the beginning, more reactive than proactive in the development of the contemporary CSR movement.[20] Some familiar examples – Shell and Nike – can be drawn on to demonstrate this and provide background for later analysis.

One of the leaders in the adoption of explicit CSR policies, codes and reports was Shell, its 'transformation' having become a classic business school case study,[21] and it was very much responding to major PR crises resulting from both environmental and human rights issues,

[18] For more detail on these arguments, see McBarnet, 'Human rights and the new accountability', in T. Campbell and S. Miller (eds.), *Human Rights and Moral Responsibilities of Corporate and Public Sector Organisations* (Dordrecht: Kluwer, 2004), pp. 63-80, on which this section draws. Also D. Vogel, *Market for virtue: potential and limits of CSR* (Brookings, 2005).
[19] McKinsey 2006.
[20] Though there is also a much older tradition of philanthropy or something more akin to contemporary social responsibility or business ethics among specific firms, such as the religious roots of Cadbury or Rowntree.
[21] P. Mirvis, 'Transformation at Shell', *Business and Society Review* 105, 1 (2000), 63-84.

particularly in Nigeria.[22] The company's operation in a state run by a military dictatorship accused of major human rights abuses, the impact of oil extraction on the Ogoni people and the Niger Delta environment, the execution of Ogoni leader Ken Saro-Wiwa and the campaigns of human rights organisations pointing the finger not just at the Nigerian dictatorship but at Shell amounted to a PR disaster, which was only exacerbated when Shell's plan to dump its Brent Spar oil rig at sea was met by much publicised resistance by Greenpeace.

NGOs played a major part in the publicity and pressure that prompted Shell's 'transformation', not only Greenpeace on the environmental side, but Amnesty International, Pax Christi and others on the human rights front, and the development of the CSR movement generally has to be seen in the context of the growth of a highly active and activist civil society, which has put significant pressure on business via campaigns, publicity, boycotts and pressures both for more transparency and for more socially responsible policies and practices. There is nothing new about organised protest by civil society (witness, for example, the nineteenth century campaigns against slavery), but one of the ironies of the recent era of deregulation of business (in terms of state control) has been the simultaneous expansion of constraints imposed by civil society. Non-governmental activity on a global scale has now become a key part of the discourse of globalisation and is routinely identified – by governments, commentators and business itself, as one of the key 'drivers' of the contemporary CSR movement.[23]

[22] 'Shell in Nigeria' has become a classic business school case study in CSR courses. See Harvard Business School case studies *Royal Dutch/Shell in Nigeria* (Boston: Harvard Business School Publishing 9-399-126, Rev. 20 April 2000) and *Royal Dutch/Shell in transition* (Boston: Harvard Business School Publishing 9-300-039, 4 October 1999), and management texts, for example M. McIntosh, D. Leipziger, K. Jones and G. Coleman, *Corporate Citizenship* (FT/Pitman, 1998). See too G. Chandler, 'Oil companies and human rights', *Business Ethics: A European Review* 7, 2 (1998), 69-72.

[23] The European Union, for example, acknowledged the importance of social and market pressures, noting that civil society must be recognised as playing a significant role in this new business governance; COM (2002) 347, p. 5.

The growing voice of civil society has of course been aided by another often cited 'driver', the new technology, expanding easy global communication, and making for instant worldwide publicity. There is now, it is frequently said, 'no hiding place' for corporate activity. The internet provides a ready forum for instant criticism and publicity, with websites on all kinds of issues pointing the finger at specific companies. The new technology means even one person can have a major impact, as in the case of Mike Kasky in his campaigns against Nike, of which more later.[24]

All this can be seen as resulting in a new level of social accountability that goes beyond that required by law. Take another classic case, that of Nike. Nike, like many other multinational companies, has its shoes and clothing produced in cheap labour countries by independent suppliers. Some of its Vietnamese, Indonesian and Chinese suppliers were exposed as using child labour, requiring employees to work long hours, beyond even the high legal minimum of the countries in question, at less than even the low statutory minimum wage, and in some places in conditions where carcinogens in the air were above the permitted level.[25] In short, both Nike's own code of conduct and, in some cases, local law, were being broken, but not by Nike. Under traditional criteria Nike was neither accountable nor responsible, as Nike's CEO was quick to point out.

But Nike was *held* responsible and held to account by civil society campaigners. Again, the Nike experience has become an icon of what can go wrong if companies stick to too narrow a notion of corporate responsibility – demonstrations, protests, 'shoe-ins' where Nike trainers were publicly thrown away, very public rejection of sponsorship, weeks of anti-Nike cartoons in the press, and a

[24] See also Braithwaite and Drahos, *Global Business Regulation* (Cambridge University Press, 2000).
[25] In November 1997, an employee leaked a report by the company's auditors exposing conditions in Vietnamese factories supplying it (*The Guardian*, 13 June 1998), and the story then featured repeatedly in all forms of media.

fall in profits, which Nike itself attributed to its association with child labour. The Nike case is a clear demonstration of civil society in action through social protest, and a classic naming and shaming campaign.

The Nike case demonstrates another contextual factor – trends in business practice such as outsourcing and branding. Nike was particularly vulnerable to such adverse publicity because of the importance to its business of the Nike brand. Indeed, Nike is in a sense only a brand: production is all subcontracted. In its emphasis on branding, however, it can be seen to have created its own nemesis. The very fact that the name is so well known made it an easy target for critique, in what Klein labels the 'brand boomerang'.[26] At the same time, the trend to outsourcing and subcontracting means companies have less automatic direct control over the conditions under which their products are made. Though this can be seen cynically as an advantage when no *legal* responsibility or accountability is attached, it becomes a source of risk when the new *social* accountability is brought into play. Hence the increasing corporate attention to 'ethical trading' and supply chain policy.

Brand vulnerability in general is seen to be on the increase, as the proportion of corporate value that comes not from tangible assets such as property and stock but from 'intangibles' has risen. Intangible value is essentially the difference between what the tangible property is worth and what the market will pay, and is put down to such factors as brand and reputation, intellectual property and knowledge bases. A 2005 study of FTSE100 companies found that 60% of the

[26] N. Klein, *No Logo* (London: Flamingo, 2000), p. 345.

companies' market value had to be categorised as intangibles,[27] with a not dissimilar figure (53%) attributed in 2006 to the US Fortune 500.[28]

When the brand becomes so important, the argument goes, so does reputation. Companies cannot afford to risk their reputation coming under challenge. According to research by insurance company Aon, the top 2000 private- and public-sector organisations regard damage to reputation as their biggest risk.[29] Social, environmental and ethical issues are now seen as key sources of reputation risk, a fact reflected in the risk identification and risk management sections of corporate CSR reports, and reputation risk has become a key concept in the discourse of CSR, pushing CSR issues up the corporate agenda.

Market factors: consumers and investors

Market factors can also be seen as key contextual drivers. Attacking brand reputation on CSR grounds would be ineffective if consumers and investors did not care. Further drivers can therefore be identified in a growing trend to what we might think of as 'concerned consumption'.

The CSR consumer market, once seen as purely a niche market, is growing significantly. A UK survey in October 2006 found that more than a third of consumers are prepared to spend more on 'ethical' foods, compared to 25% in 2002, while in the US LRN study of ethics in the market, 70% of those surveyed reported they had decided not to purchase products or services from a company

[27] Vivien Beattie and Sarah Jane Thompson, 'Intangibles and the OFR', *Financial Management* June (2005), 29.
[28] Corporatewatch.com; *The Guardian*, 6 November 2006.
[29] Aon insurance group, 2000, reported in Sustainability, *The Changing Landscape of Liability* (London, 2004), p. 17.

they thought had questionable ethics.[30] More valuable than what people say is evidence of actual spending patterns, and there is clear evidence of rising CSR-oriented consumer practice. A survey by the Co-operative Bank in November 2006 put the UK ethical consumption market at £29 billion, an 11.4% rise on the previous year compared to a 1.4% rise in household expenditure more generally.[31]

The sale of 'Fairtrade' products alone rose 40% in 2005 and 265% from 2002 to 2005, constituting in itself a £230 million market.[32] Fairtrade guarantees producers a price that at least covers the cost of production and is usually better than market price, as well as providing a premium for social and environmental projects. The producers in turn must meet set standards on labour and the environment.[33] Marks & Spencer reported a 27% rise in sales in three months when it switched all 38 of its tea and coffee lines to Fairtrade sources in 2006.[34] Organic food sales doubled from 2000 to 2006, with £1.6 billion spent in 2005-06.[35] Ethical trading encompasses not just food but a wide range of materials and products such as organic cotton and sustainably produced timber, with pressure on the mining industry also increasing from the gold and diamond trade.

Socially responsible investment (SRI) is another major development, with investment funds screening companies by triple bottom line criteria rather than simply on the basis of financial performance or value. In the UK, FTSE (the Financial Times Stock Exchange Index) introduced in 2001 the FTSE4Good index using criteria based on CSR. Dow Jones in the US has its Sustainability

[30] www.lrn.com/news/releases, 30 January 2006.
[31] *Financial Times*, 27 November 2006.
[32] Mintel survey; *The Guardian*, 14 October 2006.
[33] *The Guardian*, 28 June 2006.
[34] *ibid.*, 31 July 2006.
[35] *ibid.*, 3 November 2006.

Index. There are 'socially responsible', ethical and 'green' investment trusts. FTSE4Good's approach is to raise the bar over time, 'engaging' companies to meet higher standards at each review and dropping companies that fail to do so. In its first three years it dropped 87 companies, including household names such as Goldman Sachs and Avon, while the introduction of more demanding human rights criteria resulted in 53 companies developing new policies and practices to ensure continued inclusion.[36] Companies included in these indices make much of it in their CSR reports.

Socially responsible investment funds for individual investors may be relatively small beer, though growing – the LRN Survey of ethics in the US investor market found 50% of individual stockholders had at some point decided not to purchase shares in a company because they believed it had questionable ethics.[37] However, SRI is increasingly a concern for the giants of the investment field too, such as pension funds. SRI investment in France rose 76% in 2004, with 60% of that accounted for by institutional investors.[38] The twenty-four-fold rise in SRI funds in Australia to A$7.7 billion over the period 2000 to 2005 is particularly attributable to pension fund investment.[39]

Major pension funds can wield significant influence. CalPERS, the Californian Public Employees Retirement Scheme Fund, with an international investment portfolio of $217.6 billion,[40] announced in February 2002 that it was pulling out of investment in businesses in Thailand, Indonesia, Malaysia and the Philippines because they did not meet CalPERS' CSR criteria.[41] In June

[36] *Ethical Corporation*, October 2004, p. 30.
[37] www.lrn.com/news/releases, 30 January 2006.
[38] *Ethical Corporation*, September 2005, p. 4.
[39] *Financial Times*, 5 June 2006.
[40] Investment portfolio market value $217.6 Billion as of 30 September 2006, cited in *CalPERS' Facts At A Glance*, available at http://www.calpers.ca.gov/eip-docs/about/facts/investme.pdf.
[41] *Business Week Online*, 25 February 2002.

