

Public Policy, Private Power: Ethical Leadership and Extractive Industry

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Foreword

The Sheldon M. Chumir Foundation for Ethics in Leadership, through the award of its 2002-2003 Public Policy Fellowship, has made possible this study, which examines how one corporation's experience and one country's response might contribute to a general understanding of how a culture of ethical conduct can be fostered in extractive corporations, and in the public services which regulate, support, or protect them. Though the foundation, its President and staff, must be thanked for the support they have given as the work progressed, any errors or inadequacies reflected in this final paper must rest solely on my shoulders.

John Harker

Introduction

On December 9 1999, Talisman Energy Inc., a major Canadian independent oil producer, announced that it had signed on to a code of ethical conduct, in this particular case the International Code of Ethics for Canadian Business. In a letter to Canada's foreign affairs minister that day, Talisman's CEO, Dr. Jim Buckee reminded the minister that the two of them had, when they met in November 1999 to discuss Sudan, discussed the Code. At that time Jim Buckee had argued that Talisman "has always had a strong code of business conduct in place", with its principles taken very seriously "throughout our organization". He demurred to sign the "International Code" at the November meeting, but his Board of Directors adopted it at their meeting on December 7 2002, under his guidance.

Why did this happen, and what did the action signify? Jim Buckee hoped that the Canadian minister, and presumably by extension the Canadian people, would agree that "corporate ethics has always been a strong internal priority at Talisman".¹ Why was this ever in question?

The search for answers necessitates a look back to October 1998, when Talisman Energy Inc. bought Arakis Energy Corporation, another Canadian company, and with it a 25% share of the Greater Nile Petroleum Operating Company. GNPOC was, and remains, a multinational consortium licensed to extract oil from Sudan, a country long-embroiled in a civil war.

In a background paper issued in December 1998, Jim Buckee described the Sudan acquisition as a "rare opportunity to be part of the opening of a new hydrocarbon basin to the world."²

This is the Muglad Basin, described by Talisman as the largest of three sub-parallel failed rift systems in central Sudan, where GNPOC held rights to some 12.2 million acres. Others, outside GNPOC and the Sudanese government, would describe the area as being in southern Sudan.

¹ Letter from Dr. Jim Buckee to The Hon. Lloyd Axworthy, December 9 1999

² Talisman Energy Inc., *Sudan—The Greater Nile Oil Project*, Calgary 1998

The Talisman background paper set out “The Issues”, stressing that civil unrest had been part of Sudan’s history for a long time, with the roots of the conflict resting in tribalism, with elements of religion, Marxism, regional conflicts, colonialism and uneven economic development.

Everything but oil, perhaps? The project, Talisman asserted, lay 250-500 km north of the trouble zones and was well protected.³

Oil and trouble have never been far apart in the modern history of Sudan. That is not to suggest that the search for oil, its extraction and marketing, have caused the enduring war in Sudan, a war which has known many causes. Some of these causes were set out in Ann Mosely Lesch’s ground-breaking work on “the difficulty within the Sudan concerning its national identity.”⁴

She describes how enduring problems between North and South, Arab and Nilotic, Moslem and Animist or Christian, were complicated by the country’s need for economic development, and by Chevron’s discovery of oil in the Muglad basin (in truth a geological delineation, not a political one).

The discovery was quickly followed by a move, initiated by the then Attorney General, Hassan al Turabi, to have the “parliament” accept a new map of Sudan, one showing the oil find not in the south, Upper Nile province, but in the northern province of South Kordofan.

The then President, General Numairi, stopped this particular revisionism, but he also replaced southern troops in the Bentiu area of Upper Nile with northern ones, and instigated a plan to have any oil produced refined not, as expected, in the oil region at Bentiu but in the north, at Kosti.

Within two years, fighting had broken out again, and it has not really stopped since, a cease-fire brokered in late 2002 with U.S. assistance notwithstanding.

³ Ibid.

⁴ Ann Mosely Lesch, *The Sudan: Contested National Identities*, James Currey: Oxford 1998

The southern forces were organized into the Southern Peoples Liberation Movement and Army, and quickly made it clear to Chevron that its oil activity was unwelcome. The company ceased activity in 1984, and little further oil activity took place until Chevron left in 1990 and Arakis entered the scene a few years later.

When Talisman asserted that the conflict was a great distance from oil, it may have been seeking to reassure itself; few outsiders were convinced. Certainly the 20 Canadian churches and NGOs which made up the Sudan Inter-Agency Reference Group were not. They had first protested the entry of Arakis, fearing that oil would harden the Government of Sudan against making peace with the armed opposition, the SPLA and other groups fighting together under the umbrella of the National Democratic Alliance (NDA) against the government in Khartoum. SIARG then protested against the Talisman acquisition of Arakis, and pressured the Canadian government to find a way to, in turn, pressure the company into quitting Sudan until a peace had been achieved there and a democratic system of government introduced.

Jim Buckee may have had this in mind when he wrote to his Shareholders and observed that “The government of Sudan has opposition both inside and outside the country, and some activist groups argue that western companies should refrain from all commercial activity there. I recognize that those who advocate boycott are well-intentioned but I view their argument as counter productive...For obvious reasons we hope that diplomacy can bring about conciliation and ultimately peace. It is not partisan to contend that Western engagement—commercial as well as diplomatic—can promote that process far more effectively than quarantine.”⁵

When Talisman decided to go ahead with the purchase of Arakis, it did so over the muted opposition of the Canadian government. Or rather, it went ahead despite warnings from the Department of Foreign Affairs and International Trade that doing so could be difficult.

Almost from the outset, Canada’s Sudan policy after the Talisman acquisition of Arakis was dominated by adverse public reaction to the development.

⁵ Jim Buckee, *Letter to Shareholders-Sudan*, Talisman, Calgary May 4 1999

Much of that public reaction involved the SIARG group of civil society organizations. It appears that the SIARG had actually met with Talisman in July 1998 to advise it not to buy the Arakis holding, pointing out that there was evidence of forced displacement, with the government of Sudan complicit in these human rights abuses.

The company exercised its own prerogative; it had the legal and financial power to invest in Sudan, and did so.

Public Policy: Responding to Conflict

In January 2003, Canada's Foreign Affairs minister, Bill Graham, announced his "dialogue" on foreign policy. He did so by sharing with Canadians a discussion paper, setting out how he saw the world and Canada's involvement with it. Many topics were included, and others will find their voice as the dialogue proceeds in the first half of 2003.

One section of the paper dealt with matters relating to Canada's "prosperity", and attention was paid to the issue of Corporate Social Responsibility. It was being said in Ottawa prior to the release of the discussion paper that Bill Graham had made clear to his staff his determination to ensure that CSR featured in whatever form of review, dialogue, or debate the government fostered on foreign policy.

The discussion paper stated that "Looking abroad, the Government recognizes that foreign investment by Canadian firms should be both competitive and responsible in its social and environmental impacts. Some companies have had exemplary success in embodying Canadian values in their foreign business operations. Foreign investment is bringing substantial benefits to developing countries. In certain cases, however, it can fuel violence and unrest in conflict-ridden areas or poorly governed states."

At the time of Talisman's investment in Sudan, that country could be fairly described as conflict-ridden.

In 1999, Canada and Sudan agreed that an assessment mission should be sent to Sudan by Canada, mandated to investigate and report on the alleged link between oil development and human rights violations, particularly in respect of the forced removal of populations around the oilfields and oil related development.⁶

The Assessment Mission concluded that "it is hard to deny that displacement is now, and been for some time, because of oil", and it spoke of "major displacements of civilian populations related to oil extraction."⁷

Minister Lloyd Axworthy made the conclusions of the Assessment Mission public in an appearance before the House of Commons on February 14 2000. He held a press conference at which he endorsed the conclusions that oil was exacerbating the conflict in Sudan, and that the conflict was responsible for large-scale displacement of people.

The Assessment Mission did not recommend that the minister take measures to force Talisman to leave Sudan and thus escape its responsibilities. In turn, the minister, in his public response, did not indicate that he would follow a policy of using Canadian law to force Talisman out of Sudan. But he did announce support for work related to the use of legal instruments to ensure that private power was not able to ignore public policy and purpose.

The Assessment Mission report mentioned that in December 28 1999 the Federation of Sudanese Canadian Associations had written publicly to Minister Axworthy to argue for Talisman being forced to withdraw from Sudan, and the report noted that the Special Economic Measures Act (SEMA) had frequently been mentioned in this regard.

⁶ H. John Harker, *Human Security in Sudan: The Report of a Canadian Assessment Mission*, Ottawa:DFAIT, 2000

⁷ Harker, *Human Security in Sudan*, 2000

The report described SEMA as a regimen fashioned for application as part of a multilateral response to a given situation, and the Assessment Mission recommended that the government encourage work it understood was going on to “de-link” SEMA from a multilateral context, making it suitable for use in individual, Canadian, circumstances. The minister accepted this recommendation and indicated that such a “revisiting” of SEMA would receive the support of his department.

Little, if anything, seems to have been done to act on this undertaking. If Canada lacked an appropriate instrument for dealing with an individual Canadian company in February 2000, it lacks it today.

Minister Axworthy observed, in his response to the report of the Assessment Mission, that he had advised the company, Talisman Energy Inc., against investing in Sudan but the company was free to take the advice, or not.

Here it is worth noting another development which bears on Canadian public policy and its relation to private power.

Only weeks after releasing the report on Talisman’s investment in Sudan, an investment committed against his advice, the minister was again involved with a private company considering an investment opportunity in the Sudanese oil business.

The company was Fosters Resources of Calgary, and it did not ask Minister Axworthy or his department if it should dive into Sudanese oil.

Fosters had a 25% interest in Melut Petroleum, which was intent on exploiting a concession it had acquired in the Melut basin of Blue Nile state in Sudan. Fosters hoped it could increase its ownership of Melut Petroleum to 83%.

The Fosters CEO, Randy Pawliw, told the Financial Post⁸ his job was to “enhance shareholder value, but we can do that in an honest, ethical way and at the same time be a good citizen.”

The author of the Assessment Mission report warned Fosters that “the war in Sudan around oil seems to be one that is gaining, not abating”.⁹ And Minister Axworthy said he would write directly to Fosters, advising against investing in Sudan.¹⁰

Fosters did not proceed with the planned investment, and a problem in raising the required capital was cited as among the reasons for the change of heart. Whatever the reason, Canada had to contend with the continuing public focus on only one Canadian firm active in Sudan’s troubled oil business.

Minister Axworthy was, when he responded to the report on Talisman, not so much thinking of other Canadian firms and how they might approach the Sudan issue, but he was thinking about the impact of Canadian business on the lives of the Sudanese people.

He introduced a number of measures which he asserted would help address the human rights needs of the affected people, and would encourage Talisman to meet its responsibilities through living up to the fundamental values of Canadians in conducting its business activities. He expected Talisman to live up to the terms of the corporate code of conduct which it signed on to in December 1999.

He said the code was one “which has served as a model of how a company can operate without compromising respect for society and environment of their operations.”¹¹

⁸ Claudia Cattaneo, “Fosters unit wins Sudan concession”, Financial Post, March 13 2000

⁹ Jeff Sallot and Steve Chase, “Axworthy warns firm about Sudan”, Globe and Mail, March 14 2000

¹⁰ Ibid

¹¹ The Hon. Lloyd Axworthy, *Press Transcript*, February 14 2002

He encouraged Talisman to “continue its efforts to develop, with non-governmental organizations (NGOs), an effective mechanism for monitoring its operations in Sudan, to ensure that they do not lead to an increase in tensions, or otherwise contribute to the ongoing conflict.”¹²

Regrettably, within a week the talks between Talisman and the NGOs were broken off. The NGOs maintained that the company was unwilling to recognize that human rights abuses were associated with its operations, the company maintaining that the NGOs wanted monitoring across southern Sudan whereas the company preferred to monitor only in its area of operations, where a practical plan could be implemented.

The NGOs carried on protesting the Talisman presence in Sudan, the government of Canada carried on implementing the policy of cautious engagement Minister Axworthy announced on February 14 2000, though work on revisiting the SEMA seems to have quickly petered out, and the company carried on making money in Sudan, though it did soon thereafter start to listen to prospective buyers.

At the end of October 2002, Talisman announced the news many people had been waiting for and some had been expecting. Its Sudan stake in GNPOC was being sold, to the Indian National Oil and Gas Corporation, OVL. The price was right: \$1.2 billion. A little over six years before, Talisman had bought in for \$277 million.

“Controversial journey ends” was how the Calgary Herald put it. And perhaps the journey is not over yet.

On November 11 2002, Michael Jantzi Research Associates Inc. issued an alert for investors with human rights and/or environmental screens. The alert recommended that such investors avoid Talisman because it has, shades of the NGO reasoning behind the breakdown of the monitoring talks, refused to acknowledge “its role in Sudan’s human rights abuses”, and had not taken “any meaningful action to redress these human rights abuse.”

¹² Ibid

The company, according to the alert, “has been named a co-defendant in a lawsuit alleging collaboration in ethnic cleansing against the civilian population” and its record “in Sudan raises concerns about the company’s willingness to deal with human rights issues at its operations in Colombia.”

But Talisman is in the business of journeys, of exploration and even, one might now say, of discovery, and while already commentators are musing about whether the Nilotic peoples of southern Sudan will be safer or better-off without Talisman in GNPOC, it is also appropriate to keep in mind the commitment to ethics in business which Jim Buckee stressed in his dealings with Minister Axworthy before the Assessment Mission went to Sudan.

This commitment was built on as the company responded to the Report of the Assessment Mission and the protest campaign which continued after its delivery and took shape as a major focus on corporate social responsibility. One meant to relate not only to Sudan but wherever Talisman journeyed in its quest for oil, from Colombia to Canada.

Private Power: Talisman and CSR

On March 10 1999, Talisman CEO Dr. Jim Buckee signed his Letter to Shareholders for inclusion in the 1998 Annual Report of the company. In it he said that a few words were in order “concerning our participation in development of Sudan’s petroleum resources.” He informed the shareholders that management was convinced that this was “a sound business investment and our involvement could be carried out in a responsible, ethical manner.”

