Corporate Abuse in 2007:

A discussion paper on what changes in the law need to happen

Written by Jennifer A. Zerk

This discussion paper has been written to stimulate debate amongst corporate accountability campaigners and policy makers. Although the paper explores many potential areas of reform of UK legislation, CORE recognises that there are other mechanisms that may be useful tools in preventing corporate abuse that are not discussed here. The aim of this paper is to stimulate debate amongst decision makers and experts in this area.

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The Corporate Responsibility (CORE) Coalition works to make changes in UK company law to minimise companies' negative impacts on people and the environment and to maximise companies' contribution to sustainable societies. The Corporate Responsibility (CORE) Coalition represents over 130 civil society groups including Amnesty International UK, Friends of the Earth and Action Aid.

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Executive Summary

Any discussion about regulatory reform needs a regulatory context. This discussion paper examines options for future domestic law reform to curb corporate abuse in other countries, against the background of eight case studies provided by CORE members.

While social and environmental issues are already highly regulated in the UK, in other parts of the world this is not necessarily the case. Although laws may exist on paper, regulatory oversight can be weak, under-resourced and, in some cases, corrupt. It is in these regulatory environments, where legal protections for people, communities and the environment are non-existent, ambiguous or poorly enforced, that "voluntary" CSR clearly has a role to play. But is the "voluntary" approach to CSR a sufficient response to the social, environmental and human rights challenges of international business today? The eight case studies featured in this report suggest not.

Extraterritorial social and environmental regulation of companies by home states is not widespread. This is no doubt due, in part, to concerns about jurisdictional limitations under international law (although a lack of political interest or will is probably the greater cause). However, as this report shows (see Part 1), there are a number of steps that home states like the UK could potentially take to help reduce adverse social, environmental and human rights impacts of UK-based companies in other countries, through its jurisdiction over the parent company.

That, at least, is the theory. This research project takes these ideas one step further and applies them to eight real life case studies concerning different kinds of corporate abuse to try to ascertain which of the various regulatory options open to the UK would have the most impact (a) in terms of providing redress to victims of corporate abuse and (b) as a deterrent against future abuse. This is done by way of an evaluation process whereby the various regulatory options are long-listed against a set of case-specific regulatory objectives and then compared (using a wish/demand evaluation technique) to determine which are potentially most useful (see Part 2).

Although the process favoured a number of solutions that were product or sector-specific, several "cross-cutting" solutions emerged (see Part 3). These were (a) reforms to trade practices law to allow wider enforcement of CSR commitments entered into by companies (b) new private rights of action based on new statutory duties in relation to the activities of subsidiaries, suppliers and other contractors abroad, (c) new, less formal, complaints mechanisms and, finally (d) more (targeted) social and environmental reporting obligations for companies in relation to their overseas activities.

However, each of these proposals has obstacles and limitations associated with it (legal, political and practical) that require further investigation.

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Preface: A brief statement about aims, scope and methodology

Aim of research

Redress and deterrence: Can more be done? Any discussion about regulatory reform needs a regulatory context. The aim of this research project is to analyse a series of case studies involving corporate abuse and to explore the changes in the law which would be likely to deliver the most significant positive impacts in terms of (a) access to justice for individuals adversely affected by corporate activity and (b) a reduction in cases of corporate abuse in future. The case studies featured in this report are:-

1. Palm Oil Industry (Author: Friends of the Earth);
2. Shell/Gas flaring in Nigeria (Author: Friends of the Earth);
3. Tesco/Orchard workers in South Africa (Action Aid);
4. Anglo Gold Ashanti in Ghana (Action Aid);
5. Conflict Diamonds (Amnesty International);
6. Cut flower industry (War on Want);
7. Baby Milk (Save the Children); and
8. Garment workers in Bangladesh (War on Want).