2006, the Norwegian government pension fund, one of the largest in the world, with spending power of $230 billion, withdrew investment from Wal-Mart and Freeport McMoRan Copper and Gold on human rights and environmental grounds.[42] In the previous year it had divested from oil company Total on the grounds of complicity in human rights violations in Myanmar, the former Burma. NGOs, it might be added, have also targeted banks and other financial institutions to demonstrate their own CSR credentials by investing only in socially responsible ways, and by ensuring their clients comply with the banks' stated social and environmental standards.[43]

The employment market is also identified by some as a driver of CSR. In the UK, a MORI poll in August 2006 found 92% of employees considered it important that their employers be socially responsible and 60% said they felt strongly about it.[44] It has been argued that good corporate citizenship can be used to attract, retain and motivate the best workers.[45]

The CSR industry and ethical scandals

There is another factor which should be added to the usual list of 'drivers'. This is the emergence of a whole new CSR industry. As well as socially responsible investment funds and 'ethical banks',[46] there are CSR consultancies advising on policies, offering training, and writing codes of conduct or CSR reports. CSR reporting needs standards against which to report, so there are CSR standard-

[42] www.socialfunds.com/news, 16 June 2006.
[43] For example, CR Coalition, *A Big Deal? CSR and the finance sector in Europe*, 1 December 2005; 'My money, clear conscience', a campaign launched by Belgian NGOs against investment in the defence industry. *Ethical Corporation*, May 2005, p. 10.
[44] *The Guardian*, 6 November 2006.
[45] Marc Benioff and Karen Southwick, *Compassionate Capitalism: How Corporations Can Make Doing Good an Integral Part of Doing Well* (The Career Press, 2004).
[46] The Triodos Bank, for example, has advertised positions under the headline, 'Would you like to work for an ethical bank?'

setting organisations and CSR reporting certification firms. There are companies publicising the publication of social reports – 'with up to 150 reports released each month, how can you ensure your report is read by the people who matter?'[47] The big accountancy firms now include CSR consultancy as well as green and social responsibility audits. There are CSR specialist law firms. There are companies organising CSR conferences and publishing CSR magazines and newsletters.

All of these businesses have a vested interest in selling CSR, with the result that CSR has itself become a business and a market factor. In addition, companies themselves are constructing whole bureaucracies of CSR managers who also have a vested interest in – and often a positive passion for – keeping up CSR momentum.

There have been some ironies in relation to the CSR industry, of course. Arthur Andersen worked in 1999 with the London Business School on a survey on reputation management in relation to CSR and ethics. In the process, it marketed the services of its own 'ethics and responsible business practices consulting group', arguing that, with reputation an 'increasingly valuable corporate asset', companies needed 'robust programmes for guiding employee behaviour' and expressing concern that 'adoption of programmes to manage business ethics risk is by no means evident in all large companies'.[48] Two years later, with its own collapse after its involvement with Enron, that advice must have had something of a hollow ring.

The Enron collapse itself, and other business scandals of the early 2000s based on accounting scandals – Worldcom in the US, HIH in Australia, Parmalat in Italy – have also boosted concerns

[47] Advertisement in *Ethical Corporation* (June 2005, p. 17) for subscriptions to ReportAlert.info.
[48] Arthur Andersen/London Business School, *Ethical concerns and reputation risk management* (1999), p. 7.

about the ethical aspects of CSR and brought CSR and ethical risk more overtly onto the corporate governance agenda.

Voluntary CSR and the business case

The idea of 'CSR drivers' has become something of a cliché, referred to as a taken-for-granted background to CSR by all parties involved. The factors involved are real enough, but just how much impact they have, and how inevitable and sustainable that impact is, could do with more testing empirical research, and there is certainly plenty of scope for criticising dependence on these drivers as a means of securing CSR, as we shall see. The question can also be asked as to just who is doing the driving, since CSR has also been positively embraced by significant segments of big business, seen not just as a problem to be dealt with but as an opportunity to be seized in the pursuit of competitive advantage. Companies use their CSR credentials in marketing as they press for more market share:

> "CSR company of the year."
>
> Once could be deemed lucky, twice is just plain responsible.[49]

– this was Marks & Spencer's full-page advertisement in the UK national press in the summer of 2006. CSR branding has moved from niche to mainstream. The Body Shop created an early niche market in ethical products, but the brand was taken over in 2006 by mainstream company L'Oréal wanting in on the CSR market. Likewise Nestlé, another company that features in business school case studies for various CSR crises, launched a Fairtrade coffee in 2005, despite having previously

[49] E.g.,*The Guardian*, 14 July 2006, referring to its Business in the Community Awards.

dismissed Fairtrade as merely a niche market, while Cadbury Schweppes went partially organic by taking over Green & Black's. The concept of 'bottom of the pyramid' business has attracted attention to the fact that even the purchasing power of the very poor of the world adds up in aggregate to a significant market, and new markets are being found in meeting needs in developing countries while simultaneously doing profitable business. Vodafone's provision of mobile phone services in sub-Saharan Africa – which as well as providing social contact has facilitated entrepreneurship in an area lacking adequate communications – is a good example. If CSR can be seen as a way of making money it can also be seen as a way of saving it. Energy conservation and other green measures, for example, also cut costs. BP's internalisation of CO^2 emissions reportedly saved a net $600 million.[50]

This combination of reactively responding to social and market pressures, protecting the brand from reputational risk, and proactively seizing cost-saving techniques and market opportunities is usually packaged as the 'business case' for CSR. CSR is seen essentially as in harmony with the traditional pursuit of profit rather than in conflict with it. Market opportunities and cost savings make for short-term profit, while CSR activity without direct and immediate financial reward can be seen as brand enhancement, beneficial to long-term shareholder value. Presented in this way, CSR is perfectly rational for business, the much cited 'win-win' situation for business *and* the rest of the world. Good (ethical) business is good (profitable) business.

[50] BiTC, Insight Investment and FTSE, *Rewarding Virtue*, November 2005.

CSR against the law?

The business case has been a very useful way of packaging, and indeed marketing, CSR. In particular, it neatly sidesteps the criticism that it is simply not legitimate for management to adopt CSR policies, putting the interests of other stakeholders before those of shareholders, with any social benefit coming from investment and economic development – the view classically summed up by Milton Friedman as '[t]he social responsibility of business is to make profits'.[51] Managers are reminded that it is the owner's money they are spending. Particularly attacking corporate philanthropy, critics have asked: whose company is it?

> Corporate philanthropy is charity with other people's money … When Robin Hood stole from the rich to give to the poor, he was still stealing … he was still a bandit – and less of one, arguably, than the vicariously charitable CEO, who is spending money taken … from people who have placed him in a position of trust to safeguard their property.[52]

Attacking CSR by attacking corporate philanthropy could be seen as something of a mis-hit, both because the extent to which philanthropy detracts from profits tends to be exaggerated – corporate philanthropy by the UK's FTSE100 companies, including donations, gifts in kind, staff time and attributed management costs, in fact amounts to less than 1% per annum of pre-tax profits[53] – and because CSR is in any case about how companies make profits rather than about how they give them away. But similar arguments are made too in relation to core CSR issues such

[51] Friedman, 'The Social Responsibility of Business'; see also D. Henderson, *Misguided virtue: false notions of corporate social responsibility* (Institute of Economic Affairs, 2001).
[52] *The Economist*, 22 January 2005, CSR survey supplement, p. 8.
[53] *ibid.*, p. 4.

as environmental issues, supply chain standards and other 'selfless sacrifice for stakeholders'.[54] Management is seen as having simply no right to spend shareholders' money in the interests of the wider social good.

This position has indeed been framed by critics of CSR as a legal point, particularly in the context of Anglo-American company law,[55] with CSR seen as effectively constituting a breach of managerial duty. The legal role of managers is seen as one of stewardship for the owners of the company. Their legal obligation therefore is to focus on profit maximisation for shareholders, constrained only by the need to comply with any other legal regulations imposing particular duties on them.[56] CSR can be seen in this context not so much as management proudly going beyond legal obligation, but, in effect, as management going beyond its legal powers (acting '*ultra vires*') or even breaching its fiduciary duty to the owners. It is CSR *against* the law.

This is, however, an oversimplification of the law, which is rarely quite so cut and dried as this suggests. While the rules of statutory company law, in a number of jurisdictions, might 'on their face' seem to support this view,[57] the effective meaning of law depends on how those rules are interpreted in practice, and interpretation over the years has in fact been more complex and subtle. As CSR has grown in significance and critics have overtly raised legally based objections to it, so have legal champions emerged to draw attention to this and to overtly argue the case that company law, far from preventing CSR, can be seen as permitting, and perhaps even requiring, CSR practices.

[54] *ibid.*, p. 9.
[55] The stakeholder approach taken in Germany, for example, raises different issues.
[56] Friedman, 'The Social Responsibility of Business'; Henderson, *Misguided virtue*; and see critiques in *The Economist*, 22 January 2005, CSR survey supplement (see nn. 52-4).
[57] Parkinson, 'The legal context of corporate social responsibility', *Business Ethics: A European Review* 3, 1 (1994).

John Parkinson,[58] an influential participant in the UK Company Law Review, took a strong line on this issue, demonstrating from analysis of case law in the UK and elsewhere that while profit maximisation may be a management obligation, courts have in practice tended to leave a good deal of discretion to management in terms of how they achieve that goal, and far from insisting on short-term profit maximisation, have accepted the justification of attention to wider constituents and interests as a means of enhancing long-term shareholder value. Indeed, Parkinson argues that even the *Ford Motor Company* case,[59] which he describes as a 'rare example of a successful challenge' to management – though it is one that is often cited by those who see an expanded CSR as against the law – need not have been lost. Managers had reduced dividends, with the motivation of making cars cheaper and increasing employment. The case, says Parkinson, might well have been won by management, had the same facts been presented (as they reasonably could have been) as motivated rather by long-term shareholder interests. In effect, what we have here is the 'business case' again, being argued within the context of law itself.[60]

This approach may indeed be enhanced in future cases by the growing extra-legal awareness and promotion of CSR, judicial change often being influenced by what is seen as changing public opinion. Mitchell has argued that the assumption in the 1980s and 1990s in the US that the legal obligation of management was to maximise shareholder profit – 'in its extreme version short term shareholder profit' – can be attributed more to the market culture of the time than to legal construction, though he sees the legal establishment as having tended to go along with it: 'the

[58] *ibid*. Also see Mitchell for a US perspective: L. Mitchell, 'Roles and incentives; the core problems of corporate social responsibility', *Ethical Corporation*, October 2005.
[59] *Dodge v. Ford Motor Company* case, 170 NW 668 (1919).
[60] It can be seen as particularly effective if CSR is distinguished from philanthropy, though Parkinson argued even philanthropy could be justified by the business case on reputational grounds.

trend in corporate law is to accept it as the basic norm'.[61] A different social and market culture could impact in a different way. Social accountability and legal accountability can interrelate.