This appears to be the only mention of ethics and responsibility in the 1998 Annual Report, which covered in detail the company’s involvement in various operations, from Canada to Indonesia, not to mention the North Sea.

On February 14 2000, Jim Buckee again communicated with Shareholders, through the medium of a Conference Call dealing with the release of the Assessment Mission report and Minister Axworthy's reaction to it. Among other things, he stressed that "As a corporation, our responsibility is to conduct our own activities ethically and we are fully committed to that responsibility....Within our sphere of influence and operations, we strive to maintain high standards of ethical behaviour—as we always have. We also hope to influence events by example..."

Within months of that conference call, Talisman had acted to bolster its engagement with Corporate Social Responsibility. It issued its working definition of CSR when it said that "At Talisman, corporate social responsibility means conducting activities in an economically, socially and environmentally responsible manner. It also includes working with stakeholder groups to identify constructive solutions to shared problems. We believe that our operations bring direct benefits to the communities in which we work, including the creation of jobs, expansion of local infrastructure and support of community projects that create opportunities for a better future. As a responsible business we also believe it is our duty to observe and promote ethical business practices, and advocate respect and tolerance by and for all people."

Public pressures were mounting, not abating, when Talisman held its May 2000 Annual Meeting in the aftermath of the release of the Assessment Mission Report. The document was referenced in a Shareholders' proposal, one of the spokesmen for which told the AGM that "The shares of Talisman Energy have got the colour of blood and the stench of death on them."¹³ The report was also drawn on by Amnesty International in London, which released its statement, "Sudan- The Human Price of Oil", on the very day of the Talisman meeting.

Amnesty International stated that while it took no position on sanctions or disinvestment, it considered that companies, including Talisman, had a responsibility to contribute to the promotion and protection of human rights, wherever they may operate.

¹³ *The Globe and Mail*, "Heat grows on Talisman over Sudan", May 4 2000

The human rights organization had, it should be mentioned, been working for some months alongside British and U.S. corporations and other civil society groups on guidelines for companies operating in “conflict-ridden areas” an exercise directly instigated as a result of concern about the human price of Sudanese oil.

Talisman, for its part, denied exacerbating the conflict in Sudan, and CEO Jim Buckee even said the company was trying to get to the same point as Amnesty International. And would do so through quietly exerting influence and implementing corporate social responsibility.

The company appointed a Senior Advisor, Corporate Responsibility, introduced a “Newsletter About Corporate Social Responsibility”, and set in motion the generation of specific annual CSR reports based in part on outside expertise and validation.

The first issue of the Newsletter, which was given the title of HOPE, Helping Others Participate through Engagement, carried an introduction by Jim Buckee and included an interview with author of the Assessment Mission Report. It also carried an extract from the International Code of Ethics for Canadian Business which Talisman signed, after initially refusing to do so, during the time the Assessment Mission was in Sudan.

The second issue appeared soon after, and it carried a report that since that signing, Talisman had taken a number of steps to ensure compliance with the code.

Senior head office personnel had been dispatched from Calgary to all international office, including those in Indonesia and Sudan to review the code with local staff, all of whom were given training on the code and its performance requirements.

Agreement had been reached with a university for it to help Talisman draft procedures for implementing and auditing compliance with the code, and discussions had been initiated with a number of outsiders on the practical issues associated with this challenge.

Meanwhile, Talisman's Board approved the company's first Corporate Social Responsibility Report, for the year 2000, which the Senior Advisor on CSR described as an attempt to "document our corporate social responsibility efforts thoroughly and reference internationally accepted human rights standards."¹⁴

A major CSR thrust by Talisman in the aftermath of the Assessment Mission Report was to initiate, as an element of its commitment to annual reporting on CSR, the involvement of PricewaterhouseCoopers (PWC). This took two forms.

On the one hand, the International Survey Unit of PWC, based in Belfast, United Kingdom, interviewed stakeholders to obtain feedback on the company's 2000 CSR report. In the summer of 2001, meetings were held with 15 stakeholder groups, in Canada, the U.S. and Sudan. According to the company, comments on Talisman's performance ranged from extremely positive to extremely negative.¹⁵

Clearly, many competing viewpoints were expressed, and the company committed itself to focus on improving its CSR reporting by providing additional information on both human rights concerns and the verification process instituted by PWC. It was realized that it would be difficult to subject some opinions to any test of verifiability, but the desire was expressed to explore just how the next CSR report could be both more independent and more reflective of the global nature of Talisman's operations.

It was also decided to sharpen a policy framework for Stakeholder Consultations, so as to ensure regular consultations.¹⁶

Here it is interesting to note that "many participants did not have a lot of previous experience with consultations and could therefore not offer advice on what they had found effective."¹⁷

¹⁴ Letter from R. Manhas, Senior Advisor, Corporate Responsibility, Talisman April 10 2001

¹⁵ Letter from R. Manhas, Senior Advisor, Corporate Responsibility, Talisman October 4 2001

¹⁶ Ibid

¹⁷ PWC International Survey Unit, *Formal Stakeholder Engagement: Presentation of Key Findings*, Belfast 2001

Some noted that assistance in this regard could be drawn from the Canadian and British governments, which were held to have guidelines on consultation which could be useful.

Nonetheless, the input enabled the Survey Unit to postulate that stakeholders believed that a socially responsible company uses accepted standards, has effective independent monitoring, has a culture of social responsibility throughout the company, and is transparent.

The second aspect of PWC engagement has already been alluded to: verification of the claims made by Talisman in its CSR reporting. This was another issue raised during the Survey Unit's consultations with "stakeholders". It appears that a number of those surveyed felt that, while PWC added credibility to the company's CSR reporting, it would have been better had someone other than Talisman had actually hired PWC to undertake the verification. In addition, concern was raised that the terms of reference for this verification exercise should have been developed outside the company, not by it.

The Talisman CSR Report for 2001 carries an independent opinion, expressed by an executive with a leading risk management company, which observes that "Verifiers must be both independent and internationally respected..."¹⁸ Otherwise, company social policies, which must be subject to external verification, will lack credibility.

PWC have described their approach to verification as being one of "looking at a number of different pieces of evidence to see if together they support the Report text".¹⁹ In a formal letter to the Board of Directors of Talisman, this was expanded on to indicate that PWC had been asked to audit statements in the CSR Report for 2001 relating to policies and processes within Talisman and to both the Sudan operations and CSR activities carried out in Colombia.

¹⁸ John Bray, Control Risks Group, "Business and Conflict: Facing up to the Ethical Dilemmas" *Talisman CSR Report 2001*

¹⁹ Talisman, *CSR Report 2001*

It was made clear that the CSR report itself was prepared by Talisman management, with PWC being responsible only to that management for reporting on statements in the report on terms agreed with management.²⁰

It is interesting to note that in his April 2001 letter describing Talisman's first CSR Report for its Sudan operations, the Senior Advisor, Reg Manhas, also advised that the company was "in the process of refining existing risk analysis and business planning processes to develop appropriate corporate responsibility responses to new business opportunities and established operations."²¹

It is perhaps too soon to tell if the company has taken heed, in these planning processes, of the need for independent external verification stressed in its own publication by a respected authority on risk analysis.

Let a Thousand Flowers Bloom

Talisman is, of course, in the business of searching not just for oil but for "new business opportunities", and to this end, it appears to keep under review its "established operations." These constitute assets which can be sold to add to the company's bottom-line, free resources to enable new assets to be acquired, and protect the overall standing of the company in a competitive world where many players search for that commodity sometimes known as black gold, oil.

One commodity which does not seem to be in short supply are benchmarks, nowadays usually in the form of "codes" or "guidelines" for measuring social responsibility performance. Including the efforts of the World Bank or the U.N.'s Global Compact, there at least a dozen multilateral instruments, not to mention the various national codes.

²⁰ PricewaterhouseCoopers, London, *Letter to Talisman Board of Directors*, 7 March 2002

²¹ Op. Cit

And, of course, numbers of corporate codes. This, according to a major union organization “may indicate some sense of corporate responsibility or may simply result from brand name vulnerability to public pressure.”²²

Being skeptical is not restricted to union bodies. A major department of the Canadian government has said that “while codes are voluntary—firms are not legislatively required to develop or adhere to them—the term ‘voluntary’ is something of a misnomer. Voluntary codes are usually a response to the real or perceived threat of a new law, regulation or trade sanctions, competitive pressures or opportunities, or consumer and other market or public pressures...Once the code is in place, the initial pressure that led to its creation may dissipate, which could cause compliance among adherents to taper off.”²³

The same might be said of the codes which go beyond the concerns of any one company. A look at the non-corporate codes suggests that these, at least, are meant not only to allow for measurement of past behaviours but also encourage future performance, behaviours in-line with the requirements of the code or set of guidelines.

In announcing the Canadian government’s reaction to the 2000 Report of the Assessment Mission to Sudan, Foreign Affairs Minister Lloyd Axworthy emphasized that his department would start a major discussion and consultation with Canadian companies to further strengthen codes of conduct and other means that can be established for behaviour of companies overseas.

The Minister’s original involvement with codes was, of course, his policy of encouraging the elaboration of the “International Code of Ethics for International Business”, which he later strongly encouraged Talisman Energy to subscribe to. He “requested” the company to “effectively implement the Code” in its business dealings in Sudan.²⁴

²² International Confederation of Free Trade Unions, *A Trade Union Guide to Globalization*, Brussels, 2001

²³ Industry Canada, *Voluntary Codes: A Guide for their Development and Use*, Ottawa, March 1998

²⁴ DFAIT Press Release, No. 232, October 26 1999

It was, in fact, another Canadian oil company, CanOxy, now re-named as Nexen, which made the substantial contribution of effort which led to the establishment of the Code in the first place. The Code is not a specific set of obligations, rather a framework of operating principles. It states that signatories are “committed to implementation” through the development, at company level, of operational codes and practices that are consistent with the vision, beliefs, values and principles” enshrined in the Code. These are themselves set out in detail, and speak of ethical leadership, transparency, and multi-stakeholder processes.

But no-where does the Code make a clear reference to a specific human rights or universal labour standard, and basically only mentions such standards in the context of workplace concerns, though it does say signatories will support and promote human rights within their spheres of influence and not be complicit in human rights abuses.

One international initiative, though not a code itself, in which a number of Canadian companies have shown interest is the UN’s Global Compact. This was launched at the World Economic Forum in January 1999, when Secretary General Kofi Annan asked business to be socially responsible and demonstrate good global citizenship wherever it operated. He conceived the Compact as an enabling forum, providing business an opportunity to engage in constructive dialogue with the UN and civil society on human rights, the environment, and sustainable development.

Some of the world’s leading companies are joining the Compact, which is now anxious to move towards the capacity to identify and model Best Practices. It began with the elaboration of nine principles grouped under three headings, human rights, labour, and the environment. Its officials believe that companies should be able to build these into their own business activities, and then proceed to joint projects. This would foster greater concern among companies for their social and environmental responsibilities, and help bring inclusiveness and social legitimacy to globalization, or so it is believed. Meanwhile, participating companies have to post on the Global Compact website at least once a year the concrete steps they have taken to give effect to any of the nine principles.

Though the sentiments are noble, how far corporate leaders believe in them remains to be demonstrated, and the real success of the Global Compact will depend on how its corporate participants make use of the “convening platform” which it offers. Some will quite possibly have “signed on” only because of the call to do so from UN Secretary General Kofi Annan.

A few months after he had addressed the business community, the Secretary General met with a delegation of international trade union leaders. The discussion stressed the need for rules for a world economy being transformed by globalization. The union leaders and the Secretary General issued a joint statement which underscored their agreement that the Global Compact should contribute to this process of rule-building by helping to build social partnerships of business and labour, which will help make globalization more responsive to social and environmental needs.

The union delegation was headed by the General Secretary of the International Confederation of Free Trade Unions (ICFTU). This organization brings together most national trade union centers around the world, including Canada’s principal one, the Canadian Labour Congress (CLC) and the Quebec-based Confederation of National Trade Unions (CSN).

The ICFTU General Secretary is one of two labour leaders participating in the Global Compact’s Advisory Council. The other one is the General Secretary of the International Federation of Chemical, Energy, Mine, and General Workers Unions (ICEM).

The ICEM represents more than 20 million workers in 108 countries. It has a global reach, and one of its main activities is the negotiation and monitoring of global agreements with multinational enterprises. Another is representing these workers’ interests within the UN, its agencies and other intergovernmental bodies. It is committed to the global application of the best possible standards, especially within multinational enterprises. Little wonder that it is centrally involved in the Global Compact.

The Advisory Council on which the two labour leaders sit alongside corporate and civil society counterparts meets twice a year, but it appears likely to grow in importance.

It seems that the Advisory Council has been able to make solid progress towards agreement on a few developments which, if implemented, could be very significant for the impact of the Global Compact.

One of these relates to the initial act of embracing the Compact; as it stands, the CEO of a company must indicate in a letter to the UN that the company wishes to be listed as willing to accept the Compact and the limited obligations which flow from it. It appears that the Advisory Council has been discussing a more complete “signing on”, which reflects the growing importance of corporate governance. This is the requirement that a company’s Board of Directors must pass a resolution that the company will be part of the Compact.

A second development which has been under discussion is a requirement that the Annual Report of a participating company must indicate how the company is meeting the 9 principles in its corporate activities.

The final development worth noting is one which flows naturally from the now current practice that a participating company must be listed on the Global Compact website. It seems likely that the Advisory Council will advise the UN that should companies consistently fail to honour the nine principles, they should be de-listed.

These changes will not convert the Global Compact into a super code of conduct; it will remain a forum, albeit a more purposeful one, and it will avoid becoming an alternative to strong national laws as regards giving effect to the nine principles. But they will likely increase the pressures on companies to behave ethically, and on their leaders to show ethical leadership and accountability. In this the union leaders and the UN Secretary General appear to be on the same track.

A different “Code” the Secretary General is associated with is the Global Sullivan Principles. In the 1970s, the Reverend Leon Sullivan elaborated a set of principles which he promoted to serve as a guide for U.S. companies doing business with apartheid South Africa.

At the time, the EU and Canada were elaborating code for their companies operating in South Africa, an alternative of sorts to a policy of divestment and economic sanctions.