Scope of research

CORE is a UK-based coalition of NGOs and other organisations campaigning for legal reforms within the UK to improve corporate accountability at home and abroad. This report therefore focuses primarily on legal reforms that could be introduced by the UK legislature *acting unilaterally*. However, all of the case studies underlying this research project involve cases of *extraterritorial* abuse. Therefore, there will be cases (e.g. involving international trade) where unilateral action by the UK will either not be legally possible, or at a purely practical level, will not be able to deliver the desired results. Where this is the case, areas of necessary international or regional cooperation are highlighted.

Consistent with CORE's mandate, the research focuses on positive legislative change, rather than "soft law" or "voluntary" options. The political feasibility of the different legal reform options is beyond the scope of this project and will be the subject of follow-up work. Instead, the research focuses on what is "legally possible". Also, while precedents are helpful in identifying new regulatory possibilities and in fleshing out regulatory ideas, they are not critical: in other words, nothing is excluded just because it has not been tried before.

Finally, this report is concerned with identifying potentially beneficial reforms of broad application, not with developing new regulatory proposals in detail.

Methodology

Part 1 sets out a range of different legal reform options that may potentially be relevant to the case studies, but does not seek to anticipate the case studies in any great detail. Part 1 is intended as a general resource: inclusion of a regulatory option in Part 1 does not mean that it will necessarily be "long-listed" in relation to a case study (in Part 2).

Individual case studies are considered in Part 2. Each case study begins with a statement of "The Problem", to help frame the issues and the discussion that follows. (***Note: Factual information and claims set out in each case study have been supplied by informants to this study. They have not been checked by the author of this discussion paper and are referred to in this discussion paper solely for the purposes of the evaluation exercises referred to below. The author expresses no view as to their accuracy or otherwise***). "The Problem" yields a set of "regulatory objectives" for each case study which are used to select a "long-list" of potentially applicable solutions from the selection laid out in Part 1. Each of these long-listed options is subject to an evaluation process based on a scoring system to test how well they each respond to a series of "requirements" (see further Appendix 1, and individual evaluation tables). The "requirements" lists appearing down the left hand side of the tables are designed to reflect the regulatory objectives for each case study as closely as possible – with some adjustments to enable easier comparisons to be made between the different case studies. The "requirements" also include some more generic demands, designed to allow a rough assessment to be made of each proposal's compatibility with international law (on issues like jurisdiction and cross-border trade) and its potential effectiveness generally.

The highest scoring proposals are then highlighted and subject to a brief analysis and explanation. Each case study then concludes with a brief set of "recommendations" for regulatory reform.

Part 3 pulls together the key findings of the case study evaluations into a set of overall "Conclusions and Recommendations" for further discussion. Taken together, the case studies reveal a number of common themes and problems. This means that, while the optimal regulatory approach may differ for each case study, there should be regulatory options available that are capable of having an impact, regardless of the sector, or whether the case concerns abuse by a subsidiary (a "subsidiary abuse" case), or somewhere within the supply chain (a "supply chain abuse" case). These "cross-cutting" solutions are identified and some suggestions are made as to how different complementary options could potentially be matched together to form a workable reform package.

Part 1: Options for Legal Reform

Introduction

There are many obstacles to corporate accountability under national and international law. Limited liability, restrictions on state jurisdiction and the sheer range and complexity of international business arrangements all combine to make it difficult to bring companies to book, particularly where the abuse has taken place overseas. However, no law is ever set in stone. There are many steps each and every home state could take to help reduce instances of corporate abuse abroad and to provide redress to victims, given enough creativity and political will.

While the case studies examined later in this report have some common themes, differences in commercial sectors, corporate structures, sourcing arrangements and regulatory backgrounds mean that there is unlikely to be a single, overarching regulatory solution to these problems. But before discussing the case studies in any detail it is important to be clear about what the different legal reform options mean in practice. The aim of this Part is to explain the terminology used in the following chapters, the basic elements of the various reform proposals, their advantages and disadvantages, and their most likely applications. Because all of the case studies involve corporate abuse *outside* the UK, particular attention is given to methods of *extraterritorial* regulation, i.e. how to extend the reach of UK legislation beyond national borders.