The business case has been a highly useful concept in the CSR movement, employed by NGOs to persuade business to adopt CSR policies, within business to justify their adoption, and by lawyers to justify a wider rather than a narrower legal interpretation of corporate responsibility. It provides the means of adopting a new model of corporate social responsibility that is simultaneously the traditional model. CSR is in shareholders' interests. As Shell put it, in its first social report: 'Principles or profits: does there have to be a choice?'[62] CSR is presented as a matter of principles *for* profits, meeting the demands and opportunities of a new context and a new market. The implication is that the voluntary adoption of CSR, within the context of social and market drivers, is a reliable way of harnessing the market for the social good.

Challenging social accountability and voluntarism

Useful for all parties as the business case for CSR may be, there are problems with it. For some the problem is the business case itself as a source of motivation, and the belief that business should be ethical regardless of the business case. As Sir Geoffrey Chandler, founder-chair of the Amnesty International Business Group, has put it, 'ultimately you do it because it is right'.[63] There has to be a moral element involved in the way business is done. So long as the only justification for adhering to CSR is shareholder value, it cannot be assumed that in a conflict of demands CSR will win out. 'People sometimes argue that, if it makes good commercial sense to respect human rights then

[61] Mitchell, 'Roles and incentives'.
[62] The Shell Report, 1998
[63] 'Does capitalism deserve to survive?', keynote lecture, MBA course on corporate responsibility, Said Business School, Oxford University, 30 April 2003.

market forces will secure compliance. It is not self-evident however that human rights norms are always good for business.'[64] Google and Yahoo in 2006 admitted sacrificing their own principles for entry to the lucrative Chinese internet market: 'the requirements of doing business in China include self-censorship – something that runs counter to Google's most basic values and commitments as a company'.[65]

Attractive as the concept of profits and principles as a harmonious unity may be, the problem is that sometimes there does have to be a choice, and one concern of CSR advocates is that where there is a clash of interests, voluntary CSR may not be adequate to ensure that CSR goals, even if they can be seen as in the long-term or reputational interests of the company, will be selected over short-term profit or securing limited business opportunities. Oil companies, for example, cannot choose where oil reserves are to be found. If the choice is to work with a government noted for human rights abuse, or to miss out on a limited business opportunity, what will the choice be? Some companies make a point of expressly declaring their voluntary codes trump commercial considerations. BT's code of business practice, for example, requires employees to 'stick to our business principles', adding: 'This might mean that we have to reject potential new business if it looks as though it would force us to compromise'.[66] And in fact companies do report instances of choosing to lose immediate business opportunities rather than take reputational risks. But the concern for critics is whether such policies can be depended on, and can be depended on for companies in general. Would voluntary CSR survive a major market downturn?

[64] International Council on Human Rights Policy, *Beyond Voluntarism: human rights and the developing international legal obligations of companies* (ICHRP, February 2002), p. 8.
[65] Testimony to the US Congress International Relations Subcommittee, *Financial Times*, 16 February 2006.
[66] BT, *The Way We Work* (2004).

There are other issues with voluntary CSR. How many companies adopt voluntary CSR policies? The practice may now be prevalent among big business, but what about small and medium sized companies? What about global variations in the take-up of voluntary CSR? The McKinsey survey found significant variations between countries in executive assessment of the social role of business. How reliable and transparent is CSR reporting? Though they acknowledge Shell to have 'a pretty reasonable reputation for corporate responsibility', NGOs producing 'The Other Shell Report' have criticised Shell for failing to report legal actions against it.[67] How real are corporate CSR policies in practice? How are they implemented, followed through, enforced? How selective are those policies? Though Wal-Mart, in a Damascean conversion, set itself new environmental goals in 2005, CSR ideas did not seem to affect its practices regarding employees.[68] Is CSR fundamentally just PR?

There are criticisms too of the efficiency of extra-legal – market and civil society – pressures as a means of fostering CSR. Does the 'market for virtue' work? [69] Good companies, it is argued, do not necessarily prosper, nor 'bad' ones lose out, and there are reports that FTSE4Good and Dow Jones Sustainability companies have underperformed by 3% and 8% since their inception,[70] though, of course, investors might in the long run still prefer an under-performer to a temporary over-performer such as Enron, which ends up bankrupt.

NGO pressure on big brand names has been criticised as necessarily patchy in impact. After all, when we burn our Nike shoes in a grand protest, do we go barefoot or wear trainers from another

[67] Reported in *Ethical Corporation*, September 2004, p. 47.
[68] *The Independent*, 2 November 2005. A leaked memo noted 46% of children of employees either had no health insurance or relied on emergency government programmes set up for the indigent and unemployed. Health plans had been cut to cut costs.
[69] Vogel, *Market for virtue*.
[70] Goldman Sachs Report, *Ethical Corporation*, June 2005.

brand, and how do we know the factories where they were made are, in CSR terms, any better? Nor is brand sensitivity an issue for all business, but only for high-profile brand names.

How strong are CSR consumer markets? They may be growing but how many consumers be willing to opt for CSR over price? How reliable are CSR certifications? Reports have been published of Fairtrade-certified coffee allegedly being produced by labourers paid less than the minimum wage, or from illegal plantings in protected rainforest.[71] How fair is fair-trade? How much of the premium price differential goes to the producers as opposed to the retailers? Marks & Spencer has promised not to increase its margins on Fairtrade products, but is this the norm?[72]

How deep does socially responsible investment go? How closely do investment funds investigate the practices of the companies they assess? Are investment policies based on 'best in class' (the least bad in a poorly performing, in CSR terms, sector), as practiced by some SRI investors, what we would expect from socially responsible investment? In 2005 FTSE4Good dropped eleven banks for failing to meet its standards at the same time as the Dow Jones Sustainability Index, taking a 'best in class' approach, added fifteen.[73]

And then there is the issue of what the socially responsible approach is, especially given the breadth of the concept, where conflicts of interests between multiple stakeholders can arise. How is support for developing countries via fair-trade purchases to be balanced against the environmental impact of the 'food miles' involved?

[71] *Financial Times*, 9 September 2006.
[72] *Financial Times Magazine*, 22 July 2006.
[73] www.socialfunds.com, news report, 8 September 2005.

Concern has also been expressed over putting pressure on business through extra-legal means – NGOs and the market – on grounds of democratic deficit and the rule of law – the idea of CSR *against* the law once again, at a more abstract level. By what authority do NGOs set social standards? Is it legitimate for unelected organisations to not only set standards but enforce them through extra-legal means, such as adverse publicity, protests and boycotts, particularly when the case they make may be contestable? Greenpeace, having protested over Shell's plans for disposing of the Brent Spar oil rig, and secured a change of policy, later agreed the original plan would have been the best solution. Indeed, it is because of pressure from business on these fronts that leading NGOs Greenpeace, Amnesty and Oxfam introduced a joint code of conduct to govern their own operations in June 2006, committing themselves to ensure 'the high standards that we demand of others are also respected in our own organisations'.[74] The same question of legitimacy can indeed be applied to business overreaching its role and making public-interest decisions, when, as the *Economist* put it in a critique of CSR, 'the proper guardians of the public interest are governments, which are accountable to all citizens'.[75]

The call for legal regulation

One result of such concerns has been a call to end reliance on voluntary corporate action as a route to corporate social responsibility, and to introduce more regulation through law. In the European Union, Socialist and Green Members of Parliament (MEPs) have argued against a purely voluntary policy on CSR and urged the European Commission to impose binding rules.[76] Even at the Green Paper stage, the 'large consensus' for voluntary CSR did not include trade unions and

[74] *Financial Times*, 3 June 2006.
[75] *The Economist*, 22 January 2005.
[76] www.euractiv.com, 14 July 2005.

civil society organisations who 'emphasised that voluntary initiatives are not sufficient to protect workers' and citizens' rights'.[77] Naomi Klein, despite her elaboration of the power of NGO and market pressure for CSR through the brand boomerang, nonetheless concludes that they are not enough, calling for international regulation to control corporate practice.[78] John Ruggie, UN Special Representative for Business and Human Rights, talking of supply chain issues, argued 'compliance efforts cannot fully succeed unless we bring governments back into the equation'.[79]

Sir Geoffrey Chandler has called for more legal regulation, seeing voluntary CSR as a 'curse'[80] distracting from the need for effective external control. Friends of the Earth, in its response to the European Union's Green Paper, has also noted:

> we remain very concerned that CSR may be used as a convenient excuse by companies to undermine necessary legislation and regulation that support sustainable development … While CSR may be valuable in terms of promoting better corporate behaviour it can never be seen as an alternative to good public policy and legislation … Voluntary commitments are hardly the basis for ensuring responsible corporate behaviour.[81]

There is concern, in effect, that voluntary CSR will be used *against* law to prevent new legal protections or dilute old ones. Academics too such as Shamir have criticised voluntary CSR as a way of staving off regulation.[82] Vogel argues there are limits to what NGOs and the market can

[77] 'Communication from the Commission concerning CSR', COM (2002) 347, p. 4.
[78] Klein, *No Logo*.
[79] Remarks at the forum on CSR, Bamberg, Germany, 14 June 2006.
[80] G. Chandler, 'The curse of "Corporate Social Responsibility"', *New Academy Review* 2, 1 (2003).
[81] Friends of the Earth, December 2001, p. 2.
[82] R. Shamir, 'Between Self-regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility', *Law and Society Review* 38, 4 (2004). It is not just business that has argued voluntary CSR means legal regulation is not needed. Harvard Business School academic Debora Spar has argued 'spotlight' controls of companies

achieve and underlines the need for effective government regulation.[83] While market-driven CSR should be valued, it 'should not be regarded as a long-term substitute for the rule of law'.[84]

The argument is that only legal regulation can provide 'systematic impact'.[85] It would apply to and be enforceable against all business, not just those companies which voluntarily choose or are pressed by brand vulnerability to adopt it. It would be fairer, making for a level playing field for business, it would have more legitimacy, based on and providing due process of law, and, most importantly, it would be more effective.

Responding to the critique

Two responses should be made at this stage to this critique of 'voluntary' CSR and social accountability, and to the accompanying call for more legal regulation. The first is to urge caution in being too critical of CSR 'beyond the law' and dismissing it as 'just PR'. The second is to question just how accurate it is to describe the present state of CSR as purely extra-legal. The reality on both points is more complex.

First, if it is important to keep a critical eye on new developments, and to be wary of taking them always at face value, it is also important to avoid being so critical that valuable steps forward are lost, and real commitment to improvement abandoned because whatever is accomplished it is

through brand targetted campaigns have made legal regulation redundant; D. Spar, 'The spotlight on the bottom line', *Foreign Affairs*, 13 March 1998, cited in Klein, *No Logo*, p. 434.

[83] Vogel, *Market for virtue*.

[84] D. Vogel, 'The limits of the market for virtue', *Ethical Corporation*, September 2005, p. 46.

[85] Ruggie, remarks at CSR forum, Bamberg Germany, 14 June 2006 (see n. 79).

never enough. 'The best should not be allowed to be the enemy of the better', as Vogel puts it.[86] Nor should CSR developments be viewed only through the cynical lens of vested interest. Many of the individuals in the CSR business have found in CSR a way of combining involvement in business with a genuine wish to make a social difference. Awareness is growing within business.[87] NGOs and others acknowledge that real changes of practice have been accomplished.