In the 1990s, work began on the development of a set of principles which could both honour Leon Sullivan and contribute to the “socialization” of globalization. Kofi Annan actually announced them in November 1999, when he met with a group of business and government leaders from around the U.S., telling them that if globalization were to become a reality for the poor and disadvantaged, principles such as these would have to be implemented.

Each year, member companies gather to share best practices. It is exhortatory, and useful, but it has no strong relation to specificity and verification.

Social Accountability International (SAI) is more focused on these things. It began life as the Council on Economic Priorities Accreditation Agency (CEPAA), founded in 1997. For many years before that, the CEP itself had been carrying out research on what we now label as CSR.

In the 1990s it responded to the increase in companies that publish their own codes of conduct, and found that many such codes were inconsistent, expensive, and difficult to monitor. There were too many unclear definitions, and too few trained “auditors”. Some also appeared to be insensitive to local laws and customs.

In response, SAI, which assumed the name in 2000, developed what it saw as a standard for workplace CSR, (SA or Social Accountability 8000) and with it a system for the independent verification of company compliance. These draw on established business strategies for ensuring quality control (such as those used for ISO 9000) and reflect input from human rights experts.

SAI believes that major corporations are becoming aware that their reputation for social accountability is a competitive asset, and SAI wants its standard, SA8000, to be seen as both a viable solution for improving workplace conditions and a sound business decision.

It accredits “sub-contractors” to carry out SA8000 certification, and maintains oversight of these delivery mechanisms.

The Organization for Economic Co-operation and Development (OECD) is now also firmly into the Code industry. Its Guidelines for Multinational Enterprises constitutes a framework of voluntary standards and principles for responsible business conduct. Voluntary, yes, but endorsed by “adhering” governments, among them the Government of Canada. Here it can be noted that more than 50 of the world’s 100 leading economies are, in fact, MNEs, not countries, and according to the 2000 UNCTAD World Investment Report, in 1998, 92 of the 100 largest MNEs were headquartered in the European Union, the U.S., Canada or Japan. Only one was based in a developing country.

The guidelines were first created in 1976, and revised in 2000. They are meant to achieve a number of goals, among them encouraging the positive contribution enterprises can make to sustainable development and building an atmosphere of mutual confidence and predictability between enterprises, labour, governments, and civil society.

They cover general areas of good corporate behaviour, including contributing to sustainable development and respecting human rights, and they cover the sensitive issues of non-discrimination, forced labour, child labour, freedom of association, and collective bargaining, not to mention environmental concerns and transparency itself, the disclosure of reliable and relevant information by multinational enterprises.

It could be said that the guidelines reinforce voluntary initiatives by providing a common frame of reference and a focus for international efforts to encourage corporate social responsibility.

By endorsing these guidelines, Canada and the other “adhering” countries undertook to establish a mechanism whereby they would be promoted and fully understood by interested parties, primarily business and labour plus NGOs.

The mechanism, the National Contact Point, seems to work well in some countries, less so in others. It involves, in Canada, all of the relevant government departments and is responsible not just for promoting awareness of the guidelines but for resolving issues that arise, such as when it is alleged that specific conduct by a Canadian-based multinational enterprise flouts the principles set out in the guidelines.

The procedure has been initiated: the NGO, Oxfam, has raised the reported behaviour of a Canadian company, Ivanhoe Mines, with respect to its copper mine operations in Myanmar.

The intent is that the enterprises will, voluntarily, respect these principles which are, after all, meant to represent good practice for all companies.

Myanmar is one of the countries put under a different but related form of scrutiny by another NGO, the Collaborative for Development Action (CDA). This organization, in part with funding from Canada, has embarked on an ambitious project, the Corporate Engagement Project (CEP). The aim is to use field-based analysis and a comprehensive examination of company operations to then assist companies in developing practical management tools for operating in “conflict zones”.

The ultimate goal is to foster the emergence of a just and peaceful working environment based on a constructive relationship between the company and its local stakeholders. In Myanmar, such a relationship seems particularly difficult to achieve, but its absence might do a lot to explain why Canada’s Ivanhoe Mines has warranted a report to the National Focal Point for the OECD guidelines and California’s Unocal is facing a class action law suit in the United States.

NGOs and trade unions in Canada believe there is a link between the Ivanhoe joint venture mine and mass conscription of forced labour.

Amnesty International has reported that “About 1,500 political prisoners are still being held, while political killings and forced labour continue to be reported in ethnic minority areas.”

The International Labour Organization (ILO) investigated the claims of forced labour in Myanmar, which has outlawed trade unions. It found practices there contrary to ILO Conventions 29 and 50, and has requested that member states encourage private enterprises to withdraw investments and operations.

The company has claimed that there is no evidence that its investment in the copper project, as partner with the government-owned Mining Enterprise No. 1, is contributing to the alleged use of forced or involuntary labour by anybody anywhere in Myanmar.

It also claims that its Monywa project sustains 500 direct employees and their families and that the project does not receive electricity from the Thazi hydroelectric plant investigated by the ILO. While the existing mine may not receive electricity from the Thazi plant, NGOs have pointed out that the company's documents say that a new Ivanhoe mine project under development at Monywa does receive electricity from it.

Ivanhoe says that the joint venture did not require, and does not use, a railway line that is more than 20 kilometres away from the existing mine. Nevertheless, the ILO says that 921,753 people were forced to build the railway connecting Monywa to the town of Pakokku. It does appear that the rail line built with forced labour is a key supply line to the town, which in turn helps supply the mine and is part of the extended infrastructure in the region that enables the mine to operate.

The OECD guidelines depend on voluntarism, but it needs to be a voluntarism accompanied by transparency.

Voluntarism has its place, but it would be a mistake to assume that it will always be held to be sufficient in the thinking of "adhering" governments, let alone the NGO community. And this has implications for just how corporate social responsibility will be re-engineered in the years ahead.

CSR has been described in a draft policy paper written for the European Commission as companies deciding voluntarily to go beyond what is required of them by law in contributing to such public goods as labour standards, a safer environment, the reduction of poverty, and can be seen as reflecting “the triumph of self-regulation over external regulation”.²⁵

The extent to which this has validity is determined by the ability of those who would impose or advocate external regulation to make informed choices concerning the risks and benefits involved in eschewing it in favour of reliance on internal or self regulation. Such choices really depend on transparency.

This is advocated by one major extractive company, Shell, which has both elaborated its own set of “business principles” and engaged with a number of the multilateral instruments mentioned above. Shell manages a broad engagement with its external environment, and is not reluctant to embrace, even promote, different codes and principles.

It does, however, regard these as “benchmarks” and “points of reference” which add to the value of its own, internal, code of practice.

Its executives are quick to stress that no external offering or development will find its way into influencing the way Shell actually works unless it can be translated into an element of the company’s operational processes which are meant to guide its managers. And these are invariably people with heavy, and time consuming, responsibilities.

To assist them, Shell has produced a comprehensive guide for managers on human rights.²⁶

It makes clear to managers that the guide is not to be read as a check list of what business should and should not do, as the issues are too complex.

²⁵ Kirstine Drew, *Lessons for CSR-Draft Only*, Development Studies Association Conference, London November 2002

²⁶ Shell International Petroleum Company, “Business and Human Rights: A management Primer”, 1998

It describes the practical challenge for Shell as being to support international human rights standards and understand how they can be translated into operational practices where applicable. It is stressed that the General Business Principles which govern all Shell businesses make explicit commitment of support to fundamental human rights and managers are expected to honour this commitment as they make their way in a world where many human rights abuses occur. Shell's engagement with multiple codes and fora relating to CSR does not remove from its managers the obligation to meeting the responsibilities set out in the GBPs.

Seeing the Wood, ignoring the Trees

It is unlikely that the company executive who remarked on how his company felt there was merit in the appearance of multiple fora wherein companies and stakeholders could discuss corporate social responsibility was in favour of deliberately spreading accountability thin, or given to oft quoting the aphorisms of Marxist leaders such as Mao Tse Tung.

A British politician once quoted a colleague, Morgan Phillips, as saying that "The Labour Party owes more to Methodism than to Marxism".²⁷ Certainly the pragmatic approach to politics which that party has usually embraced is in keeping with a tradition of common sense in both language and action.

This is a tradition in which there remains pride of place for cautionary aphorisms such as not being able to see the Wood for the Trees; and perhaps when the trees are, in fact, fig trees, we may be well-advised to a certain wariness, that the leaves might hide more than the blooming of flowers can reveal.

There is a danger that so much energy now going into the creation of the new might also detract from giving effect to the old.

²⁷ James Callaghan, *Time and Chance*, 1987

It is not uncommon to hear assertions, especially at academic events, that what the world needs is a “normative framework”. What the world might actually need more is respect for the normative frameworks and instruments which we have painstakingly built over the decades.

An illustration is provided by the constant struggle for implementation, rather than violation, of the Conventions of the International Labour Organization, (ILO), now a specialized agency of the United Nations but one with a venerable and proud record: it was created as a critical element of the Peace of Versailles in 1919, and on its fiftieth anniversary in 1969 was awarded the Nobel Peace Prize.

First with the changing emphasis of the OECD, towards more interest in labour standards as a factor in competitiveness, and then with the appearance of what became the World Trade Organization, the ILO has tended to be relegated to playing an “advisory” role rather than acting firmly, and authoritatively, as the keeper of the Standards to which all men, women, and children have a right and to which all governments, and companies, should aspire. If they are to be ethical in their conduct.

But at least the standard-setting function of the ILO is backed by a sound procedure for monitoring compliance, with due process accorded to those under investigation and a solid body of jurisprudence, as befits an important element of international law.

Regrettably, this is not at all the case with another important normative instrument, the Supplementary Anti-Slavery Convention of 1957.

It deals with what some refer to as “traditional Slavery” which today exists only in very hidden places, but it also deals with what some commentators are beginning to refer to as “Contemporary Slavery”, slavery-like practices such as Bonded labour for example.

This is at a time when critics of Globalization are pointing more and more to practices such as Bonded labour, the worst forms of child labour, and sex-trade trafficking as social consequences of unchecked Globalization, in the face of which, calls for more Norms are raised louder than ever.

What if more effort were placed in trying to ensure implementation of the norms we now have, which cover all of the evils now being heaped on Globalization? Would this make it more unlikely that corporations would embrace ethical conduct as appropriate and beneficial?

In a speech to the World Economic Forum, the Secretary General of Amnesty International observed that “In the long term, human rights are fundamental for stable, open societies which businesses need for their operations.”²⁸

Amnesty International has been participating in the Davos meetings for four years, but it has been actively engaged with companies in the extractive industries, and the governments they work with, for much longer.

It has seen, close-up, the reality that companies like Shell frequently operate where stable and open societies have yet to be achieved.

It is worth noting that Shell, in setting out a listing of “external benchmarks for reference”,²⁹ lists a number of ILO Conventions, which Shell says have particular relevance for business and are considered to be part of international law.³⁰

Law and Ethics are not the same, but extractive industries are more and more coming to feel the weight of law when outsiders believe that the company concerned is not living up to their understanding of the “ethical requirement”

²⁸ Irene Khan, January 23 2003

²⁹ Shell, *Human Rights Dilemmas-A training supplement*, 2002

³⁰ Shell. *Business and Human Rights-A Management Primer*, 1998

Often it appears that reaching for the law is the way in which such outsiders express the conviction that companies must not only change unacceptable behaviours but must be held accountable for not having made such changes earlier.

The international relations community is now paying greater attention to the relationship between a State which refuses to meet its responsibility to protect its people and corporations which may be enabling it to do so.

Such relationships have recently been the subject of legal proceedings in the U.S., where the Alien Torts Claims Act, a piece of post-Revolutionary legislation, is being used to win punitive damages from corporations which have partnered with foreign State-power to impose harm on the citizens of the State in question.

A year and a half after the Canadian Assessment Mission traveled to Sudan, displacements were still taking place. According to the *Economist*, in late July 2002, government militias drove 100,000 civilians from oil-rich Western Upper Nile.³¹

In response to this situation, the international community has, through Operation Lifeline Sudan, spent hundreds of millions of dollars on relief and humanitarian assistance for the millions of war-affected people; regional and western governments have worked at bringing the warring parties to a negotiation process and, hopefully, an end to war.

In addition, lawyers in the U.S. have taken Talisman Energy Inc., and the Republic of Sudan, to court, under the Alien Torts Claims Act. They have done this on behalf of plaintiffs from southern Sudan living now in the U.S. and those still enduring deprivation in their homeland.

³¹ *Economist, A merciless battle for Sudan's oil*, London: August 31 2002

The Statement of Claim lodged with the court by the lawyers for the plaintiffs alleges that the defendants' actions 'violate or aid and abet the violation of the law of nations and customary international law relating to torture, slavery, the treatment of civilians during armed conflicts and the treatment of ethnic and religious minorities and their property'.³²

U.S. torts law is most often in the news when courts in that country impose punitive damages, such as the \$4 billion imposed by a Los Angeles jury on the Phillip Morris tobacco company on behalf of a smoker with cancer.

It has been said that the federal statute, the Alien Torts Claims Act, which relates to events outside the U.S., is particularly advantageous to plaintiffs.³³ Certainly plaintiffs enjoy the prospect of punitive damages being imposed on the defendants against whom they have taken legal action, but these punitive damages are meant to respond to situations of malice or gross negligence, when the plaintiffs have been hurt in ways that show the defendants held them in disdain or contempt.

In February 2002, lawyers representing Sudanese plaintiffs lodged a class action suit, under the same Alien Torts Claims Act, against a Canadian oil company operating in Sudan, Talisman Energy Inc.. They lodged the suit in the United States District Court for the Southern District of New York.

The plaintiffs, including the Presbyterian Church in Sudan, alleged that the defendants, Talisman and the Republic of Sudan, 'collaborated in a joint strategy to deploy military forces in a brutal ethnic cleansing campaign against a civilian population based on their ethnicity and/or religion for the purposes of enhancing the defendants' ability to explore and extract oil from areas of southern Sudan.'³⁴

³² Civil Action No. 01 CV 9882 (AGS), *Amended Class Action Complaint*, New York, February 25 2002

³³ Anthony J. Sebok, "Forum Non Conveniens", *Findlaw*, Atlanta, GA., CNN. 2000

³⁴ Civil Action No. 01 CV 9882 (AGS) *Amended Class Action Complaint*, New York, February 25 2002

The lawyers engaged by Talisman lodged with the court a motion for dismissal, citing the doctrine of *forum non conveniens*. At the time of writing, the judge, Allen G. Schwartz, has not decided on the fate of this motion.