CORE's recent campaigning has focussed on possible reforms to company law (and particularly reforms to directors' duties, reporting and limited liability) against the background of the recent overhaul of company law in the UK. But there are other options worth considering too. This chapter discusses the company law reforms first, before turning to other legal areas, such as criminal law, tort law, tax and trade practices law. The focus of this chapter will be on steps the UK could take unilaterally. However, as the following chapters will show, there will be cases where unilateral action cannot deliver the desired outcomes and so, for completeness, a brief discussion of possible international law reform options is also included. As a member of the EU, there are areas where UK is prohibited from acting unilaterally (e.g. where the proposal may infringe EU law regarding "free movement of goods"). Where this is the case, these limitations are also highlighted.

As will be seen, there is much scope for creativity and many possible variations in how each law reform proposal could be put together. For clarity, and to set the scene for the case studies that follow, each section below concludes with (a) a brief "nutshell" summary of a possible way forward ("reform proposal in a nutshell"), (b) a short outline of the kinds of cases for which the reform proposal would be most useful ("most likely applications") and (c) any limitations or problems a proposal may have ("limitations and problems").

Company Law

1.1.1 Widen and strengthen directors' duties under the Companies Act 2006

In the UK, as in many other jurisdictions, directors are under a legal duty always to act in the best interests of the company. This is expressed in the Companies Act 2006 as a duty to act "to promote the success of the company for the benefit of its members as a whole". While this duty is well established, it is also open to criticism on the basis that it may cause directors to focus on short-term financial gains at the expense of wider social and environmental concerns. During the course of the UK Company Law Review it was argued by some groups (and CORE in particular) that directors' duties should be expanded to cover, not just shareholder interests, but the interests of other stakeholders as well. However, this "pluralist" approach was ultimately rejected by the UK government in favour of the principle of "enlightened shareholder value". Enlightened Shareholder Value is based on the idea that the long-term financial success of a company requires directors to factor social and environmental concerns into their decision-making, and that shareholders therefore have a real interest in how a company responds to social and environmental issues and challenges. The new statement of directors' duties can be found at section 172 of the Companies Act 2006, which requires directors to "have regard to", among other things, "the impact of the company's operations on the community and the environment".

While a "pluralist" approach has its attractions as a means of encouraging greater "corporate social responsibility" ("CSR"), grafting this onto the current director's duties regime is not without its problems. Not only does the proposal raise some tricky compliance issues for directors, it would also require a whole new system of enforcement[1] and remedies.[2] Finally, is there any sense in creating new liability regimes that apply only to *companies* and not to other business vehicles? For the time being, the UK government takes the view that company law ought not to be used as a method of social and environmental regulation, and that these particular concerns are better dealt with by other means (i.e. in legislation designed specifically for the purpose).[3]

On the other hand, company law is continually in the process of development. Theoretically, there is still room to strengthen and widen the existing statement of

[1] At present, directors' duties are enforced by shareholders on behalf of the company itself. But would shareholders be inclined to enforce these wider duties towards other groups? Clearly, enforcement rights would need to be granted to other groups too, but on what basis? Shareholder rights to enforce directors' duties are based on their position as owners of the company. What connection with the company would be needed to enforce a breach of, say, environmental duties?

[2] At present, because derivative actions are brought on the company's behalf, any financial benefit is retained by the company, not the claimant. Claims by *non-shareholders*, on the other hand, would be an entirely different kind of legal action – brought not on the company's behalf but on behalf of the claimants themselves – which would sit uneasily within the current system of remedies under company law.