There has also been a steady escalation of demands on business, and a dynamic – and indeed competitive – response.[88] Critics, assessors for socially responsible investment or verifiers of CSR reports have moved from seeking evidence of CSR policies on paper to seeking clear evidence of their implementation – moving from 'tell me' to 'show me', as Shell has put it. It is not just socio-legal scholars who know that policies 'in the books' do not necessarily mean policies 'in action'. Pressure has moved on from seeking evidence of attention to CSR issues within multi-national corporations themselves to seeking evidence of their attention to these issues in their supply chains and in the practices of their joint-venture partners.

In any case, as I have argued elsewhere,[89] even if CSR were to be seen as just PR, it may be that 'just PR' will do. Policies first adopted for PR purposes may not be allowed to remain at that level, and strategies can take on their own momentum, both internally and externally. Within the organisation, CSR staff may put pressure on boards to move beyond PR to embedded practice, noting that 'just PR' will not work even as PR. Externally PR has its own function as a means of

[86] Vogel, 'The limits of the market for virtue', p. 44.
[87] The Unilever/Oxfam research project on Unilever's operations in Indonesia was reported by both the NGO and the business participants as a significant learning experience; J. Clay, *Exploring the links between international business and poverty reduction: a case study of Unilever in Indonesia* (Oxfam and Unilever, 2005).
[88] Marks & Spencer's commitment not to increase margins on its Fairtrade products was followed by Sainsbury's announcement that it would have no differential in price between its Fairtrade and non-Fairtrade bananas, mainstreaming Fairtrade (for bananas at least) so that customers did not have to pay a premium for 'ethical consumption'; *The Guardian*, 13 December 2006.
[89] McBarnet, 'Human rights and the new accountability', and 'New sources of leverage', Regnet plenary lecture.

leveraging practice. The more a company adopts what we might think of as 'halo branding', the more vulnerable it is to criticism if the halo slips. Both BP and Shell, generally presented as leaders in the CSR field, have experienced this effect in recent years, Shell when its reserve accounting was found to be misleading in 2004, BP in 2006 when it faced a barrage of CSR and ethical crises in its US operations, with accusations of oil price manipulation,[90] allegations of 'unethically trying to induce a settlement' in a personal injury lawsuit brought by victims of the 2005 fatal fire at its Texas City refinery,[91] and safety and environmental disasters in Alaska and elsewhere attributed not to misfortune but to serious systems failure and unethical practices.

NGOs are well aware of the enhanced vulnerability of companies that have adopted the strategy of halo branding and the leverage this provides. Witness Peter Frankental of Amnesty International: 'From an NGO perspective, a company that ties its flag to the mast of human rights is offering a hostage to fortune. If it fails to deliver on its stated commitments, its credibility will be at stake'.[92]

While this comment was made in the context of human rights, it could be applied to any social, environmental or ethical commitment. PR can be a double-edged sword, and a source of reputational and market leverage in itself. Voluntary, or market-driven CSR should not be too readily dismissed in the call for more law.

In any case, law is no longer quite so separate from CSR as the debate might suggest. The image of CSR as the voluntary adoption of policies beyond the obligations of law is beginning to look

[90] *The Guardian*, 7 September 2006.
[91] *Financial Times*, 6 September 2006.
[92] P. Frankental, 'Can branding reinforce human rights?', in M. McIntosh, et al., *Visions of ethical business* (www.business-minds.com, 2000).

increasingly shaky as new legal pressures and new legal mechanisms to enforce CSR policies are brought into play – and brought into play not only by governments and intergovernmental agencies, but also, once again, by civil society.

II CSR through law

Law is playing an increasing role in enforcing 'voluntary' CSR policies. Few of the commitments companies normally sign up to in their voluntary CSR policies (addressing such issues as health and safety, discrimination and corruption) are entirely free of legal obligation anyway. Indeed, companies routinely make commitments in their codes of conduct to comply with the law, though that is obviously a legal obligation. However, even what are presented as voluntary CSR codes and policies, 'beyond mere compliance', are in fact increasingly being encroached on by law. New legal developments are directly and indirectly fostering voluntary CSR and market pressures, while new legal tools are being evolved, and old ones creatively used, to make what businesses have perceived as voluntary, or beyond the law, in fact legally enforceable.

This is not, on the whole, state regulation that we are discussing, nor indeed international law, though both come into the picture, but other facets of law, often private law being used by private parties, NGOs, business itself, and indeed governments under a different hat. This raises interesting angles on the nature of legal governance and on law's capacity to empire-build. It also shows how social and market forces increasingly interplay with law, with more complex forms of governance emerging. Legal doctrines and processes are being used by NGOs as part of their strategy, and market forces are being stimulated and facilitated by legal measures. At the same

time, of course, much of the momentum for legal intervention has come from the CSR movement and from the change of culture it reflects and promotes.

How is law being brought into play? Governments are fostering CSR through indirect regulation, old legal rights are being put to new uses, and private law – tort law and contract law – are being used, tort law to extend the legal enforceability of CSR issues, contract law to give CSR standards the weight of legal obligation.

Government: fostering CSR through indirect regulation

Despite the fact that governments have shown themselves reluctant to make the adoption and implementation of CSR policies a mandatory requirement of company law, governmental legislation has nonetheless played a part in fostering CSR. The UK, in its review of company law in the 1990s, opted to keep CSR a voluntary matter.[93] At the same time, however, the UK government also introduced legislation which not only encouraged, but in practical terms necessitated, the adoption of CSR policies by major companies. The route was indirect, using disclosure as the tool, and indirect in another sense too, in that it was accomplished through legislation directed at investors in business corporations rather than at the businesses themselves.

In July 2000 pension funds were required by new UK legislation[94] to state whether and how they took into account in their investment decisions social, environmental and ethical considerations.

[93] It has been observed that governments encouraged the emergence of the CSR concept, arguing, at the 1992 Earth Summit, for 'responsible entrepreneurship' but through voluntary initiatives (Paul Hohnen, *Ethical Corporation*, 2 May 2005).

[94] Occupational Pension Schemes (Investment, and Assignment, Forfeiture, Bankruptcy etc.) (Amendment) Regulations 1999, S.I. 1999/1849.

There was no legislative obligation on them to do this, the requirement was merely to disclose whether they did so or not. Nonetheless, the practical consequence was that pension funds have increasingly chosen to take into account the CSR policies of the companies they invest in. What pension fund, with its own reputation in mind, would want to publicly declare that it considers ethical, social and environmental issues irrelevant? This in turn had a knock-on effect on companies seeking investment from pension funds. Pension funds are major players in the stock market – members of the National Association of Pension Funds control a sixth of the UK stock market[95] – and their demands could not easily be ignored. Similar legislation has followed in Germany, Belgium and Australia.

Reference has already been made to the role of SRI, socially responsible investment, as a market pressure on companies to adopt CSR policies. This legislation could be seen as making mainstream investment of necessity 'socially responsible' to one degree or another. So underlying the social and market pressures making CSR rather less voluntary than the word might suggest, there can also be seen to be legal forces at work. These legal forces are subtle in their approach in that they are indirect and, in legal terms, non- mandatory. In practical, *socio*-legal terms, however, once the legal obligation to disclose was in place, the pressure was on to disclose a positive approach to CSR. Governmental regulation has thus quietly bolstered, and indeed created a whole new level of, market pressure, and indirectly fostered voluntary CSR. There has been another knock-on effect too, in that listed companies, through the voice of the Confederation of British Industry (CBI), have in turn criticised financial institutions for failing to provide themselves the level of

[95] *The Guardian*, 22 August 2005. The same article reports the NAPF's announcement that while it was not issuing guidelines for pension fund trustees, it was nonetheless 'urging' them 'to ask the investment managers who oversee their pension funds to consider corporate social responsibility when investing on their behalf' as 'CSR should be a "normal part of the investment process"'. The NAPF had already 'been telling company boards that "failure to take account of their wider role in society could cause serious damage to their prospects", but was now going one step further'.

disclosure they demand, increasing the pressure for further disclosure in the financial sector itself.[96]

Disclosure is also the approach taken by the European Union in its requirement for companies to produce a 'business review' as part of their statutory annual reports, describing the 'principal risks and uncertainties' they face. This expressly requires reporting on 'non-financial' performance, 'including information relating to environmental and employee matters'.[97]

The requirement has been implemented in the UK in the Company Law Act of 2006. In fact, the business review is a weaker requirement than was first proposed in the UK, where the original intention was for a more demanding 'Operating and Financial Review' (OFR). The proposed UK law had set out more detailed requirements and more overt reference to CSR issues. Companies would have been required to disclose their strategies for identifying and dealing with risk, expressly including risk from social, environmental and ethical factors – a wider express list than the EU's, and clearly CSR-led. They would also have had to disclose their policies on these issues. This too was set to foster the voluntary adoption of CSR policies by business, since one obvious way to demonstrate CSR risk control is to adopt express CSR policies, implementation strategies and compliance programmes. However, despite the years of consultation that lay behind it, the OFR was suddenly dropped in November 2005 as, it was said, a demonstration of the Labour government's reduction of red tape for business.

Ironically however, the reaction from business to the dropping of the OFR was far from supportive. Investment funds wanted the disclosure, reflecting as it did the new concern with reputational

[96] *Ethical Corporation*, May 2005, p. 4.
[97] European Accounts Modernisation Directive 2003/51/EC, at 10 (a) 1.

risk.[98] Social and environmental responsibility, they argued, should both be put at the heart of corporate decision-making and reported accordingly, preferably in the statutory annual report.[99] What is more, many large companies had already invested heavily in introducing the policies, the staff and the mechanisms for identifying, measuring and reporting CSR risk.

The result was that, even before the new, weaker legislation was in place, or compliance required (not till 2008), companies were producing OFR-like reports. By March 2006, 85 of FTSE100 companies had published non-financial reports, 3 had reported via a parent company or subsidiary and the remaining 12 had included some non-financial reporting in their annual report.[100] For many companies this was simply a continuation of their voluntary CSR reports with a new focus on the language of risk and performance indicators. For some it was anticipation of expected legislation, law affecting practice even before it comes into play. At the same time practice also influenced law. The introduction of the legal requirement for disclosure could be seen as itself facilitated *politically* by the fact that the practice had already begun in response to social and market pressure, while it was facilitated *practically* by the prior existence of reporting standards produced by international non-governmental organisations. Market forces, voluntary action and legal obligation intertwined.

The UK's new disclosure requirements did not in fact stop at replacing the OFR with the business review. Legal requirements were beefed up again with two requirements, first, that the business

[98] The London Stock Exchange's Combined Code on Corporate Governance, and the Turnbull Report (1999) before it, had already included reputation as an asset to be protected by companies, and required internal reviews and reputation risk management with, it has been suggested, directors potentially open to attack for breach of fiduciary duties if they did not pay this issues sufficient attention (Philip Goldenberg, partner in Berwin Leyton, quoted in the *Financial Times*, 9 March 2002). By 2006, as we have seen, reputation risk inevitably included CSR issues.

[99] See the Association of British Insurers position paper reported in the *Financial Times*, 30 November 2006.