But he has decided on a second motion submitted to him by Talisman's lawyers. On August 8 2002, they wrote to Judge Schwartz, asking him to request that the U.S. Department of State indicate whether, as they felt, his adjudication of the case would negatively impact U.S. foreign policy.

The lawyers drew his attention to 'unprecedented progress' in the search for an end to the civil war in Sudan, and attributed this largely to U.S. foreign policy. The implication was that a legal determination in a U.S. court as to whether the defendants had behaved, or were behaving, as alleged, would interfere with a U.S. foreign policy interest, achieving peace in Sudan.

Their argument was that "Adjudication of these issues by the Court would interfere with U.S. foreign policy in relation to Sudan and, in particular, with efforts by the Executive Branch to help achieve a peace agreement between the various parties to the internal conflict in Sudan"³⁵

The Talisman lawyers drew the judge's attention to a case filed the previous year, Doe et al. v. Exxon Mobil Corporation. The action had been filed on behalf of Indonesian citizens alleging that Exxon Mobil was responsible for human rights violations they suffered at the hands of an Indonesian army unit engaged to provide security at the company's project in Aceh, Indonesia.

Judge Louis F. Oberdorfer, presiding, had written to the Legal Adviser of the Department of State, inquiring whether the Department of State had an opinion as to 'whether adjudication of this case at this time would impact adversely on interests of the United states, and, if so, the nature and significance of that impact.'³⁶

³⁵ Clifford Chance Rogers and Wells, *Letter to Judge Allen G. Schwartz*, New York, August 8 2002

³⁶ Louis F. Oberdorfer, *Letter to The Honorable William H. Taft, IV*, Washington, May 10 2002

The Legal Adviser replied to Judge Oberdorfer at length, making it clear that the Department of State believed “that adjudication of this lawsuit at this time would in fact risk a potentially serious adverse impact on significant interests of the United States, including interests related directly to the on-going struggle against international terrorism.”³⁷

Here the Legal Adviser, William Taft, was concerned to maintain U.S. Indonesian co-operation, particularly in the security sector itself. He not only cited the U.S. interest in prosecuting the war against terrorism but stressed that adjudication of the case in a U.S. court would be seen by Indonesia as an intrusion while it was trying to maintain national cohesion, in which the U.S. has an interest. This could impair co-operation between the world’s “largest Muslim nation” and the U.S., would discourage foreign investment, weaken economic stability, and prejudice Indonesia against U.S. business.

Judge Oberdorfer took the views of the Department of State to heart, and the case was dismissed. Judge Schwartz, on the other hand, did not agree to seek guidance from the Department of State on the Talisman case and made this clear to the lawyers for the defendants.

The lawyers for the plaintiffs had, needless to say, asked the judge not to seek the views of the United States as to whether the litigation negatively impacts U.S. foreign policy.

The plaintiffs’ lawyers made the point that the Executive Branch is well aware of the litigation and did not need an invitation to make its views known, which it had not done.

The lawyers for the plaintiffs also referred to the on-going war against terrorism, drawing the judge’s attention to news that al Qaeda may have shipped gold to Sudan, news which underscored ‘Sudan’s continued support for the al Qaeda terrorist network and eclipses Talisman’s argument that this litigation could be viewed as antithetical to U.S foreign policy interests.’

³⁷ William H. Taft, *Letter to Louis F. Oberdorfer*, Washington July 29 2002

In this they have not opposed the orthodox view that the major U.S. foreign policy interest in the post-September 11 world is success in the war against terrorism, rather they have sought to show that success in their class action would constitute a victory in this war.

But an earlier, more traditional war, goes on and they also took the opportunity to refer to fresh reports of fighting around the oilfields of Sudan, and reports of major displacement of people,³⁸ evidence that contrary to the claims of Talisman's lawyers, a U.S. brokered peace was not within early reach.

The statement of claim in the Sudan class-action seeks to obtain redress, through punitive damages, for past injuries, acts of maltreatment and enforced displacement, but the case clearly also seeks to stop further hurt. In the final numbered paragraph of the statement, it is alleged that the plaintiffs, and the class represented, have been injured by the conduct of the defendants, and that, absent a court order, they will continue to suffer such injuries "to their irreparable harm."³⁹ It is not all about the past, though lessons from it can determine future behaviours, and it is an action which speaks to the 'responsibility to protect'

Meanwhile, the same lawyers representing plaintiffs against Talisman have lodged a suit, also under the ATCA, against Royal Dutch Shell. The case has been filed with the U.S. District Court for the Southern District of New York, on behalf of "Plaintiffs, victims of human rights violations, who were residents of Ogoniland, Rivers State, Nigeria, during any period between October 1 1990 and May 28 1999, individually and on behalf of those similarly situated". The Class Action Complaint alleges that "Defendants acted under governmental authority in a joint strategy to deploy military forces in a violent campaign to depopulate areas for oil exploration and extraction, terrorize the civilian population for the purposes of intimidating Plaintiffs and the Class, discourage peaceful protests against the Defendants' oil exploration and extraction activities, and allow such activities to continue in Ogoniland."⁴⁰

³⁸ Carey R. D'Avino, *Letters to Allen G. Schwartz*, Philadelphia, August 21 and September 3 2002

³⁹ Civil Action, *Count 1-International Law paragraph 76*

⁴⁰ Civil Action No. 02 CV 7618, USDC SDNY, Sep 20 2002

The case is clearly just at its beginning stages, and little can be said about it. However, the Plaintiffs allege serious collusion between the Nigerian authorities and Shell as to how to proceed in Ogoniland, and there is a growing body of scholarship on the different forms and impacts of relationship between companies and governments.

It is becoming more clearly understood that foreign investors, particularly those working through extractive companies, can exert considerable influence on governments.⁴¹

If the companies do not do the ‘right thing’ in exerting positive influence, it can be asserted, they stand to be complicit in acts committed by the “partner” governments which hurt their peoples, or classes of them.

The Oxford English Dictionary defines complicity as “partnership in evil action”.

The real threat of punitive damages being imposed is one lever towards such companies neither acquiescing when governments use their resources, their name, or their mere presence to enable or justify such hurt, nor actually, knowingly, participating in or enabling such hurt, evil action.

The various court cases now underway may be dismissed, perhaps under the doctrine of *forum non conveniens*, or because a presiding judge feels they may impact negatively on U.S. foreign policy and therefore will not take the case further. This has been seen in a case of ExxonMobil and Indonesia. In another case, concerning Unocal and Myanmar, a decision to stop the case has been overturned by an appeal court.

Also, the various cases might go forward and end in victory for the corporate defendants, or may result in settlements for the plaintiffs large enough to prompt second thoughts about the value of doing business in ways or with partners that can lead to suits under the Alien Torts Claims Act.

⁴¹ Mats Berdal and David Malone, *Greed and Grievance: economic agendas in civil wars*, Boulder: Lynne Rienner, 2000

The lawyers for the plaintiffs, in the Sudan case at least, clearly hope that corporate management, irrespective of sector, will undertake bottom-line assessments of “militarised commerce”, instances where to do business means either to require that armed force be used to protect the business concerns or at least to acquiesce in the use of such force against people in the area of business operations. They hope, furthermore, that the assessments will conclude that enlightened self-interest must dictate forbearance in similar cases.

Sums ranging from \$4 to \$100 billion have been mentioned as possible punitive damages in the various cases lodged under the Alien Torts Act. It is worth noting that in estimating the cost of recent corporate scandals to the U.S. economy, such as the Enron disaster, the Brookings Institution concluded that the cost will be \$35 billion, equivalent to a \$10-a-barrel rise in the price of oil.⁴²

In the world of post-September 11 2001, oil, justice, and the role of the U.S courts interact in ways which need much more study.

Oil is what took Talisman to Sudan, and oil is what kept it there in the face of strong public protest. Oil stands at the heart of another form of intervention directed at the relationship between a State and foreign corporations which partner with it.

A Community of Interests

The Alien Torts Claims Act may have implications for an emerging initiative not based on the courts, but on intergovernmental co-operation and regulation.

⁴² Alan Beattie, *Stock Market Decline*, London: Financial Times, September 4 2002

Primarily in response to the part that oil revenues, particularly those not recorded in transparent national accounts, may have played in fuelling war and internal conflict in developing countries, ‘Publish what you Pay’ has emerged.

This initiative owes much to the energy of the NGO, Global Witness, known for its work on blood diamonds and its tireless campaign to force transparency on oil revenues paid to Angola, and particularly its ruling elite, by the western oil companies operating there. Global Witness has estimated that US\$1 billion in such payments have “gone missing” each year in Angola since 1997.⁴³

“Publish What you Pay” also owes much to the involvement of the financier, George Soros. Between them these apparently disparate intervenors, along with 50 NGOs around the world, hope to build a force for transparency, and thus social as well as financial accountability.

George Soros is very clear about the close connection between the exploitation of natural resources and the prevalence of corrupt and oppressive regimes, and he maintains that corporations involved in extraction industries cannot escape responsibility for what happens in the countries in which they operate. He believes that it is in the enlightened self-interest of such companies to ensure that what they pay is not misappropriated, fostering not development but repression.⁴⁴

The architects of ‘Publish What you Pay’ are not unfamiliar with the corporate world, and have stated that because individual companies may be disadvantaged if they disclose information that others keep hidden, voluntary disclosure is not the way to go. They want to see G8 governments impose a disclosure obligation on the extractive companies.

It has been reported that France would like the issue to be discussed at the G8 Summit to be held in Evian in July 2003.

⁴³ Charlotte Dempsey, *Short warns of oil boycott over African Corruption*, London, The Guardian, Feb. 11 2003

⁴⁴ George Soros, *Transparent corruption: Oil and natural resource companies should make clear how much money is being taken by officials*, London: Financial Times, June 13 2002

It was discussed at a recent meeting, but one dominated by tensions over Iraq, between President Chirac and British Prime Minister Blair. Britain's International Development Minister has linked the campaign to G8 efforts to overcome corruption in Africa.

She has indicated that oil companies should publish payments so that voters in countries like Angola could hold their governments accountable. And she has said her government certainly has not ruled out mandatory disclosure, which she maintains some oil companies would welcome. Finally, she has, in stressing that "powerful transnational corporations are recognizing that their vulnerability lies in their reputation", warned the companies that they could be hit by consumer boycotts if they fail to disclose voluntarily.⁴⁵

It might very well be that the companies and the G8 governments will, in the coming months, fashion some response to the positions outlined by George Soros and Clare Short, and it is not unlikely that in any such exercise, some assessment will have to be made of the possible impact of future class-action suits under the Alien Torts Claims Act.

Similarly with regard to 'voluntary' acts currently instituted or endorsed by the oil and other extractive companies. Some of these are emerging at the level of individual companies or through "trade associations". One example is the International Cocoa Initiative. This brings together major corporate players and civil society stakeholders such as the Global March Against Child Labour, Free the Slaves, and the National Consumer League of the U.S.. The International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco, and Allied workers' Associations (IUF) is strongly supportive.

Its General Secretary is co-chairing the board of the Initiative, alongside a senior executive of the Mars Company, acting on behalf of the industry side, which includes Mars, Nestle, Cadbury, Hersheys and the trade associations.

⁴⁵ Dempsey, Op. Cit

This development is important in a number of respects, including its reference to specific labour standards, its multi-stakeholder ownership of an institutional response, and the fact that not just companies but also their trade associations are involved.

It could be usefully observed that CSR mechanisms, from Codes to Compacts, too rarely involve the trade associations. This is a shortcoming, as the associations have cross-fertilization to offer, could provide “Best Practice” information, and should be encouraged to provide a strengthening for as much transparency as can be committed by the oft-competing member companies.

This is essential to responsible, sustainable, business development.

When the Initiative was established in Geneva in July 2002, the IUF General Secretary observed that it represents a good faith effort by industry, in co-operation with the IUF and others, to address, in a responsible, long-term and practical manner the unacceptable use of child-labour and related issues in cocoa-growing.”⁴⁶

The adoption of the Charter of the International Cocoa Initiative as a multi-stakeholder institution was, needless to say, preceded by much serious talk and negotiation.

One initial step was taken in September 2001, when the Chocolate Manufacturers Association and the World Cocoa Foundation signed a Protocol for the growing and processing of cocoa beans and their derivative products “in a manner that complies with ILO Convention 182 concerning the prohibition and immediate action for the elimination of the worst forms of child labour.”

The Protocol set out its guiding principles, and stated clearly that Convention 182 was specifically incorporated. It made clear the industry’s conviction that achieving the objective of compliance was possible only through partnership among the stakeholders, each having important responsibilities, be they companies, governments, unions or consumers.

⁴⁶ Ron Oswald, *Launch of the International Cocoa Initiative—working towards responsible labour standards for cocoa growing*, IUF Geneva July 2002

And it was asserted that the stakeholders had to be involved in problem-solving and fashioning long-term solutions according to an action plan. This plan should be developed by a multi-stakeholder infrastructure, including but not dependent on the industry, and the ILO should have an active role in “assessing, monitoring, reporting on, and remedying the worst forms of child labour in the growing and processing of cocoa beans and their derivative products.”

Two months later, an impressive grouping of stakeholders, including the Confectionary Manufacturers Association of Canada, met in Geneva to fashion and issue a joint statement that supported the framework laid out in the Protocol and committed the signatories to the establishment of a joint foundation to oversee and sustain efforts to eliminate these worst forms of child labour. The signatories welcomed the commitment by industry to provide primary financial support for the foundation.

No ethical approach to extraction can ignore child labour or violate international labour standards. It is necessary to ask if corporate efforts, where partnership and co-operation matter, will be negatively impacted by the growing recourse to redress through the class action suits described above? And if so, will this itself matter if the legal approach turns out to have the power to change behaviours?

In an ideal world, pressures would not be needed, and in the case of many extractive corporations, they are not: internal and clear-headed commitments are more and more being made to compliance, and compliance to both the law and the distillation of socially-responsible corporate values, ethics it could be said, articulated by the corporation itself and built into its management processes.