[100] CorporateRegister.com; *The Guardian*, 6 November 2006.

review be audited, and second, that companies disclose information on their supply chain and other contractual relationships. With conditions in a company's supply chain and the activities of its joint-venture partners (in relation, for example, to human rights)[101] key issues in the CSR debate, this could become another significant factor for CSR by fostering more CSR-conscious supply and joint-venture policies. There is also potential for further pressure via disclosure, with the 2006 Companies Act including a reserve power to allow the government to require institutional directors to disclose how they have voted at annual meetings.[102] This was included with the express purpose of fostering voluntary disclosure. The resort to law will take place only if 'managers fail to come clean on their voting records voluntarily'.[103]

In effect, while supporting a voluntary approach to CSR, UK government strategy – with significant civil society lobbying behind it – has been to legislatively support and strengthen the market pressures on companies to pay attention to CSR issues. In effect, it has used law to boost the potential for social accountability.[104] Similar practices had already been adopted elsewhere. Even before the EU's new requirements, France had required disclosure of social and environmental issues in companies' annual reports.[105]

Indirect fostering of CSR-related policies, particularly in more narrowly focussed corporate governance – though also in relation to such issues as the environment and corruption – can be seen in the US too, though there largely through enforcement strategies. It was noted earlier that all the US Fortune 500 companies have for some time had corporate codes of conduct or

[101] See the reference to Shell in Nigeria earlier . A late amendment allowed companies to veto data where it might be exploited by extremists (*Financial Times*, 1 November 2006).
[102] *Financial Times*, 4 November 2006.
[103] *Financial Times*, 6 June 2006, quoting Alastair Darling, Trade and Industry Secretary.
[104] See Friends of Earth, 2001, n. 81.
[105] Nouvelles Regulations Economiques, applicable from 2002 annual reports.

statements of principle in place. One factor in this was government action which, again though not directly mandating such codes, in practice fostered their adoption. When the Foreign Corrupt Practices Act introduced tougher penalties for corruption, the Sentencing Commission also introduced scope to mitigate them *if* a corporation could demonstrate it had a code of conduct in place and an active programme for its propagation and enforcement.[106] Not surprisingly, such programmes subsequently proliferated.

Since then the Sarbanes-Oxley Act, in reaction to Enron, has required companies to introduce codes of ethical conduct. These were narrowly defined and directly mandated only for chief executive officers and chief financial officers. However, once again, by making evidence of a corporate 'culture of integrity' a mitigating factor in any future prosecution, the Sentencing Commission has indirectly fostered a wider application of codes and code implementation, including company-wide communication and training in ethics.[107] Other agencies, such as the Environment Protection Agency, take account of internal policies in deciding on penalties. The Securities and Exchange Commission requires both codes of ethics and evidence of effective implementation procedures, as do, since 2004, the New York Stock Exchange and NASDAQ. The courts in Delaware (where some 58% of the Fortune 500 companies are legally based) have also lent the weight of law to this by holding boards responsible for the implementation of compliance systems consistent with the sentencing guidelines.[108]

[106] See Simon Webley, 'The Nature and Value of Internal Codes of Ethics', paper presented at the conference on *The Importance of Human Rights in International Business*, University of Exeter, 15-17 September 1998.
[107] US Sentencing Commission, *Federal Sentencing Guidelines Manual* (2004).
[108] L. Paine, R. Deshpande, J. Margolis and K. Bettcher, 'Up to Code: does your company's conduct meet world class standards?', *Harvard Business Review* December (2005), 122-33.

No wonder that for public companies operating in the US, Paine et al. see codes of conduct as 'arguably a legal necessity'.[109] A similar use of enforcement policies has been mooted in the UK, using the carrot as much as the stick, in the idea of risk-based enforcement, where companies that demonstrate themselves to be 'responsible' would be treated with more trust and less regulatory inspection.[110]

CSR policies and ethical codes may then be upheld by governments as a matter for voluntary business practice, yet at the same time actively fostered by subtler or more indirect legislative or regulatory action.

In the UK's case, not all of the government's interventions have in fact been indirect. The 2006 Companies Act also sets out a duty on directors to act in the way they consider 'in good faith, would be most likely to promote the success of the company for the benefits of its members as a whole'.[111] Discharging this duty requires attention to factors such as the interests of employees, relationships with customers and suppliers, and impact on the environment, effectively codifying the wider understanding of directors' duties noted in our earlier discussion of case law. Interestingly, Margaret Hodge, the Industry Minister, also declared that the current legislation would be only a 'first step' in imposing tougher standards on directors.[112]

[109] *ibid*., at 122. Also see Parker on meta-regulation, forthcoming in McBarnet, Voiculescu and Campbell *The New Corporate Accountability*

[110] See the 'Hampton Review', P. Hampton, *Reducing administrative burdens, effective implementation and enforcement* (HM Treasury, 2004), discussed in BiTC, Insight Investment and FTSE, *Rewarding Virtue*.

[111] Section 172(1) Companies Act 2006, coming into force in 2008.

[112] *Financial Times*, 25 October 2006.

Civil society and the law: shareholder activism

It is not just governments that are using law, often indirectly, to foster CSR. NGOs, and members of civil society more generally, are increasingly moving beyond the conventional indirect route of lobbying for changes in legislation to using the mechanisms of law directly themselves in order to produce change at the level of business practice.

NGOs have, for example, used company law to gain legal status and a legal voice within companies, making themselves not just external pressures on companies but internal pressures. They have done this through the simple expedient of buying shares, making themselves shareholders and exercising shareholder rights to bring resolutions to annual general meetings. Such actions have provided a new means for their conventional role of awareness-raising, with significant publicity raised through reporting of their actions at AGMs.

More than publicity has resulted, with changes in corporate policy also being accomplished. In California in 2004, the Interfaith Center on Corporate Responsibility, an umbrella organisation filing for a group of shareholding NGOs, withdrew a resolution destined for Occidental's AGM only when the company agreed to adopt a human rights policy.[113] NGOs have thus used the opportunities available in law to move from the role of advocates outside the corporation to the role of legal actors within it. The shareholder resolution brought by the Ecumenical Council for Corporate Responsibility (ECCR) to Shell's 2006 AGM was introduced as being proposed because of

[113] William Baue SocialFunds.com, 19 March 2004 (*Ethical Corporation*, 20 March 2004).

concerns about 'the loss of production, environmental costs and reputational risk' (all 'business case' concerns) 'faced by *our* company'.[114]

Amnesty International USA[115] has also extended the tactic into a base for more conventional campaigning by asking 'ordinary Americans to voice their concerns and priorities to institutional investors holding shares in their names, asking them to support shareholder resolutions addressing human rights'.[116] Two resolutions pressed in 2006 were first, in relation to Dow Chemicals, seeking more help for the remaining 100,000 and more victims of Bhopal, and, second, in relation to Chevron, regarding health and environmental issues in the Ecuadorian Amazon which Amnesty alleged were caused by the operations of Chevron's subsidiary Texaco.

This 'Share Power' campaign, and the general exercise of shareholder rights to promote CSR, confronts and exploits the narrow legal interpretation of corporate responsibility as primarily to further shareholders' interests by making shareholders advocates of CSR. Major shareholders are also exercising their rights in order to raise CSR issues. The UK Institutional Shareholders Committee specifically noted corporate responsibility as one of the items that should be raised with companies, on the basis, for example, of reputational risk.[117]

[114] www.eccr.org.uk, my emphasis.
[115] AIUSA has held an activism portfolio of shares in companies it might want to target since 2001 (*Ethical Corporation*, October 2005, p. 25).
[116] *Ethical Corporation*, 12 September 2005, and see October 2005.
[117] BiTC, Insight Investment and FTSE, *Rewarding Virtue*.

Private actors, private law: enforcing human rights

Civil society has also played a very direct role in bringing law into play, often in innovative and even surprising ways, to enforce CSR, and increasingly to make it a legal obligation. Instead of just seeking to influence state or international legislation – public law – they have turned to the mechanisms offered in *private law*, essentially tort and contract, and used them to make direct legal inroads on 'voluntary' CSR.

One of the most creative examples is the use, in the US, of the Alien Tort Claims Act. The Alien Tort Claims Act (ATCA), a US statute relating to 'piracy on the high seas', dates back to 1789, and was rarely used in two centuries. It is, nonetheless, currently proving the bane of multinational corporations who are being pursued, via ATCA, through the US courts.[118] The goal is to have them pay out compensation – and be seen to take responsibility – for human rights abuses committed abroad by foreign governments with which they have been operating in joint venture. The use of ATCA is an example of highly creative legal enforcement by NGOs concerned with human right abuses, but with no way of enforcing claims through more conventional legal routes.

ATCA was first pressed into the service of human rights by a human and civil rights activist organisation, the Centre for Constitutional Rights, in the case of *Filartiga v. Pena-Irala* (1980).This first case was concerned with human rights but not with business. However, ATCA has since been developed into a tool to hold multinational corporations to account on human rights issues, via the *Unocal* case, brought to court by the CCR again, along with Earthrights International and Amnesty International. The *Unocal* case was settled out of court in 2005, but it has left a legacy of

[118] See McBarnet and Schmidt, forthcoming in McBarnet, Voiculescu and Campbell *The New Corporate Accountability* for a detailed analysis.

valuable precedents and procedures, a long list of pending cases on the same theme – involving such companies as Shell, Texaco, Chevron, Rio Tinto, Coca-Cola and Gap – and gained extensive publicity for the issues involved. It has also encouraged others to find legal means within their own jurisdictions to enforce respect for human rights on business, while the UN has set up a panel of experts to look into formulating an international law standard on corporate aiding and abetting liability.[119] The case also gave institutional shareholders ammunition for pressing corporations on human rights. Unocal has subsequently merged with Chevron, and, as a result of the ATCA case, pension funds such as CalPERS have put additional pressure on Chevron to publish and implement its human rights policy,[120] legal initiatives again fostering market action.

Human rights have been on the CSR agenda for some time, and it has become routine practice for multinationals to sign up to voluntary human rights commitments such as the UN's Global Compact, and to include respect for human rights in their own codes of conduct. But the use of ATCA by NGOs has made it clear to multinationals that commitment without compliance is not enough, and that, in some situations at least, there are legal means to enforce it.

Legal accountability on voluntary commitments

Law has been used innovatively by civil society in other ways. Repeated reference has been made to the voluntary construction and publication, by most major businesses these days, of corporate codes of conduct and CSR reports. Corporations can, however, find themselves held to account on these voluntary initiatives, not just socially but legally. Once in place, and with an active civil society to press the case, such voluntary declarations may turn out to have legal implications. Nike

[119] See, for example, www.Earthrights.org, news, July 2006.
[120] www.socialfunds.com/news, 17 August 2005.

is once again key here. In *Kasky v. Nike*,[121] Marc Kasky, an activist on environmental issues and labour rights, brought a legal case against Nike on the basis that it had made false statements in response to the criticisms in the late 1990s that sweated labour was being used in the factories that supplied it. Nike had stated in its CSR reports that its suppliers adhered to its code of conduct which did not permit sweated labour, and Kasky argued this was simply untrue. Indeed, it was false and misleading and therefore in violation of California's legislation on unfair competition and false advertising.

Like *Unocal*, the *Kasky* case ended by being settled out of court, with Nike paying $1.5 million[122] to NGO the Fair Labor Association.[123] But it has had its effect in firing a warning shot on the use of CSR as PR, and on the adoption of policies without adequate implementation and verification. Though it was anticipated that one result might be a cessation of voluntary CSR communications from corporations, CSR reporting has in fact continued. As another participant, a spokesman for one of the several NGOs that supported Kasky via '*amicus* briefs', put it, 'Companies will continue to tell their side of the story, as they have a real market reason for doing so: to attract capital and new consumers. None of that has changed as a result of this lawsuit, the companies just need to be more careful that what they say is accurate'.[124]

Though Nike's first response was to announce that it would no longer produce a CSR report, in fact it not only resumed its CSR reporting but made it more transparent, publishing for the first time in

[121] *Kasky v. Nike, Inc.*, 45 P.3d 243 (Cal. 2002).
[122] P. Rudolph, 'Ethical reporting and the law', *Ethical Corporation*, 3 February 2005.
[123] An industry sponsored non-profit organisation promoting adherence to international labour standards and improved working conditions (*Ethical Corporation*, 23 September 2003). Nike was a founding member of FLA in the wake of the criticisms of its suppliers' practices in the 1990s.
[124] Adam Kanzer, general counsel and director of shareholder advocacy for Domini Social Investments, which filed an *amicus* brief in support of Kasky (www.socialfunds.com, 2003). Other parties in the *amicus curiae* briefs included NGOs Reclaim Democracy, Public Citizen, Global Exchange and the Sierra Club, along with four members of Congress (www.reclaimdemocracy.org, 9 April 2003).

its report of activities in 2004 a list of more than 700 suppliers around the world, thus facilitating assessment by NGOs or others.[125] The report, published in July 2005, began: 'We've been fairly quiet for the past three years in Corporate Responsibility because of the Kasky lawsuit. So we're using this report to play a little catch-up and draw a more complete picture'. Nike has also become an advocate, putting pressure on industry more generally to follow its example. 'No one company can solve these issues that are endemic to our industry.'[126] Presenting his original response to criticisms on its supply chain as 'bumpy' and 'an error', Nike's chairman and former CEO Philip Knight sets out publication of their supply chain as 'an effort to jump-start disclosure and collaboration throughout the industry'.[127]

This demonstrates the potential impact of private litigation. There can be a significant knock-on effect from even a single case in motivating the targeted company to raise the standards of its competitors rather than be left at a competitive disadvantage itself. Interestingly, Knight also stood down as CEO in favour of a new CEO, chosen 'in part on [his] track record in corporate responsibility'.[128]

There is plenty of scope in law in other jurisdictions too to transform not just voluntary CSR reports but voluntary codes of conduct into standards to which companies can be held legally accountable. A 2005 European Directive specifically, if in somewhat limiting terms, includes non-compliance by a company with its code of conduct as an instance of a misleading commercial

[125] *Nike Corporate Responsibility Report for 2004* (July 2005).
[126] Hannah Jones, Vice President of Corporate Responsibility, reported by Laureen Foster and Alexandra Harney in *Dow Jones and Reuters Factiva*, 22 April 2005.
[127] *Nike Corporate Responsibility Report for 2004*, p. 2.
[128] *ibid*.

practice.[129] Carola Glinski has argued that, despite the 'long-standing opinion of the vast majority of authors, [that] such codes of conduct merely create moral obligations but have no legal effect whatsoever', there is scope within European law for such cases to be brought, on grounds not dissimilar to the *Kasky* case, leading her to ask whether private codes of conduct can really be seen as voluntary rather than legally binding.[130]

As a result of *Kasky v. Nike*, and similar legal developments elsewhere, business organisations have been put on notice to be wary of their CSR PR, and perhaps to be conscious that their voluntary codes of conduct and CSR reports may prove less voluntary than they thought. If CSR codes and reports could once have been taken for granted as useful PR with no legal repercussions, that may no longer be the case.[131]

Business, governments and contractual control

Several of the examples so far have indicated the complex interplay between legal and market forces that is involved in CSR, the source of legal initiatives in both government and private actors, and the use of both regulatory and private law. That intricate interplay is very much in evidence in what we might call 'contractual control'. It is not just NGOs and private activists who have been using private law to transform voluntary commitments into legal obligations. So too has business

[129] EC Unfair Commercial Practices Directive 2005/29/EC, OJ 2005 No. L149/22. This is limited to situations 'where the commitment is not aspirational but is firm and is capable of being verified, and the trader indicates in a commercial practice that he is bound by the code'; Art. 6 (2)(b).
[130] Forthcoming in McBarnet, Voiculescu and Campbell *The New Corporate Accountability*.
[131] Likewise, Oxfam's concern that voluntary CSR meant victims had no recourse to remedies has been disproved, in some situations at least (Oxfam International, *The European Commission's Green Paper: Promoting a European Framework for CSR, a Submission by Oxfam International*, January 2002, p. 5).

itself. Large companies have been using private law to impose CSR policies on *other* businesses. So indeed have governments.

There is a growing trend for major companies to include CSR commitments in the terms and conditions they set out for their contracts with their own suppliers.[132] While the market power of large companies vis-à-vis suppliers is itself clearly an important factor in any influence accomplished, it is becoming regarded in business as best practice to formalise this as a legal obligation. The adoption of this controlling role by big business over its suppliers may be less surprising and less altruistic than it seems. Some of the companies whose reputations have been hardest hit by the CSR movement have found themselves pilloried for the practices of external suppliers which were not their legal responsibility, but for whose actions they were nonetheless held accountable. Nike's experience vis-à-vis the child labour practices of its south-east Asian suppliers epitomises this. It may be no wonder then that companies increasingly require their external suppliers, as well as their own companies, to adopt CSR codes of conduct, and are using the legal mechanism of contract to do so. So the pressures of market and civil society have had the knock-on effect of business exercising legal control over business. It might also be noted that the production of contracts is itself facilitated by companies' ability simply to incorporate standards already set by NGOs such as the International Labour Organisation.

Nor is it just business organisations that are using contract as a means of promoting CSR. National, local and indeed supranational governments are not only using conventional regulatory law to foster CSR, but are also using their market power, and private law, by including CSR obligations in their own procurement contracts. The UK government, for example, has proposed requiring

[132] See McBarnet and Kurkchiyan, forthcoming in McBarnet, Voiculescu and Campbell *The New Corporate Accountability*

specified 'green' standards for the companies whose goods and services it purchases, covering energy efficiency, greenhouse gas emissions, the efficient use of natural resources and raw materials, transport, pollution controls and appropriate sourcing of environmentally sensitive goods such as timber.[133] Californian and Massachusetts state procurement policies are well known for their policy-driven stance, while a number of European states and the European Union have also taken CSR procurement on board.[134] Government procurement has enormous market power, with UK government procurement spending, for example, amounting to some £150 billion per annum.[135] Indeed, one CSR advocate has suggested that governments could do far more for CSR by forgetting about regulation and using their contractual power.[136] In a sense we have come full circle here, back to market forces and consumer power, but in this case the consumers are both business itself and government, and consumer power is expressed in legal form through contractual obligation.

CSR: beyond the law or through the law?

There is then increasing legal intervention in the arena of CSR, to an extent where its voluntariness must be questioned not only in terms of the social and market forces, but in terms of the legal forces driving it . There is also a significant interplay between legal, market and social forces, with each fostering and fostered by the other. Indeed, even the general trend to increasing intervention by law feeds back into market pressures through the threat of financial and

[133] *Financial Times*, 9 June 2006.
[134] The European Commission's Communication on CSR included discussion of its own capacity to include CSR requirements in its procurement policies; COM (2002), p. 21. And see McCrudden, forthcoming in McBarnet, Voiculescu and Campbell *The New Corporate Accountability*.
[135] *Financial Times*, 9 June 2006.
[136] In a nice twist, NGOs are using the Freedom of Information Act to find out about government procurement, who they have contracts with, and exploring CSR issues. Friends of the Earth alone was reported in March 2005 as having put in 'about 100' requests for information (*Ethical Corporation*, 29 March 2005).

reputation risk inherent in CSR-related litigation. Insurance firms have begun to put pressure on business on the need to pay attention to CSR issues on the grounds of increased litigation risk and higher premiums.

This increased legal intervention emanates in part from regulatory initiatives by government that are more subtle than direct mandating of CSR. But the voluntary nature of CSR is also being brought into question by the development of strategic uses of private law, often in highly creative ways, by both government and civil society. Law is not just a tool of government, and governmental regulation is not the only way to try to control business through law. Civil society too is increasingly deploying legal mechanisms to constrain business. What is more, law is being deployed to *enforce*, rather than just to encourage, commitments by business to ethics, human rights, and social and environmental responsibility.

These initiatives are not seen by all as the best way to make CSR a legal rather than a voluntary matter. There are criticisms and concerns that these initiatives, just like voluntary CSR, might divert from the full-scale legal regulation some see as the only way to ensure real corporate accountability. Indirect fostering of CSR by governments as opposed to outright regulation can be seen as too soft, private litigation as patchy in target and impact, contractual control as too limited, and creative uses of law such as the Alien Tort Claims Act as too reliant on the quirks of specific legal systems. Sir Geoffrey Chandler, an eloquent champion of the need for corporate accountability on human rights, sees ATCA only as 'a crude weapon' being used because it is 'all that is available'.[137] Even Paul Hoffman, lead advocate in the ATCA case against Unocal, has observed, 'International legislation, will, at the end of the day, be a better means of curbing

[137] 'The slow march to corporate accountability', *Ethical Corporation*, May 2004, p. 23.

corporate behaviour than law suits'.[138] What is really required, in other words, is mandatory legal regulation.

As an ideal this is hard to refute. But in practice, mandatory legal regulation has its limitations too. Indeed, there may be scope not only for regulation to contribute to the efficacy of CSR, but for CSR to contribute to the efficacy of regulation. Hence the concern to explore the idea of CSR *for* law.

III CSR for law

For a range of reasons, well rehearsed in many years of socio-legal research, legal regulation is not always as effective as might be hoped in controlling business. Indeed, the pressure from civil society for voluntary CSR has come about partly in recognition of the failure of legal regulation. This is often presented as a failure to establish effective global regulation in an era of global business, a view which might suggest that, in time, global institutions of governance could arise, filling the legal vacuum and making way for effective legal regulation. Or it is seen as a matter of, in time, strengthening the substantive standards and enforcement of law in developing countries. The limitations of law as a means of controlling big business are, however, much more endemic than these views imply.

Limits in the law and the role of extra-legal CSR

The issue of globalisation is real enough. While big business is transnational, global institutions for the governance of business remain poorly developed, particularly when it comes to enforcement,

[138] Quoted in magazine news story 'Under the shadow of ATCA', *Foreign Direct Investment*, 5 June 2006. See McBarnet and Schmidt, forthcoming in McBarnet, Voiculescu and Campbell *The New Corporate Accountability*.

and competition between different jurisdictions allows business to play the game of regulatory arbitrage, moving away from a high regulation area to a less demanding legal environment, or achieving a more amenable legal environment where it is through the threat of such a move.