In the real world, there is probably room for a variety of external pressures, both punitive ones and co-operative ones, and it is not hard to see that in the future, more “campaigners” will choose one way or another, as they do now, but also keep more in touch with, and not be dismissive of, counterparts involved in the “other” way.

In fact, a judicious blend of pressures, strategically applied, might be something we see more of not too far from now. But to state this comes dangerously close to leaving in place the impression that it is, indeed, only the threat of “damages” which can move a corporation towards ethics, and this is quite possibly too firm a conclusion.

Take the chocolate industry, for example. When the world heard about the practice of trafficking in West Africa to provide child labour for cocoa farms, particularly in Cote D’Ivoire, the chocolate manufacturers were quick to want to ensure that whatever could be known about the practices would be known, and acted on. The ICI is a direct result, just as much as it is a result of the IUF exploiting strongly the opportunity provided by the expose, to advance the goals its members have set for it, including, it should be said, its member organization in Cote D’Ivoire.

But perhaps it could be said that the manufacturers could have been well aware of what was going on, if they had wished to be. In the case of Talisman, the Report of the Assessment Mission quoted a former UN Human Rights Rapporteur for Sudan, who said that if the oil companies did not know what was going on, they were not looking over the fences of their compounds.

The Class Action Complaint against Shell alleges that “Defendants knew, should have known, or recklessly disregarded that the consequences of their collaboration and cooperation with the Nigerian military would include the violent acts that occurred. But they were willing to aid, participate in and facilitate those acts in order to profit from Ogoniland’s proven oil and gas reserves.”⁴⁷

Rumour and allegation are commonplace, which is not to say they are always untrue or invariable false. Concrete knowledge is often not easy to come by; it has to be worked for, and this demands commitment. It should also command a commitment to credibility and reliability. Otherwise “partnerships” will never displace “contest” and the co-operation necessary for sustainable development will eventually crumble under the weight of particular interests.

⁴⁷ Civil Action No. 02 CV 7618

Any of the initiatives geared to company and community co-operation, efforts either meant to head-off a move to the courts or to obviate any need for one, or to reflect an awareness that sustainability does require co-operation rather than contest, must be visited with commitment on the part of the non-company actors. They must arm themselves with up-to-date knowledge just as much as the companies must do.

Otherwise, they will be unable to act as any kind of “regulator”, and could risk through laxity being accused by others of being at least willing to act as a source of bestowed good standing, once known as a whitewash, now sometimes described as a greenwash, with the reputation and standing of the company in question benefiting from the cleaning involved, the strain removal. Such cannot be the objective of the non-company actors hoping to maintain or acquire a good reputation for themselves. Their “ethical ambition” has to be more real than that.

Similarly with respect to the companies themselves. In order to be “ethical”, extractive companies must be informed about the likely consequences of their actions or their deliberate inactivity, and they must incorporate this knowledge into their decision-making. They must want to be ethical and this cannot be simply assumed or left to chance; the corporation must have, and adhere to, an “Ethical Ambition”.

This is actually the title of a book by the human rights campaigner, Richard Bell.⁴⁸ He has argued that it is possible, and necessary, to maintain integrity while seeking success, in business and any endeavour, even though being “good” may run counter to a modern understanding of a successful life as entailing a large salary, a grand title, and a larger airline seat.

It is at least arguable that many extractive CEOs want to maintain their integrity and be ethical in their business operations but in addition to the temptations listed by Richard Bell, they often have to conduct these operations in an environment where security is not a given, not the kind of security that relates to stock options, pension benefits or tenure but the kind of security that involves armed attack and violent response.

⁴⁸ Richard Bell, *Ethical Ambition: Living a Life of Meaning and Worth*, Bloomsbury, London 2002

The Security Imperative

The fact is that extraction often requires security, beyond that evidenced in stable countries characterized by the rule of law, displaying an order which protects companies and communities, corporate leaders and common citizens.

The class actions underway in the United States suggest that it is this requirement, the why and how of its being met, that rests at the very heart of widespread concern about the “overseas” behaviour of extractive companies.

The Unocal case, relating to that company’s operations in Myanmar, puts this into stark relief.

In 1997, an action was lodged in California against Unocal Inc., a California-based oil company.⁴⁹ The plaintiffs alleged that Unocal hired military units from the state to provide security for its gas pipeline project, the soldiers imposed forced labour, rape, and murder on local civilians, and the company was aware of this abusive behaviour.

Initially a federal judge ruled that the victims of this abuse could not sue Unocal for damages, as the harm had been done by government soldiers, not company employees, though evidence was produced showing that the company knew about, and benefited from, the soldiers’ conduct.

Recently the U.S. Ninth Circuit Court of Appeals overturned this original ruling, and the case was sent back to the district court with instruction that the case proceed to trial.

In this Unocal case, it has thus been ruled that a company cannot, in a legal rather than physical sense, hide behind the security forces of the host state.

In the case against Talisman, the allegation is made that the company did not so much hide behind the actions of the Sudanese security forces as it did encourage them.

⁴⁹ National Coalition Government of the Union of Burma v Unocal Inc., 176 F.R.D. 329, 335 (C.D. Cal.1997)

According to the Financial Times⁵⁰, a document filed by the plaintiffs' lawyers and purporting to be a Sudanese government directive shows that the armed forces were ordered to "conduct cleaning up operations" in the oil area, "...fulfilling the request of the Canadian company."

The document was dated May 7 1999, and it is established to the satisfaction of the UN and the Canadian government that just two days later a massive military operation began, one which resulted in the displacement of thousands of villagers. The operation was described by the Financial Times as one of the largest military offensives of "the brutal 20-year civil war."

Talisman was quick to assert that the contents of the alleged directive ran contrary to everything the company practiced in Sudan, though it did confirm that it faced serious threats from rebel forces.

The controversial document had, according to the plaintiffs' lawyers, been sent from the energy ministry in Khartoum to "Petroleum Security, Heglig", a security force under the jurisdiction of the ministry. Critics of the Government of Sudan and its partners in oil development have frequently wondered about the links between "Petroleum Security" and the Security unit of GNPOC, the oil operating consortium. The role of security advisors deployed by the individual companies or consortium members has also been the subject of speculation.

Talisman, for its part, has always maintained silence on security matters, other than to point out that the oil installations are threatened and the Government of Sudan has a right and obligation to undertake defensive measures to protect them.

The company's CSR Report for 2001 contains a section entitled Dilemma: What is the appropriate use of infrastructure in the oilfields?

The question came to the fore as a result of the work of the Canadian Fact Finding and Assessment Mission, particularly its reporting on the use of airfield facilities at Heglig by military

⁵⁰ Financial Times, London, March 22 2002

aviation of the Government of Sudan. This practice, which included helicopter gunships and Antonov bombers refueling and re-arming at Heglig Field, was reported to Minister Axworthy on December 22 1999 in a letter from the Head of the Mission. The minister reacted strongly, protesting to Sudanese President Omar Bashir.

The Talisman response to the “dilemma” was to stress that while it supports the need for military protection to ensure the safety of GNPOC workers, the use of infrastructure in the GNPOC concession is of great concern. The company has advocated to the government that it refrain from any offensive military activity that uses GNPOC facilities or personnel.

It helped implement a monitoring system at Heglig to record civil and military use of the airfield and continues to “strongly advocate that infrastructure within the GNPOC concession be used for defensive purposes only.”⁵¹

The company has, in addition, introduced human rights training initiatives, and in 2001, sixteen senior members of the GNPOC security staff were given international human rights training, in both Canada and the UK.

Such training comes under the rubric of “Security Sector Reform”, SSR, when the trainees are employees of the state or subsidiary levels of public authority.

Given the close connection between GNPOC Security and the security organs of the Sudanese state, it is appropriate to take a look at just what is or can be meant by SSR.

The institutions of a state which are responsible for ensuring the safety and security of individuals as well as national security, including the military, police, judiciary, correctional services, intelligence services, coast guard and customs enforcement systems, as well as the relevant legislative and regulatory oversight and review mechanisms, can be referred to as the “Security Sector”.

⁵¹ Talisman, CSR Report 2001

SSR can be defined as the national and international effort to enhance the effectiveness, accountability and affordability of the security sector institutions of partner countries in protecting the public and in humanely and responsibly meeting the state's legitimate national and international security needs

According to the U.S. State Department, in the opinion sent to the judge in the Exxon Mobil class action case referred to above, this is what the U.S. has been embarked on in Indonesia.

In responding to the judge's request for an opinion on whether adjudication of the case would impact adversely on the interests of the United States, the Legal Adviser of the State Department began by stating that the Department believed it would risk a potentially serious adverse impact and may diminish U.S. ability to work with the Indonesian Government (GOI) on such matters as efforts to promote human rights.

Then he said that before describing its concerns, the Department would like to "reaffirm its condemnation of human rights abuses by elements of the Indonesian armed forces in locations such as Aceh."⁵²

He went on to stress that the U.S. was "actively seeking to assist Indonesia in reform efforts aimed at ending the kinds of abuses alleged in this litigation. Through improved training and support for security personnel, as well as judicial reform, these programs are designed to establish a higher degree of professionalism and respect for individual rights. Should the GOI withdraw from these programs in reaction to the litigation, it will impact adversely on our goal of improving Indonesia's treatment of all members of its population, including the people of Aceh."⁵³

Judge Oberdorfer, on receiving this non-binding opinion, dismissed the case against Exxon Mobil. It is not known if SSR has proceeded effectively in Indonesia, or if Exxon Mobil has helped to ensure it did so.

⁵² Letter from William Taft IV to Judge Louis Oberdorfer, July 29 2002

⁵³ Ibid

The relationship between extraction and security took an interesting turn in January 2003 with the news that a Canadian oil company, Nexen, has reached an agreement with Yemen on an issue which could fit within the definition of SSR presented earlier.

The Brussels-based International Crisis Group (ICG) is an independent, non-profit, multinational organization working through field-based analysis and high-level advocacy to prevent and resolve conflict. According to the ICG, Yemen is “not a failed or failing state, but it is a fragile one.”⁵⁴

In its major report on how the Yemenis are coping with terrorism and violence, the ICG stresses just how complex are the realities of Yemen, and these realities have to be faced daily by foreign companies investing in that country.

In October 2002, a small boat filled with explosives rammed the French oil tanker Limburg as it approached the Al Dhaba oil export terminal at Al Mukalla, Yemen. The terminal is run by Nexen, which is one of the biggest oil companies in Yemen, producing up to 270,000 barrels of oil daily.

On January 20 2003, the Globe and Mail reported that while details were not available, the Yemeni government had signed “a deal with Nexen to receive new monitoring systems, boats, and training for coast guards.”⁵⁵

The Canadian Coast Guard is no stranger to the promotion of maritime safety and security, for Canada, and for other countries around the world, including Yemen.

As a signatory to both the 1974 International convention on Safety of Life at Sea and the 1979 International convention on Maritime Search and Rescue, Canada takes seriously its responsibilities for sharing experience and expertise.

⁵⁴ ICG, “Yemen: Coping with Terrorism and Violence in a Fragile State”, Brussels, January 2003

⁵⁵ Globe and Mail, *Nexen signs security deal with Yemen*, Toronto, Jan. 20 2003

To this end, in 1997, CCG instituted what has now become more or less an annual gathering of Middle East, North African, US, and Canadian authorities to discuss maritime safety issues.

MarSaf, the Maritime Safety Colloquium, grew out of CCG's history of co-operation with its Middle Eastern and North African counterparts. This has included consultations with Egypt on Search and Rescue and Vessel Traffic Services, contributing to the establishment of the Palestinian Coastal Police, and involvement in regional issues of integrated coastal zone management and navigation.

Though the first two events were held in Nova Scotia, the third, MarSaf 99, took place in Aqaba, Jordan, it being felt by participating authorities that the event both deserved to be put on an annual footing and held somewhere in the region rather than in North America.

CCG has also been active on the Arabian peninsula. At DFAIT's request CCG participated in the Canada/Saudi Joint Economic Commission meetings both in Canada and in Saudi Arabia, which is interested in a broad range of maritime matters including SAR, Marine Communications and officer and crew training. Yemen actually participated in MarSaf 99, held in Jordan.

Perhaps Nexen would both protect itself and make a solid contribution to SSR and practical security for Yemeni assets and interests if it were to partner with Canada and its Coast Guard in implementing the deal it has reached with Yemen.

Partnering seems to be essential on matters of the relation between extractive companies and security forces, particularly if the hope of Amnesty International, which desires a time when companies exercise their responsibility to contribute to the protection of human rights, is to be realized. And it is cautionary to note that in its May 200 report on Sudan,⁵⁶ AI emphasized that “the silence of powerful oil companies in the face of injustice and human rights violations is not neutral.”

⁵⁶ Op. Cit

As has been mentioned, just a few months before making that statement, AI “partnered” with some of the most powerful of oil companies, and other extractive companies in mining and metals, in working towards the promulgation of voluntary guidelines which could help ensure that British and U.S. extractive companies would not be themselves in violation of human rights through their search for security for their operations.

It began with Sudan. In February 2000, British parliamentarians objected, in the House of Commons, to reports that government officials were actively promoting British investment in the exploitation of oil in Sudan. Apart from a flurry of denials, clarifications, and confrontations, work began on “new guidelines designed to promote and protect human rights during mining and energy companies operations overseas”.⁵⁷

The impetus may have been “Sudanese”, the activity was British and American: extensive consultations were convened jointly by the British Foreign and Commonwealth Office and the U.S. State Department.

These were not restricted to extractive companies. On the British side, the talks involved International Alert and Amnesty International, and from the U.S., Human Rights watch and the Lawyers’ Committee for Human Rights. In addition, the ICEM, or International Federation of Chemical, Energy, Mine, and General Workers Unions, played an active part.

Several major corporations were involved, Shell, BP, Chevron, Texaco, Freeport McMoran, Enron, Rio Tinto Zinc, and Conoco.

The British government was quick to praise the guidelines process, and the Foreign Secretary, Robin Cook, proclaimed his hope that “these guidelines will greatly reduce the scope for human rights abuses associated with the way companies protect themselves and their employees overseas. They demonstrate the UK’s commitment to put human rights and conflict prevention at the heart of Britain’s overseas activities. The fact that all sides have agreed these guidelines shows

⁵⁷ Press Release from the British Mission to the UN, New York, December 20 2000

what can be achieved when industry, NGOs, and Governments work together. Now we must ensure that they are put into operation effectively.”⁵⁸

There, of course, is the crux of the matter. In his own press release welcoming the guidelines, the Executive Director of Human Rights Watch was more guarded and said “In an area where no standards exist, we see the development of some guiding principles as a positive first step. But this is only the beginning of the process. The business, human rights, and government communities all still have a lot of talking to do.”⁵⁹

Human Rights Watch saw the guidelines process as part of an ongoing effort to ensure that corporate security arrangements fully respected human rights, and noted that in the past, corporations were criticized because their security providers committed human rights violations.

This is to understate a problem which is more fully described in the various class action cases, though it is less of an understatement than the British FCO press release’s focus when it pointed out that “in a significant number of conflict-prone developing countries, government security forces are unable to protect” the extractive companies, which are then “obliged to engage private security firms to give the protection they require”.

This protection is defensive and entirely legitimate, according to the FCO, but “on occasions” the conduct of the firms employed has “fallen short of internationally recognized human rights standards”, for example, by misusing equipment provided to them. And, yes, sometimes, “state security forces” in such countries have “occasionally” provided some protection “in a manner that was not consistent with international standards”.⁶⁰

A few weeks later, the NGO Earthrights(ERI) issued its reaction to the appearance of the guidelines. It did so under the banner of a “Sincerity test for Codes of Conduct”.

⁵⁸ Ibid

⁵⁹ Kenneth Roth, HRW Press Release, New York, December 21 2000

⁶⁰ Op Cit

Earthrights wondered from the outset if voluntary codes were a even step in the right direction. It felt that voluntary standards fall far short of what should be demanded from extractive companies claiming to be responsible.

What is needed, according to Earthrights, are mandatory laws that protect human rights, not promises to encourage private and police security forces to use minimum force, avoid hiring known violators of human rights, and respect local people's rights to protest.

Earthrights pointed out that the guidelines not only lacked any enforcement mechanism, no monitoring of compliance was in place, and the public might never hear of any infractions.

This ERI editorial⁶¹ acknowledges that extractive companies could be expected to “sign on” concerning the guidelines, “not necessarily because they are committed to human rights protection, but because, by signing the voluntary code, corporations may be seeking to fend off a tougher challenge: legislation that requires them to behave responsibly.”

It is entirely appropriate to wonder if avoidance of a class action suit might also figure in the reasoning behind the response of some companies.

The question for Earthrights is simple; does a voluntary system move us closer or farther away from transparency, which requires binding laws? It makes the reasonable claim that extractive companies often have to work where the resources are and accept the need to co-operate with local forces which may be quite harsh in their rejection of concerns about human rights.

Some of these companies, according to ERI, imply that it is naïve to think extraction can occur without violence. It is only transparency which can enable all stakeholders to prove any such assertion to be a fallacy, and this seems to be most likely when “voluntarism” is buttressed by public pressures and public actions which demonstrate that naivety has been replaced by determined realism.

⁶¹ ERI January 28 2001

In this thinking, it appears that ERI has a new ally. In her speech to the 2003 World Economic Forum in Davos, the Secretary General of Amnesty International, the major human rights organization which had been party to the creation of the U.K./U.S. guidelines for extractive companies, delivered a blow to the primacy afforded to voluntarism in CSR.

Secretary General Irene Khan said AI would continue to ask companies to voluntarily support basic human rights principles, and would remain associated with the Global Reporting Initiative, but in addition the organization had concluded that that this was not enough. It now will campaign for corporations to be legally accountable for human rights under international law.

What is particularly interesting is AI's reasoning. Ms. Khan advanced six powerful arguments.

First, only the most enlightened companies, less than 40 of them, have agreed to include references to human rights in their own, corporate, codes of conduct. Second, some companies, arguing that human rights law applies only to states, claim they are not required to respect human rights principles. They claim they are keeping out of politics in this way.

Third, voluntary commitment often lets governments off the hook, hiding behind voluntary dialogue to avoid their own obligations. Fourth, companies wield considerable power, which can only be counterbalanced by law. Fifth, law does deter, as it brings with it a prospect of damages and penalties which cannot be ignored.

And sixth, companies are, of course, subject to national laws, but in an era of globalization, enforcement and application vary enormously, and global ethical standards, reflecting universal human rights standards can overcome such weaknesses.

She ended by saying that companies say we should trust them and their voluntary principles, but it took violence and unrest around oil pipelines and installations to bring oil companies in the UK, US, and elsewhere to endorse the guidelines anyway. Voluntary codes, she said, are important, but not enough. Both legal accountability and self-regulation are needed.

So AI does not suggest that “sincerity” and “codes of conduct” cannot go together. The involvement of serious and cautious trade union bodies and human rights NGOs belies that. So must an awareness that there are present in many companies executives and directors who do believe in ethical behaviour, and believe in showing, as leaders, their commitment to leading with integrity.

Leading with Integrity

The 2002 Nobel Peace Prize was awarded to former US President Jimmy Carter. One of his many achievements has been the creation of a Council of Ethical Business Practices.

In May 1999 the Carter Center held a conference on Transparency in the Americas, and following the event, a group of corporations requested assistance in forming and facilitating a working group to discuss the importance of ethical business practices. The conference had focused on the value of transparency to governments and civil society and recommended specific measures on the way in which governments could combat corruption. The corporations recognized the value in sharing experiences with other corporations and assisting smaller corporations with compliance issues in an effort to fight corruption in their own arena.

The corporations involved in creating the Council felt that the main reasons there are not more foreign companies and smaller U.S. companies engaging in ethical business practices are a lack of knowledge and the costliness of creating a corporate code of conduct. They hoped to lead the business community in educating and assisting other companies - worldwide - in drafting corporate codes of conduct and promoting engagement in ethical business practices.

The Council’s mission was to promote adoption of business codes of conduct on a national and international level with an emphasis on integrity in business transactions through the exchange of information, consultation, and even advocacy.

The hope has been that it will achieve its goals by providing a forum to discuss the issues relating to business codes of conduct, worldwide trends, and meetings with other leaders in the fight to combat corruption within the private sector.

Already the Council has organized, through drawing on the skills of the Carter Center, a conference for Atlanta companies to discuss how they created their codes of conduct and some of the "pitfalls," translating their experience with regard to compliance with the FCPA into a relevant model in other cultures and for other companies.

Other proposed activities include the creation of a Web site that would include a model corporate code of conduct and information on recent developments;

The Council, which in fact called on the Carter Center, with its ability to bridge the gap between governments and civil society, to serve as its secretariat, consists of major corporate leaders in Atlanta such as United Parcel Service, Delta Airlines, Mirant Corporations, Invesco, and BellSouth International and leading law firms, including King & Spalding, Alston & Bird, and Troutman Sanders LLP.

One of them, UPS, has published its own Code of Business Conduct, a document which is meant to guide the company and employees at all levels in meeting "our legal and ethical obligations."⁶² The sub-title of the code is "Leading with Integrity", and the CEO spelled out, in a forward to the code, just what UPS means by this.

"Leading with integrity", he said, "is about creating a climate for success. It's about creating an environment where good people can make good decisions. By ensuring understanding of our legal and ethical responsibilities, by conducting our business in compliance with those obligations, by using good judgment and by respecting each other, UPS's legacy of leading with integrity will continue. The UPS reputation belongs to us all, as does our responsibility to protect it."⁶³

⁶² United Parcel Service of America, Inc. *Code of Business Conduct*, Atlanta 2002

Leadership is an issue which has focused the thinking of Jeffrey Garten, once a senior trade official in the Clinton administration, now dean of the Yale School of Management. Invited by the Economist magazine to write about a new year and a new agenda in the magazine's first issue for 2003, he began by asking just what today's corporate leaders should be striving to attain this year.

Garten was convinced that many CEOs underestimate the challenges they face, and had an insufficient grasp of the socio-political context within which their companies must operate. For example, he feels that too many of them still believe that the public press for improved corporate behaviour and governance will soon fade.

Garten, on the other hand, sees the crisis in corporate governance as constituting a marked shift in the environment for global investment. He argues that far from concern about corporate governance having peaked, "the efforts to achieve higher standards of corporate governance will be critical if countries are to have access to the capital they will need in future."⁶⁴

He feels that CEOs will have to improve their understanding of the role of the corporation in society, and from there be able to embrace the new ethos of corporate governance while taking educated investment risks, without which business cannot succeed.

This and other imperatives, such as improving risk management, avoiding sycophantic, but ultimately destructive, advice, will redefine leadership, placing a premium on the charisma that rests on strength and constant values and rejecting that which is primarily swagger and self-promotion.

This leadership will have to contend with a new imperative: the necessary involvement of business leaders in providing constructive input to public policy.

⁶³ Ibid.

⁶⁴ Jeffrey Garten, "A new year; a new agenda", *Economist*, January 4 2003

Garten points out that CEOs have always lobbied government, usually in promoting the specific interests of the company or industry. Now they must involve business in helping shape the rules which will govern global society in the coming decades. Only in this way, he believes, will CEOs be able to create long-term sustainable value, and to get there they must both influence public policy and take more account of their own stakeholders—employees, customers, suppliers, communities—as well as their shareholders. This is interactivity in action.

He asks whether the CEOs are up to the challenge of running a company and playing a broader public role, and ends on a note of hope that the “new breed” of leader starts to emerge in 2003.

The corporate ladder is by no means reserved to those who tread its first rungs with the confidence of the business school graduate, and climbing through the ranks remains a valid and vital aspect of business development, whatever has preceded it. But it may well be that tomorrow’s CEO are today’s Business School students, and it would be unwise to ignore the contribution which can and should be made by scholarship and the academic community which fosters it.

When Canada’s foreign affairs minister met with a group of academics to discuss his growing and sharpening commitment to a “human security” approach to foreign policy, he was surprised to be asked a question along the lines of, It seems to work in practice, but does it work in theory.

Academia is all about asking questions, and more and more the questions are being asked of corporations and campaigners; how is ethical conduct being fostered, and is there a business, as well as moral case, to be made for it?

Business schools seem to think there is a business case for ethical conduct and corporate social responsibility. Gordon Pitts, business journalist with the Globe and Mail, spent time with new MBA students recently.⁶⁵

⁶⁵ Gordon Pitts, *Ethics in Demand at Business Schools*, The Globe and Mail, Toronto September 3 2002

He reports that business schools in Canada feel that they have been ahead of corporations in focusing on ethics and corporate governance, and that now, in the post-Enron era, not only are the corporations catching up but students are eager to enroll, with one school registering a 100% increase for a course on Ethics in Finance. Most of the schools he contacted have plans to examine just how they might expand the ethics and leadership component part of their programmes.

This cannot come soon enough, but it will be a pity if it brings with it too much of a focus on scandal and failure. This point was made in an interview carried in *Business Week*⁶⁶ It featured the magazine's Management Education Editor and Professor Thomas Donaldson of the University of Pennsylvania's Wharton School. In addition to his research and teaching, he appeared before the U.S. Congress regarding the Sarbenes-Oxley legislation.

Professor Donaldson is convinced that business ethics must become a major research focus in Business Schools, and without this, ethics will be important only while scandals dominate the news. He believes that too much attention has been paid to ethical failure, resulting in an emphasis on legality and compliance, at the expense of our knowing about positive ethical outcomes. The answer, for Donaldson, is more research done rigorously, which can lead to better understanding of creative corporate cultures displaying "good ethics". He also makes the point that corporations are now actually insisting that business schools pay attention to ethics, and this is a message which is listened to because of the messenger.

One Canadian business school, at Queen's University in Ontario, has for twenty five years organized an Inter-Collegiate Business competition, and for the last three of these, commencing before the epochal Enron and WorldCom scandals, the competition has featured an Ethics Event.

This is described in the Chumir Ethics Forum⁶⁷ by the Programme Director of the Sheldon Chumir Foundation for Ethics in Leadership.

⁶⁶ *Business Week*, *Institutionalizing Ethical Training*, January 17 2003

⁶⁷ Chumir Ethics Forum, Vol. 3, No. 2, Winter 2003

Alison Dempsey notes that competition judges from the public and private sectors, as well as faculty and students, commented on the importance of the fact that ethics has been a feature of the competition since before the corporate scandals in the U.S., and seems likely to continue long after the scandals have faded from view.

However, the question has been asked, will this trend, and others wherein the corporate sector appears set to embrace ethics and governance reform, “survive the next major upturn in the markets?”⁶⁸

Among attempting to answer this question are Jeffrey Garten and Irene Khan.

He was forthright, in his invited Economist column⁶⁹, when describing the unreality of many CEOs as they “underestimate the challenges they face”. He thinks too many do not understand that the crisis in corporate governance is one which constitutes a marked shift in the environment for global investment and it is one which will not vanish. Better, he believes, for CEOs to step forward and lead the push for improved corporate governance. Leading with integrity.

Irene Khan told the World Economic Forum⁷⁰ that the confidence and complacency of many corporate leaders has been sapped by the gloomy economic climate and corporate scandals. She said that in response, some people tried to portray corporate responsibility for human rights as an unnecessary threat.

This she totally rejected and stressed that human rights should be seen as important to business, whatever the climate, and she turned to the question of governance to underscore her point.

In her view, the dividing line between investors, shareholders, consumers, and the general public is disappearing, witness the fact that not only are pension funds now large investors and shareholders, people want to know where their pensions are being invested. There will be a growing, not lessening, demand for accountability.

⁶⁸ Marsha Hanen *Ethical Governance*, Chumir Ethics Forum, Fall 2002

⁶⁹ Op Cit

⁷⁰ Op Cit

In the February 2000 Report of the Canadian Assessment Mission to Sudan, the point was made that accountability and responsibility did not rest solely with the senior executives of Talisman, or by extension, any extractive company.

It also rested with the other stakeholders, particularly the directors and shareholders. Each and all had a responsibility, to the company and to themselves, to avoid being held complicit in violations of human rights through the operations of the company.