But there are other more general limitations in law. In both international and national settings, business can influence both the substance of law and how it is enforced through lobbying and negotiation, introducing compromise and weakening control. Even in the minor examples cited in this paper, we can see the effect of lobbying in UK government backtracking on the OFR. Nor can governments necessarily be relied on to prioritise corporate responsibility over what they see as national or commercial interests, not least in areas such as corruption.[139] While market, social and private litigation pressures on business are criticised as patchy, the same could also be said of regulatory enforcement, not just in the international context because of lack of effective institutional means, but generally, as decades of socio-legal research have demonstrated. Even in the context of state regulation, resources can be limited, penalties often weak enough to be treated as just another business cost, a licence to be paid, rather than a significant deterrent, and enforcement techniques can be inefficient, alienating those willing to comply voluntarily while failing to constrain those who do not. Business non-compliance with law is far from unusual, and enforcement far from fully effective.

Given these limits, extra-legal pressures from NGOs and the market can check or balance business influence on government and provide useful supplements to the resources of law. Business lobbying has already become a CSR issue, with calls for more transparency on the part of business.

[139] See for example the controversy in 2006 over the UK government putting a stop to a Serious Fraud Office investigation into Saudi Arabia's dealings with UK company BAE Systems, prompting the threat (as we go to press) of legal action by NGOs against the government. *Financial Times*, 19 December 2006

At the same time, the lobbying strength of disparate pressure groups on the environment, employees, human rights and so on has been enhanced by the very concept of CSR. Though this concept is sometimes criticised as being too open-ended, one consequence of that is its capacity to encompass a wide range of more specific interest groups making for a stronger pressure point in relation to both business and government. The UK company law debate of the early 2000s saw 130 different organisations, with interests in many different aspects of CSR, lobby in a unified campaign as the Coalition for Corporate Responsibility (CORE). This coalition effect can be seen in a range of situations. The campaign in 2005 for a more CSR-oriented approach by Europe's finance sector[140] was a co-ordinated project which included case studies on tax practices, climate issues, corruption, poverty and human rights – the range of coverage strengthening the critique. Even where campaigns are more disparate, the uniting label of 'CSR' provides focus for both the framing of critiques and proposals and the organisational response.

Enforcement and implementation too may be enhanced by the scrutiny of civil society and the market. Labour rights commentators on the UK's 2006 codification of 'enlightened shareholder value' duties for directors, while welcoming their potential to enhance discussion of social issues at board-level, may also have been right to observe that their impact in practice 'may well depend on the willingness of trade unions, NGOs and socially oriented shareholders to query how boards have interpreted the "enlightened" part of their mandate'.[141] Legal intervention does not necessarily render social and market pressure redundant, but may merely shift its focus from seeking the introduction of rights and duties to pressing for their effective implementation.

[140] CR Coalition, *A Big Deal?*
[141] *Ergon: Focus on Labour* 7 (December 2006), 6.

The idea of CSR can also raise awareness of the impact of corporate and consumer practice and enhance voluntary adoption of policies that go beyond the law, a factor which should not be overlooked. Braithwaite's model of a pyramid of legal enforcement, increasingly influential among regulators round the world, reminds us of the value of encouraging voluntary virtue before enforcing it.[142]

However, it is on yet another count that CSR may have its most significant contribution to make to the effectiveness of legal control. One of the most problematic limitations in legal control lies not in law itself but in how business responds to it. Business is extremely adept at managing law to circumvent and pre-empt legal control, through the art of 'creative compliance'.[143] Much legal regulation is frustrated by clever legal gamesmanship that creatively structures or restructures the legal form of business practices in such a way that it can be claimed they fall outside the ambit of disadvantageous law and beyond the reach of legal control. Creative compliance is normal routine practice for business and for the legal and accounting firms that serve it. It is after all readily justified as perfectly legal, not breaking the law but merely using it in creative ways.

Creative compliance can be found in any regulatory context, wherever there is the motivation to resist legal control and the resources to employ legal skills to do it through technical circumvention rather than simple breach of law. Tax avoidance and creative accounting are classic examples, but health and safety legislation, environmental regulation, and employee and

[142] Ayers and Braithwaite, *Responsive Regulation* (Oxford University Press, 1992).

[143] See, for example, McBarnet, 'Law, policy and legal avoidance', *Journal of Law and Society* Spring (1988), 113-21, 'Whiter than white collar crime: tax, fraud insurance and the management of stigma', *British Journal of Sociology* September (1991), 323-44, *Crime compliance and control* (Ashgate, 2004), and 'After Enron: corporate governance, creative compliance and the uses of Corporate Social Responsibility', in J. O'Brien (ed.), *Governing the Corporation* (John Wiley, 2005), pp. 205-22; and see McBarnet and Whelan, *Creative accounting and the cross-eyed javelin thrower* (John Wiley, 1999).

consumer rights – indeed, any unwelcome legal constraints – are all potentially subject to circumvention in the same ways. Law is scrutinised for opportunities for avoidance with a range of techniques routinely employed: searching for gaps in the law – 'where does it say I can't?'; seeking out opportunities in the 'ex-files' of exemptions, exceptions and exclusions to see if transactions can be restructured to fit within them, whether they naturally do so or not; scrutinising detailed definitions and thresholds which can then be used as guidelines for structuring practices or transactions to fall outside them; constructing innovative methods the law has not yet come to address. The concept and practice of creative compliance are discussed in detail elsewhere.[144] The important point in this context is the pertinence to all this of the idea of corporate social responsibility.

Creative compliance and CSR

Of all the obstacles to effective legal control of business, creative compliance is arguably the most intractable. Enforcement in theory could be enhanced with more resources and more powers, but enforcement can only be exercised where law is broken not where it is, arguably, complied with. Changing the law can make creative compliance more difficult but it cannot eradicate it. Specific changes to specific definitions only results in adaptation, with the new rules replacing the old as guidelines for new creative structures of circumvention. Hence the adoption of regimes based on broad principles rather than specific prescriptive rules. But principle-based regulation is not a panacea in itself. It is difficult to put into practice without its application resulting in reversion to a series of rules, and it invites criticism on the basis of involving too much uncertainty and retrospectivity, and too much power for regulators. In any case, principles still have to be

[144] See previous footnote.

expressed in words, and even requirements phrased in broad conceptual terms can be subject to creative compliance.[145]

The result is that changes to the law alone cannot easily tackle creative compliance, because creative compliance is the product not just of limits in the law but of a mind-set which seeks to exploit those limits, and, crucially, which sees this exploitation as perfectly legitimate. This is a mind-set in which law is seen not as an authoritative and legitimate policy to be implemented, but as a body of decontextualised words, and as a raw material to be worked on to one's own advantage, regardless of the intentions of the legislators in making the law or the objectives they are seeking to meet. It is about the letter rather than the 'spirit' of the law. It is a mind-set which sees the application of law essentially as a game, a game in which it is legitimate to come up with creative avoidance techniques – however 'bullish', 'spurious' or 'sailing close to the wind' the legal arguments used to justify them are perceived *by those constructing them* to be.[146] It is a mind-set in which responsibility for making the law invulnerable to the search for loopholes or to creative circumvention is taken to lie wholly with those making law, not with those targeted by it. It is a mind-set where what is 'arguably legal', and only that, defines what is legitimate. And that is where corporate social responsibility comes into play.

CSR is, as we have seen, presented by business as 'what companies are going to do beyond mere compliance with the law'.[147] Going 'beyond legal compliance' is key to the image of social responsibility. That view of CSR, however, assumes a base-line of compliance that is in fact problematic, not only because of the significant amount of non-compliance that takes place in

[145] For detailed examples, see McBarnet and Whelan, *Creative accounting and the cross-eyed javelin thrower*, or McBarnet, 'After Enron: corporate governance, [etc.]' (see n. 142).
[146] These are all quotations from corporate lawyers in my research interviews.
[147] BT Social Report (1999).

business, but because of the routine practice of creative compliance. The attraction of creative compliance is precisely that it can claim to be compliant with the law, or, as it is often more circuitously put, not, on a strict literal interpretation of the law, illegal. If that claim succeeds, there is a simultaneous escape from both legal control and any adverse legal repercussions. In some contexts this would be, and has been, seen as not only legitimate but admirably astute. But in the context of a new business environment in which companies are keen to present themselves as socially responsible, the practice of creative compliance may raise some uncomfortable questions.

For companies holding themselves out as going beyond mere compliance, is compliance with a strict literal interpretation of the law enough? Is meeting the letter of the law while deliberately frustrating its spirit *responsible* compliance? Are the *consequences* of creative compliance socially responsible? Is it socially responsible to use legal creativity to escape intended controls, obviate employment rights or circumvent health and safety protections? Is aggressive tax avoidance socially responsible? Is there not a certain irony in companies taking credit in their CSR reports for contributing to community education or health at the same time as using every arguable form of legal creativity to avoid paying the tax that might have funded them from the public purse? Nor is it just social welfare that is impeded by creative compliance but the functioning of capital markets themselves, through creative compliance in such contexts as accounting, capital adequacy regulation and corporate governance, though of course failure in the market has social effects too for investors, creditors, employees and pensioners. Is it socially responsible or ethical to use, in any context, legal arguments that 'sail close to the wind' to circumvent legal control?

Such questions imply a misfit between CSR claims and compliance practices, and indicate potential for CSR to become a source of leverage in getting companies to reassess their attitudes to law and compliance. As I have argued elsewhere, though CSR is generally presented as going beyond legal obligations, it may be that business could best 'demonstrate a new attitude to corporate social responsibility not so much by *surpassing* law's requirements, but by meeting those requirements *in spirit* at last'.[148]

Creative compliance on the CSR agenda

Such questions are no longer being raised only in the abstract. The issue is beginning to appear on the CSR agenda as a result of growing interest among NGOs, consultancies and investment funds, particularly in relation to tax avoidance. Government is also addressing the issue, and employing the language of corporate responsibility and corporate ethics to do so.

New dedicated NGOs have emerged, using classic strategies of naming and shaming campaigns. The Tax Justice Network (TJN), an international non-governmental organisation launched in the UK in 2003, has taken a key role in stirring up publicity and provoking responses. While its interests extend more widely to poverty in developing countries and the role in that of tax lobbying, evasion, corruption and international tax competition, TJN has also embraced the issue of tax avoidance and CSR. The Davos World Economic Forum (WEF) in January 2005 was seized by NGOs[149] with a CSR agenda as an opportunity to make 'Corporate Social *Irresponsibility* Awards', and tax avoidance joined more conventional CSR issues as one of the award categories. The two NGOs organising the ceremony described it as a reminder 'to members of the WEF and other large

[148] McBarnet, 'After Enron: corporate governance, [etc.]'.
[149] The Berne Declaration and Pro-Natura-Friends of the Earth Switzerland.

corporate groups that the public expects them to be responsible stewards of the environment; insists on their respect for human rights and labour rights; and does not tolerate tax avoidance'.[150] The Tax Justice Network nominated the 'winner' on tax avoidance, accountancy firm KPMG, for its marketing of 'abusive' tax avoidance schemes.[151]

Not far behind NGOs have been consultancies advising a rethink of attitudes to tax in particular, and in some cases to compliance more generally. Ironically, given its brush with infamy over 'abusive' tax avoidance, or indeed because of it, KPMG has taken a lead role here. In its 2004 paper, 'Tax in the Boardroom', it acknowledges tax strategy now carries reputational risk, due not only to changing governmental attitudes but to the role of the CSR movement. Tax planning is seen as key in this. Corporate tax planning, KPMG notes, can range from the 'social duty'-end of the spectrum to the 'shareholder duty'-end. While conventionally corporate duty was seen to fall on the shareholder duty-end of the spectrum, requiring minimisation of tax by all legal means, KPMG warn that the balance may be less clear now because of reputational damage and the risk that poses – despite the legality of the techniques involved – to long-term shareholder value: 'Boards should recognise, when overseeing the design and monitoring of tax strategies and policies, that contemporary debates about governance, corporate social responsibility and ethics mean that even legal tax-minimisation activity can generate reputational liabilities that can destroy shareholder value'.[152]

Investment organisations have entered into the debate, with Henderson Global Investors producing an influential report based on a survey of the chairmen of FTSE 350 companies. This

[150] www.publiceye@evb.ch, 20 January 2005.
[151] Tax Justice Network, *Tax Justice Focus* 1, 1 (2005), newsletter of Tax Justice Network re US exposees.
[152] KPMG, 'Tax in the Boardroom' (2004), p. 8.

was explicitly presented as a response to the fact that tax, including what some view as 'inappropriate tax avoidance', is coming under greater scrutiny and that commentators are suggesting that 'approaches to tax should be seen as a matter of corporate social responsibility'.[153] Conferences, workshops and internet debates on the subject are also springing up in rapid succession. In a multiplicity of ways, tax avoidance has emerged as an issue for the corporate social responsibility agenda, and as an ethical rather than just a technical legal concern.

To some managers, and many lawyers, this is entirely inappropriate, there being, in traditional legal thinking, no place for ethical judgement in tax law. But CSR also operates, as business keeps telling us, beyond law, and in the new context of social as well as legal accountability, it is in the courts of public opinion not just in the courts of law that business practice is being judged. Creative compliance in areas such as tax avoidance may pass the test of legality but fail on the test of social responsibility.

In the UK, the tax authorities have expressly brought the language of CSR into their discussions of tax avoidance, and developed initiatives to get 'tax on the boardroom agenda'. The OECD too sees tax avoidance as firmly on the agenda of the 'corporate social responsibility' movement: 'Tax is where environment was ten years ago'.[154]

It is not surprising that tax avoidance has caught the eye of critics geared to CSR. In terms of its consequences, it is clearly a public welfare issue. It is also, of course, a challenge for business in that it goes to the heart of the issue of profit maximisation and provides a real test of whether companies adopting CSR policies embed them throughout the organisation – including the core

[153] Henderson Global Investors, *Tax, risk and corporate governance*, February 2005.
[154] Jeffrey Owens, OECD, quoted by Vanessa Houlder, *Financial Times*, 22 November 2004.

departments of tax and accounting – seeing them as relevant to financial and legal issues as well as the more established agenda of environment, human rights and so on.

The spirit of the law

Though tax avoidance has particularly caught the CSR imagination, there are indications that a more general concern with creative compliance as a CSR and reputational risk could also evolve. Part of the tax debate, and of wider relevance for legal compliance more generally, is the increasing discussion of compliance with the spirit of the law. A report by BiTC, Insight Investment and FTSE looked more generally to the issue of compliance with the spirit and not just the letter of the law, as did Sustainability's report on tax.[155]

This language has begun to emerge too in statements of regulatory policy. Some of the indirect regulatory strategies mentioned earlier, US measures encouraging the adoption of corporate codes of conduct, were geared to fostering good ethical practices, a goal which could be seen as part of the CSR agenda. For the regulators, however, in the wake of Enron, those good ethical practices were much more specifically geared to fostering a corporate culture of compliance with the law. Importantly, the compliance sought was not technical or creative compliance, but compliance with the spirit of the law.

Former SEC chairman William Donaldson, for example, has pressed home the importance of investors being able 'to see for themselves that companies are living up to their obligations and

[155] BiTC, Insight Investment and FTSE, *Rewarding Virtue*.

embracing the spirit underpinning all securities laws … beyond just conforming to the letter'.[156] Enron had demonstrated just where a disregard for the spirit of the law – and in Enron's case, the letter of the law too – could lead. Just as important, the publicity surrounding Enron had revealed just how routine creative accounting and aggressive tax avoidance – 'gaming the system', as the then-SEC chairman Harvey Pitt put it – was among businesses in general.[157] One result of Enron was clear concern to tackle creative compliance, not just fraud, and the regulatory response relates to this.[158] UK regulators too increasingly discuss compliance in terms of the spirit of the law. And regulatory and market pressures interrelate: the more the regulators raise the issue, the more the market – as Henderson Global Investors emphasise – sees risk in ignoring it.

There are indications that the idea of compliance with the spirit of the law is being taken on board by business. In their 2006 corporate codes of conduct, 24 of the top 50 corporations in the US Fortune 500 and 26 of the FTSE 100 committed themselves expressly to compliance with the spirit of law.[159] These are small numbers and what this commitment means in practice is, like many of the issues raised in this paper, a matter for ongoing or further research. Likewise, exactly how companies will deal with the CSR pressures on the issue of tax remains to be seen. Information on amount of tax paid and on tax planning policy has begun to appear in the CSR reports of a handful of UK companies. To date, on the issue of tax planning, companies have defended their right to legally minimise tax, as one would expect. The key will be where the line will be drawn in practice on the level of aggressive artificial and creative avoidance techniques employed in doing this.

[156] W. H. Donaldson, 'U.S. Capital Markets in the Post-Sarbanes-Oxley World: Why Our Markets Should Matter to Foreign Issuers', London School of Economics, London, 25 January 2005.
[157] H. Pitt, remarks before the Annual Meeting of the American Bar Association's Business Law Section, Washington, 12 August 2002.
[158] For a detailed analysis of Enron and its aftermath for creative compliance, see McBarnet, 'After Enron: will whiter than white collar crime still wash?', *British Journal of Criminology* 46, 6 (2006).
[159] This is the subject of ongoing research under the ESRC Professorial Fellowship Scheme.

There are, however, indications that the idea that tax minimisation has to be balanced against reputation risk minimisation and the maintenance of good relations with the tax authorities has been taken on board.

The issue of legal compliance, and of what it means to comply with the law *responsibly*, does seem to be entering the CSR agenda. Bringing CSR ideas to the issue of legal compliance raises the threshold on what is required for business's legal behaviour to be deemed legitimate. Courts of law may be unwilling or find it difficult to hold companies to legal account for what is arguably technically lawful behaviour – although every now and then they do just that, with 'new approaches' which 'lift the corporate veil', look through form to substance, or reinterpret how transaction forms are read, and changing social demands might encourage this. But courts of public opinion, markets and investors can set their own standards for what they hold to be legitimate, and they may set the bar higher than what is 'arguably technically legal', viewing even legal compliance through the lens of what is ethically acceptable or socially responsible. Indeed, companies which fly the banner of CSR invite the imposition of such standards. As Shell put it, 'there is also an inseparable responsibility to ensure that our businesses are run in a way that is ethically acceptable to the rest of the world and in line with our own values'.[160]

In adopting CSR policies and holding themselves accountable to standards beyond legal compliance, companies may not have anticipated CSR reaching from calls for social responsibility on such issues as environmental concerns to calls for social responsibility in relation to legal compliance itself. But CSR has its own momentum, and the potential is there for the market to exercise judgement, and flex its muscles, in the arena of legal compliance too.

[160] Shell Report (1998).

All the usual provisos, the limits of market and social forces, of course apply. Nonetheless, those who call for CSR *through* law might also consider the potential for CSR to work *for* law, putting pressure on business to review its attitude to law and compliance, shifting the threshold of social responsibility and ethical legitimacy from compliance with the letter of the law to compliance with its spirit and so, potentially, enhancing the effectiveness of legal control.

Conclusion: a new corporate accountability?

The idea of CSR as voluntary self-regulation, or even as market- and NGO-driven self-regulation, has invited criticism, and it certainly has its limitations. But the view that CSR policies are voluntary or can be treated with impunity as 'just PR' is becoming less and less sustainable. Not only have there been growing market and social pressures, but there has also been increasing legal intervention, fostering and enforcing CSR, often in subtle and indirect ways, through private as well as state initiatives, and there is pressure for further regulatory intervention.

Nonetheless, even if CSR is becoming increasingly a legal issue, a significant part of its value may lie still in its original conceptualisation as going beyond the law, as being ultimately about business ethics in its ends and social and market pressures in its means. Law may for many reasons, not least because of the value placed on democracy and the rule of law, be the preferred mechanism for corporate accountability. But given the limits of law, we also need extra-legal ethical, social and economic pressures, both to make demands beyond the range of formal law and to make formal law effective. Different eras throw up different ideas that capture the public's moral imagination. CSR happens to be the idea of the moment which might be harnessed to that end.

In short, social and legal means need not be seen as alternatives for furthering corporate responsibility, but as complementary controls in a new style of corporate accountability that involves both legal and ethical standards. Nor need the State be seen as the only viable source of corporate governance. Both legal and social accountability have a role to play. This paper has demonstrated the multiplicity of sources of governance in operation and a multiplicity of mechanisms being employed far more complex than the traditional state-based 'command and control' model of legal regulation.

Law is not just a tool of government, and governmental regulation is not the only way to try to control business through law. Civil society organisations too are increasingly deploying legal mechanisms to constrain business. What is more, they are deploying law to *enforce*, rather than just to encourage, commitments by business to ethics, human rights, and social and environmental responsibility. At the same time, governments are using the market through their procurement power, and facilitating market and NGO pressures with enhanced disclosure. Business organisations are not only adopting internal CSR policies but are themselves exercising legal and market control over other businesses, as well as lobbying and organising (especially when stung by NGO attention themselves) to raise industry standards on CSR and level the playing field. International organisations, both public and private, are setting standards. NGOs and business are working in partnership, with NGOs advising rather than only criticising business.

What is emerging in the arena of CSR is a complex interaction between government, business and civil society, private law, state regulation and self-regulation, at national and international levels, with social, legal, ethical and market pressures all being brought to bear in ways that cut across

traditional pigeon-holes, and which, as this paper has tried to demonstrate, interrelate with and foster each other. How this will work out remains to be seen. Not all of these forces are new, though the intensity and spread may be. Many of the developments described here are in their infancy or more indicative of potential than accomplishment. Backlash is always a possibility. All of these forces have their limits. Nonetheless, under the banner of Corporate Social Responsibility, there may be emerging a new, interweaving, multi-faceted form of corporate accountability.