In the years since, much disillusion has overtaken the standing of CEOs in industrialized democracies, including Canada⁷¹, and the need for improved corporate governance has been taken up in many quarters. Some of this relates to the efforts, already mentioned here, of groups such as Human Rights Watch and Amnesty International, efforts to expose, and stop, human rights violations. But the greater impetus has come from elsewhere.

Just a little over one year ago, on December 2 2001, Enron filed for bankruptcy protection. The Financial Times carried a feature on Enron's rise and fall, and in a substantial piece on Capitalism and Ethics in the same newspaper, one journalist wrote that "an ethical deficit has been revealed at the heart of modern capitalism."⁷² Enron was not the only company to fall, and throughout 2002, corporate scandals never seemed to be off the front pages of major newspapers in North America.

By September 2002, the Brookings Institution in Washington was forecasting, conservatively they claimed, that the wave of scandals would cost the U.S. economy some \$35billion, mainly through the fall in stock values and reduced investment. It appeared, by the close of 2002, that some 250 public companies in the U.S. would have to re-state their accounts for the year, compared to only 92 being in that position in 1997, and only 3 in 1991.⁷³

⁷¹ The Globe and Mail, "Canadians don't trust executives, survey says", July 2 2002

⁷² John Plender, Financial Times, December 2 2002

⁷³ The Economist, Enron: one year on, November 30 2002

By that time, there had been a political response, in the form of the Sarbanes-Oxley accounting reform legislation, an attempt to clean up the auditing process. This was prompted by both the revelations of unbridled greed among some CEOs and their supporters on corporate boards, and the stark knowledge that auditing procedures had been tamed in some companies precisely to indulge the greed and maintain a “false” share value.

In 2000, the Enron auditors, Arthur Anderson, earned \$25 million from auditing Enron’s accounts, and another \$27 million from consulting for the company.

Sarbanes-Oxley provides for a number of requirements in corporate governance. One is the creation of a public accounting oversight board, along with restrictions on the practice of auditing firms offering consulting services to companies they audit. Another is the obligation on a CEO to sign company reports, and to hand back any bonus payments not substantiated by properly audited accounts. Currently the Securities and Exchange Commission (SEC) is working the Sarbanes-Oxley provisions into regulations, which will no doubt affect more than just U.S. companies.

In Canada, no strong political figures have, as in the U.S. Congress, stepped into the glare of public interest to restore trust, and a reasonable basis for it, in the efficacy and honesty of corporate governance. This may come as the U.S. efforts continue, and though they are less in the news than last year, serious work is still proceeding on the U.S reforms. The New York Stock Exchange, for example, has made proposals now under discussion at the SEC which will impact on the role of company directors and CEOs in ways unimaginable until scandal forced the pace.

At the Ethical Corporation USA 2002 conference, held in New York in October 2002, the observation was made that the NYSE action in recommending business codes is but a small step towards regulatory institutions to force companies to report on social and environmental issues.

The NYSE has called for listed companies to have a majority of independent directors on their boards within two years, and this quality of independence must be demonstrable.

It wants to see instituted regular meetings of non-executive directors, with no management present and the presiding director's identity made public. It will stipulate that compensation, nominating, and audit committees be composed entirely of independent directors. And that guidelines on evaluation, of the CEO and the Board, be published.

It is clear that CEOs have, in the U.S., been used to dominating the board committees, and it has been reported that a survey in New York found that in 420 out of 2000 large companies, the compensation committee included relatives of the CEO or others with close ties to the company.⁷⁴

A different survey, but one confronting the issue of corporate greed and public dismay, was reported in Canada in July 2002. It was undertaken by GPC International, and found that 67% of Canadians saw top executives as overpaid, and the same percentage wanted to curb CEO power and perquisites through a policy of splitting the role of CEO from that of Board Chairman.⁷⁵

Apparently half the companies listed on the Toronto Stock Exchange do not have any such split, and in this the Canadian picture approximates the U.S. one more than, say, the U.K. practice, where boards usually have a non-executive chair.

Other reforms being discussed include a focus on just how to represent institutional investors on boards. Are their interests best served by non-executive directors, or by accountable executive ones? And are there solid grounds for thinking that reform will, indeed, improve governance and performance?

According to a special report on corporate governance carried by the Economist,⁷⁶ a team from Harvard Business School has examined 1,500 companies and found that those which were most responsive to shareholders would have enjoyed returns 8.5 % a year higher than "management dictatorships."

⁷⁴ The Economist, January 11 2003

⁷⁵ The Globe and Mail, July 2 2002

⁷⁶ The Economist, January 11 2002

It is too early to say that reforms now being introduced or considered will actually improve both governance and performance; much will depend on how the executives and director of a given company try to make things work. But with respect to ethics and corporate social responsibility, will it matter?

Certainly, the likelihood is that reforms will result in more compliance with the law, and this is often confused with “being ethical”.

The laws and regulations now being fashioned in the U.S., which will impact on companies around the world, will probably cut into the culture of corporate excess, but this excess, greed, is not a universal phenomenon. They will probably stifle attempts to deceive investors, which is a good thing. But it should be remembered that the Sarbanes-Oxley Act almost did not make it through the demanding hurdles of the U.S. political system, and probably would not have done had the Enron scandal not been followed in June 2002 by the accounting fraud at WorldCom. So will the reforms enhance genuine drives towards corporate social responsibility?

Also, it is not clear that the CEOs can be lumped together as being opposed to CSR or free from any suggestion of “ethical behaviour”, and nor is it axiomatic that shareholders are or will be always more concerned about CSR and ethics than the executives who manage the companies in which they have invested.

Certainly, acting “responsibly” has to be in the shareholders’ interest, unless they are fully bent on immediate speculative opportunity with no thought to sustainability. Acting responsibly builds the trust which underpins sustainability, the condition of being in a profitable business relationship over time. This is not new to companies. It was a company, Proctor and Gamble, not a government, which pioneered disability and retirement pensions, for example.

But the best of CEOs understand this already, perhaps intuitively, and should be able to get the best out of a reform drive and respond well, as Jeffrey Garten hopes they will, to a radically changing context.

That changing context has many elements, and among them is a growing desire on the part of the share-holding public and those who vote but do not invest to witness more rather than less respect for human rights in the countries where companies identified with them do business.

Their doing business, particularly in low-cost manufacturing or high-risk extraction, is often characterized, and criticized, as “globalization”.

It is correct to ask, as Marsha Hanen did, if ethics-based governance reform will survive an upturn in the markets. It is also correct to bear in mind that the markets owe much to the march of globalization.

Globalization for All

One leading business service organization actively promoting corporate social responsibility also actively argues in favour of Globalization. This is the Commonwealth Business Council, which “seeks to help create a positive environment for business and investment, prepare countries to participate in globalization trends...”⁷⁷

Its chairman, Lord Cairns, has argued that the role of business in globalization should be regarded as the best hope for creating a better world, and he asserts that it is in the interest of business to help spread the benefits of globalization more equitably.

Critics of globalization have, in fact, argued that its principal impact is to create inequality. For example, the world’s largest “umbrella body” of trade union organizations, the ICFTU, has argued that the gap between the rich and the poor is widening all over the world.

⁷⁷ CBC, *Promoting Trade and Investment for Shared Prosperity*, London, 2002

It claims that in 1960 the income gap between the 20% richest and the 20% poorest countries in the world was 30 to 1; it rose to 60 to 1 by 1990, and to 75 to one by 2000.⁷⁸

This argumentation has recently drawn criticism in its turn. Philippe Legrain, formerly a speech writer for the first head of the World Trade Organization, Mike Moore, has presented his interpretation of the state and consequences of globalization.⁷⁹

Legrain asserts that globalization has, in fact, impacted positively on inequality. He argues that economic integration promotes growth, from which the world's poor do benefit, and in support, he refers to a study which suggests that global inequality has actually fallen since 1980. His conviction is that those who are "left behind" are not victims of globalization, rather they are victims of the lack of globalization.

In researching his book, Legrain visited Vietnam, and saw the extent to which export-oriented factories, mostly MNC-owned, are transforming the country. He spent time at a Nike factory and reported that the workers were being paid more than most government officials.

It is the behaviour of "brand name" MNCs, such as Nike, operating in developing countries which has attracted most of the critical attention on what is seen as globalization.

As necessary as it is to keep this behaviour under review, preferably through the sustained application of participatory "normative frameworks" such the ILO conventions and its application/supervisory process, it is also necessary to avoid falling into the convenience of "demonization".

Things are not always as simple as campaigners, pro-or con globalization, would like the broader community to believe.

⁷⁸ ICFTU, *A Trade Union Guide to Globalization*, Brussels December 2001

⁷⁹ Philippe Legrain, *Open World: The Truth about Globalization*, Abacus Press, London, 2002

Legrain went to Vietnam and visited a Nike plant. He could just as easily have gone to Thailand, where Reebok International was, until recently, sub-contracting. The Reebok executive charged with ensuring its embrace of corporate social responsibility announced that the company was withdrawing from its relationship with the Thai factory, citing as the reason that the workers were working more than 72 hours a week.

This did not sit well with the *Economist* magazine, and in its issue for November 30 2002,⁸⁰ it asserted that while it is responsible to press for better standards, the supply of good jobs, 400 at the Thai factory, matters also. According to the *Economist*, the workers were being paid above minimum wage with health and safety provisions matched by few local manufacturers. Its conclusion was that Reebok, scared of allegations that it was into “sweatshop” sub-contracting, acted without real regard for the workers themselves. The critical piece ended with a caution which is appropriate for all engaged in the business of deploying, regulating, or analyzing, foreign investment, irrespective of sector or geography.

It first pointed out that Reebok was doing no research to correlate social responsibility with sales or shareholder value, and had no idea just what its unit tasked with managing CSR actually cost the company, and then stated that “Since the most ethical way to do business is to attract investment and offer more people a way out of peasant labour, perhaps this practice should be re-labelled corporate social irresponsibility”⁸¹

The *Economist*, in making this argument, is an advocate of “inclusion”, and in this regard at least, perhaps it shares common cause with the ICFTU. In its *Guide to Globalization*, this major labour body asserts that globalization can bring with it the threat of “exclusion” for a large part of the world’s population, as well sever problems of unemployment and growing wage and income disparities.

⁸⁰ *Economist*, “Ethically unemployed—Corporate social irresponsibility” November 30 2002

⁸¹ *Ibid*

It sees globalization as being not only linked to technological and other changes which have helped join the world more closely together, but linked also to ideological elements.

Globalization has become, it states, an all too convenient excuse and explanation for anti-social policies and actions which undermine progress and break down community.⁸²

In the eyes of the ICFTU, fashioning a necessary strategy for responsible globalization requires an analysis which separates that which is dogma from that which is inevitable.

It is convinced that the challenge of globalization is not to try to make it go away or to pretend that it does not exist. The challenge is to find ways to manage change and regulate and structure globalization so that it supports fundamental rights and brings prosperity to as many people as possible.

It is hard to avoid the conclusion that for globalization to really succeed it must be linked to the globalization of respect for human rights and labour standards. This will be the true measure of corporate social responsibility and it will move us towards sustainable development for our communities and our companies.

An unavoidable conclusion

It is hard to believe that the drive towards ethical business practice and sustainable development would be as well entrenched as it is in some leading corporate cultures were it not for public pressures stemming from awareness of and revulsion at some ill-conceived acts, of omission or commission, on the part of some corporate actors.

At the same time, it would be a mistake to ignore or downplay the commitment the best corporate leaders in the extractive sector are now bringing to ethical business and sustainable development.

⁸² ICFTU, Op.Cit

It would also be wrong to imagine that necessary progress on these fronts can come without the proactive goodwill of such leaders, who must be encouraged by public policy to behave in ways which are good for the public and for the private sector which is so vital to the well-being of that public.

The Whitehorse Mining Initiative, fashioned so determinedly by disparate stakeholders, presents a “vision of a socially, economically, and environmentally sustainable and prosperous mining sector underpinned by a political and community consensus”

This is attainable for mining; it is attainable for oil, lumber, cocoa, the whole gamut of extractive industries, and for the communities where they operate. But it does not come easy, and it does not come cheap. Nor does it come through unilateral action, though this can set precedents, heighten thresholds, and spur on the necessary multi-stakeholder, multilateral, indeed global, action.

The efforts of business to curb corruption on the part of public officials provide evidence of the essentiality of concerted multilateral or global action.

President Jimmy Carter signed into effect the Foreign Corrupt Practices Act which prohibits offering a bribe to a government official in order to win concessions. For the intervening years, it has provided a rigorous framework for U.S. companies doing business abroad, and many non-U.S. corporations have systemized their own compliance with the FCPA.

But until the adoption of the OECD Convention in 2001, it was suspected that some corporations based in OECD countries were not above bribing government officials abroad.

Though it is by no means certain that bribery has vanished, the implementation and monitoring of the OECD convention, imposing more of a “level playing field” will make it the singular exception, not the common practice.

So it is with respect to corporate social responsibility. Yes, great strides have been made, on a company basis, an industry one, and even a regional one.

But more remains to be secured. For example, the plethora of “codes” could be altogether more of a positive, a thousand pleasant flowers blooming in the garden of transparency, were each of the codes to make specific reference to an appropriate, verifiable, international standard, such as was immediately done by the cocoa producers and users when they set out to develop their “Protocol”. The ILO convention, 182, on the worst forms of child labour, was not only “incorporated”, the companies concerned have made sure the organization, a specialized agency of the UN system, will be involved in their ongoing efforts to be socially responsible.

The ILO conventions are, in fact, referenced in many codes and this is encouraging. As the OECD fashions more rigorous guidelines and conventions these also should be specifically mentioned in the codes.

Governments are more and more concerned to ensure the positive impacts of international trade and investment, and want to emphasize the contribution which can be made by CSR. A Canadian minister remarked on this during a recent business promotion trip to Africa. He stressed that “promoting corporate social responsibility is an important element of the Government of Canada’s approach to promoting international trade and investment.”⁸³

However, any one government alone will not be able to provide that “level playing field” needed by both companies and communities.

Governments, of the “sending” and “receiving” countries, have to work through their intergovernmental organizations and frameworks to ensure a more global take-up of ethical business practices and the corporate social responsibility in which they are most commonly presented. This they can do sectorally or regionally on the way to global coverage.

⁸³ Pierre Pettigrew, Johannesburg, South Africa, Nov. 18 2002

For example, Canada is now active on CSR and sustainable development in the mining sector, helping develop the Kimberley Process concerning conflict diamonds, and supporting the commitment of the International Council on Mining and Metals to sustainable development.

On a regional basis, which need not always be geographically defined, Canada is, as we have seen, an “adhering government” for the purposes of the revised OECD Guidelines for Multinational Enterprises. These guidelines, issued in 2000, not only contain voluntary principles for corporate social responsibility, they are also meant to help combat Bribery, with the aim of eliminating bribery of foreign government officials.

Of course, the primary instrument whereby the OECD deals with Bribery is through its specific anti-Bribery Convention. It is worth noting that since the convention first appeared, the international business community, civil society, and trade unions, have urged OECD governments to bring it into force quickly.

In 1998, the representative groups of these stakeholders issued a joint statement, calling for effective mechanisms to be put in place, monitoring the implementation by the governments of all actions taken against all aspects of corruption.⁸⁴

The governments introduced a phased approach to monitoring, with Phase 1 involving the examination of national laws enacted to implement the Convention. The OECD reviewed the laws of more than thirty countries. Approximately one third were found to have serious shortcomings, another third had smaller deficiencies. Japan and the U.K. were among the governments criticized, and they proceeded to rectify many of the shortcomings identified through the OECD monitoring process.

Phase 2, now under-way, involves “in-country” reviews, and these are meant to examine the actual performance of the national systems, not just laws, but rules and so forth, for implementing the Convention.

⁸⁴ See Business and Industry Advisory Committee to the OECD, www.biac.org

The phase commenced with Finland in September 2001, and in 200, the U.S. and Germany were subjected to review. The Phase 2 review of Canada's performance was scheduled to commence in early 2003, and to that end, a major questionnaire has gone from the OECD to the Government of Canada. It contains a list of nineteen questions.

Industry, unions, and civil society are invited to both comment on some of the specific questions and to participate in an informal exchange of views on any aspect of implementation with the OECD evaluation team which visits the country in question.

The question must be asked, of course: why not have a similar review process in place for the OECD Guidelines on Multinational Enterprises? Why not put CSR, in broad strokes, on a footing with Anti-Bribery?

This need not be seen as inimical to Canadian interests, and might well be welcomed by both industry and the labour movement, which, as is indicated above, participate, even through joint statements, in the review process for the Convention. Furthermore, in determining its own position on the draft guidelines, Canada was able to draw on the assistance of experts from extractive industry.

The phased review process for the Convention undoubtedly has an impact on re-shaping government capacities; with CSR likely to demand more, not less, government attention in the years ahead, a monitoring approach similar to that for the convention would probably be very useful in equipping government to handle the increased, and challenging, work load.

The OECD is an organization of and for industrialized countries. Canada is an active member state. Similarly, it is a very active member of the Commonwealth, which brings together some of the most industrialized countries in the world, and some of the least, as well as more than one quarter of the world's population.

Here Canada could take the lead in focusing attention on the need for CSR, and on the need for concerted, and not unrelated, action on an issue mentioned earlier, Security Sector Reform.

This is an issue where companies have definite interests and may have contributions to make, but they cannot set the pace or contest ownership of what must be a public agenda.

It has sometimes been assumed that general support for "Good governance", now a standard feature of development thought and practice, will eventually lead to improved governance practices in the security sector.

Conferences, studies, training activities and research projects on conflict prevention, practical disarmament, and civil-military relations do contribute to better management of the security sector, but these activities can fail to address the main constraints on good governance in the security sector.

Assistance cannot work on a "trickle-down" basis, and needs to be targeted on the security sector if the capacity of civil authorities to manage and oversee these forces is to be strengthened. And, one might say, if companies can be all the freer to live up to CSR commitments.

In the past, efforts to support security sector reforms have focussed either on the armed forces or on the police, and insufficient attention accorded to the civil authorities charged with managing and monitoring the security forces, and to civil society. There is a danger of a similar compartmentalization as regards institutionalizing improvements in the public encouragement of CSR.

There has also been inadequate attention paid to the linkages among these different actors and to the roles each could play in developing good governance, not only in the security sector and the realm of corporate social responsibility but throughout society, if their capacity were only strengthened.

Without the commitment of national leadership to the process, security sector reform will fail, and without a similar commitment in both the sending and receiving countries, progress on CSR will not be maximized, however ethical corporate leaders become. The problem is, in fact, not theirs alone, and this seems to be well-understood by Canada's political leadership.

In launching his foreign policy Dialogue, the Minister of Foreign Affairs, Bill Graham, set out his appreciation of the importance of socially responsible investment by Canadian firms, knowing that this can impact in more than one way. He said that "the challenge in the coming years is to help Canadian companies invest profitably in ways that also benefit the communities in which they operate."

This is a noble and achievable goal for public policy, and linking it constructively to private power will provide the ethical leadership which we need not only in our extractive industries, but throughout that impressive array of Canadian companies operating beyond our shores, not always but often enough in "conflict-ridden areas".

Both CSR and SSR issues should become a regular component of policy discussion with foreign governments. This discussion could facilitate identifying entry points for building support for the reform processes necessary both for Canada and the countries with which it partners on the road to sustainable development.

It is dangerous to ignore the imperative need for governments in developing countries to have the capacity and appetite for appropriate regulation and governance reform. Not everything can be left to western-based companies and/or their home governments. This is widely accepted as regards Africa, thanks to the informed enthusiasm generated by the Kananaskis Summit; it applies equally well to other areas of the world.

Though here it might be mentioned that, in Africa certainly, and now in other parts of the world, demands for improved governance, for the sharpened capacities of the state, are unfortunately coinciding with the ruinous impact of HIV/AIDS on what government machinery exists.

The African state, usually confronted by major challenges, is being weakened dramatically by this pandemic, which is beginning to show similar impacts elsewhere.

This is not the responsibility of industry, but it is a fact which has to engage companies choosing to operate abroad. They and governments, home and host, can all make appropriate contributions, many of which can be subsumed under the rubric of corporate social responsibility, and be instances of ethical conduct in clear terms. It is sometimes difficult to avoid mistaking CSR for Ethics, whereas CSR is its most visible manifestation.

Minister Graham's 2003 Dialogue on Foreign Policy speaks of a Better Canada, a Better World. It did not mention Ethics, but in speaking of those of our companies operating abroad which have had exemplary success in embodying Canadian values, he doubtless was praising ethical conduct, not any community relations exercise.

The Dialogue he has introduced will take stock of what policy changes or enhancements are necessary due to the passage of time and press of events since the Government's 1995 Statement, Canada in the World. That statement asserted that Canadians want to remain actively involved in the world, and that their country was in a privileged position to influence change in that world.

Hopefully, this conviction remains strong and will be drawn on in a concerted effort to show Canada's ethical leadership in the world and ensure that communities, companies, and countries benefit from the investment and trade which Canada and other countries are busy promoting.

Some Next Steps

The Minister's invitation to a Dialogue has been addressed to all Canadians, and will generate a response from many of them, not least of all from his fellow legislators. Some will respond individually, others may seek to do so through parliamentary mechanisms such as the committee system.

Members of Parliament are well-placed to consider the need for and optimal ways of achieving the right balance between public policy and private power pertaining to ethics and extractive industries.

They might care to look at what some fellow legislators have done on this score in the United Kingdom. In November 2002 an all-party group of M.P.s at Westminster released a report on who benefits from resource exploitation in the Democratic Republic of Congo (DRC).⁸⁵

The group had visited the region in 2001 and became concerned over the widespread humanitarian disaster unfolding there. The participants also were concerned about the impact of the exploitation of the DRC's natural resources.

When the UN Panel of Experts on Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo (Panel of Experts) released its Third Report, and named various U.K. companies and individuals, the group decided to commission independent research on just how the exploitation of natural resources was impacting on the lives of people in the region and its implications for sustainable peace in the region.

At the same time, it welcomed the investigations and reports of the Panel of Experts, and went on to recommend various courses of action. It called on the government to review all U.K. companies and individuals named by the Panel of Experts, and remind them of their corporate responsibilities in the DRC and the need to implement the OECD Guidelines for Multinational Enterprises, which is a major focus of DFAIT's engagement with CSR here in Canada.

The group also urged the government to make a statement in the House of Commons on how it planned to act on the findings of the Panel of Experts. It hoped that the government would use its powers to ensure that the main findings were acted on in both the UN Security Council and the Council of Ministers of the European Union.

⁸⁵ All Party Group on the Great Lakes Region, "Cursed by Riches: Who benefits from Resource Exploitation in the Democratic Republic of Congo", London, November 2002

Finally, it asked the British government to support the DRC's compliance with the Kimberley Process for the certification of non-conflict diamonds and pressure other governments in the region to comply also. The group recommended the development of similar certification schemes for timber and other natural resources.

This is not to suggest that it is an easy matter to make parliamentary progress on the issues of ethics and extraction, as Belgium's experience must show.

In November 2001 a 15-member Senate commission was established by Belgium in the wake of the publication of the addendum report of the UN Panel of Experts. The task of the commission was to investigate the alleged involvement of Belgian and non-Belgian companies in the illegal trade of natural resources of the DRC, and to search for ways to prevent proceeds of such activities from fuelling war in the region.

Several Belgian companies have been named in the reports of the UN panel, including that of the Belgian entrepreneur Georges Forrest, as well as Lebanese diamond traders in Antwerp accused of money laundering and criminal activities.

After 18 months and 71 hearings, the commission concluded that no illegal acts were committed by the people and companies investigated.

The conclusion was announced during a news conference in Brussels on February 20. Opposition senators refused to endorse the report, saying that the recommendations were aimed to protect "Belgian political and economic interests in the region".

The commission's findings and recommendations focus primarily on the trade in coltan, diamonds, gold, and wood from the DRC, as well as on the trafficking of arms. It gave particular attention to the dealings of the Forrest Group with the Congolese state mining company Gecamines in Katanga Province. The report notes suspicion regarding the Forrest Group - whose vice-presidents are linked to Belgian governmental parties - but does not accuse it outright.

The Senate commission's report mentioned the involvement of neighbouring countries of DRC in the exploitation of natural resources in order to finance their war effort, and stressed that such efforts were made "at the expense of the Congolese population", but refrained from accusing any individual.

Critics said that the Senate commission led only one fact-finding mission to Rwanda and the DRC, in November 2002, and that the report made no mention that the pro-Rwandan Rassemblement congolais pour la démocratie (RCD-Goma) rebel movement in eastern DRC had denied the senators access to cities under their control.

The commission has suggested the creation of a follow-up committee during the next Belgian government, to be implemented after the general elections of 18 May, as the work of the UN Panel itself has been extended for a further six months.

The commission also asked the Belgian government to take the necessary steps for the launching of international regulation of investments in conflict zones, and the planning of a legal framework in such countries, but at the time of writing it is not clear that the Belgian government will act, either alone or in partnership with other EU states.

Especially in light of the fact that the Panel of Experts also named a number of Canadian companies, it would be appropriate for Canada's parliamentarians, possibly acting through their Sub-Committee on Human Rights and International Development, to mark this season of foreign policy review by considering just how the country's policies and practices on corporate social responsibility and the behaviour of our extractive companies could improved on, in the interests, as Minister Graham has said, of our companies and their communities. Such improvements would also impact on Canada's overall standing in the better world which the minister hopes the foreign policy dialogue will help move us towards.

But this current study began with a look at one extractive company, which embarked on an investment in a “conflict ridden” area without seeking or obtaining public approval, other than from the state in conflict, Sudan. It is only proper to end with a suggestion for companies, rather than governments or parliaments.

Perhaps one of them will take the lead, as Nexen did in the promotion of the Canadian code of conduct, in moving the extractive industry forward at least to the point of a transparent embrace of monitored voluntary compliance.

This could take the form of convening a gathering of extractive companies to review the workings of the evolving Global Compact, the US/UK Guidelines, and the OECD Guidelines; out of this could come a co-ordinated embrace of the first two, and a commitment to increase the value of the third by working with labour, civil society, and the National Contact Point to establish a form of regular reporting and monitoring.

However, monitoring is not enough. Talisman cannot take the lead sought here, but it has an important contribution to make. Independent and internationally respected verification has been mentioned, by John Bray of Control Risk, writing in Talisman’s CSR report, as a critical element of CSR monitoring. This may not yet have been achieved by Talisman in its relationship with a global audit company, but the value of the verification framework developed for it by PricewaterhouseCoopers should be seen as a very good starting point.

What should be striven for at this juncture, and what could in all probability stem from the initiative called for above, is the deserved status of Monitored Verified Performance. MVP for short, it would be a label signifying that a Canadian company is making the effort to both comply with appropriate standards and be ethical in the conduct of its operations. These are not one and the same, and nor are they easy to succeed at.

The exercise of developing the MVP approach should be initiated by the extractive corporate sector, but it would be fatally damaged were it to rest only with the companies; it would, furthermore, work best if government assisted by enabling the various stakeholders to research both Best Practice and Worst Case accounts from the emerging history of Canadian extractive investment in a troubled and conflict-ridden world. There are good stories to tell and be guided by, just as there are paths to avoid—but these few paths should be signposted.

It must not be assumed that all circumstances under which extraction takes place are straightforward or benign, that all governments with sovereign jurisdiction over extractable resources are just, honourable, and powerless in the face of corporate power, and nor should it be assumed that all communities where extraction takes place were paradise before extraction and hell on earth during or after it. The work of the UN Panel of Experts on the DRC has at least underscored how complex the realities are.

In different ways, many companies, governments, unions, and human rights organizations, both international and grass-roots, are trying to find pathways leading to sustainable development and human security through extractive partnerships.

The goal could be encapsulated as it is in the Whitehorse Mining Initiative, socially, economically, and environmentally sustainable and prosperous extraction underpinned by political and community consensus.

A considerable challenge, to be admitted. The ethical imperative is to assist in its realization.

The promotion of ethical conduct in the extractive sector of Canadian industry need not be seen as a dark prospect but rather, as the poet Louis Dudek put it, a broad horizon of possibilities.

H. John Harker,

February 2003