[3] Although there is a connection between the two, as regulatory standards can offer benchmarks against which to measure directors' performance: a failure by a company to uphold regulatory standards may well reflect a dereliction of directors' duties.

directors' duties, so as to bring social, environmental and human rights considerations further up the decision-making agenda. CORE has already made proposals as to how to change the current weak obligations (to "have regard to" employee, supplier, customer and environmental issues) to a more positive duty to act. Another possible (new) directors' duty worth considering would be a duty to take steps to eliminate, as far as possible, externalisation of business costs in relation to tort and environmental harm risks.[4] However the basic duties are framed, it should also be made explicit that these duties include proper supervision of the social, environmental and human rights performance of *subsidiaries* (including foreign subsidiaries): something that is far from clear under the current legislation.

Reform proposal in a nutshell: *Strengthen directors' duties under section 172 of the Companies Act 2006 so that it is clear that, in order to promote the success of the company, directors have a positive duty to act to promote the interests of employees, to protect the interests of consumers and to minimise adverse impacts to the environment and communities. Make it clear that "promoting the interests of the company for the benefit of its members as a whole" means exercising an appropriate degree of supervision over the operations of subsidiaries (including foreign subsidiaries and suppliers) consistent with the level of risk posed by those operations to the well-being of consumers, employees, communities and the environment generally, whether at home or abroad.*

Most likely applications: *Cases involving abuse by subsidiaries or suppliers abroad, which carry the risk of financial losses for the parent company (e.g. in terms of litigation costs, damages, costs of financial settlements or loss of reputation and/or markets) and/or a reduction in share value.*

Limitations and problems: *Vagueness of duties, making it difficult to predict how the law will be applied to particular cases. Also, much is still left to the discretion of directors, given the easy to meet standard of care of directors under company law. Duties are only enforceable by shareholders of the parent company. No financial compensation for victims. Any financial benefit from the claim would be retained by the company.*

1.1.2 Mandatory social and environmental reporting

The provisions in the UK Companies Act 2006 relating to the Business Review[5] reinstate much of the substance of the cancelled OFR regulations. However, the emphasis is still on social and environmental issues with *financial* consequences for the company, the main objective again being to assist shareholders. On the other hand, there is an observable trend in the policies of national governments (particularly within the EU) in favour of greater transparency by companies in relation to their global, social and environmental performance and policies. Companies listed on the French Stock Exchange, for instance, have been required since 2003 to include information on their social and environmental

[4] Thanks to Peter Muchlinski for this suggestion.
[5] Companies Act 2006, Chapter 5.

performance in their annual reports. Importantly, these regulations also require disclosures relating to the environmental impacts of foreign subsidiaries and, though to a more limited extent, social impacts. It is quite possible, therefore, that more use could be made of mandatory social and environmental reporting as a regulatory tool in future.

Reform proposal in a nutshell: *Mandatory group reporting by all large and medium UK companies of social, environmental and human rights impacts of group activities (including the impacts of activities of subsidiaries abroad). KPIs and minimum content to be prescribed by legislation. Reports to include details of policies and activities to protect the labour rights of those employed by suppliers and to minimise environmental impacts. Reporting obligations to be underpinned by a "true and fair view" duty of disclosure. Reports would be externally verified. Reporting requirements to be backed up by criminal sanctions in case of false or inaccurate claims, (although consideration could be given to a possible "safe harbour" for civil liability).*

Most likely applications: *Many, varied.*

Limitations and problems: *Legal and logistical difficulties in monitoring and verifying the accuracy of claims in relation to overseas operations. In practice, much of the monitoring work (i.e. as regards accuracy of information) may well fall to NGOs. No financial compensation for victims of abuse. Criminal sanctions will only relate to the accuracy of claims, and therefore would not target the abuse itself.*

1.1.3 Expand an existing sanction against companies: "winding up in the public interest"

Under the UK Insolvency Act 1986,[6] the Secretary of State (for trade and industry) has the power to petition for a company to be wound up if this is deemed to be "expedient in the public interest". This usually follows an investigation by the Companies Investigation Branch of the DTI under companies legislation where there has been a complaint (often by a member of the public) of corporate wrongdoing or misconduct. Many public interest petitions are aimed at shutting down companies that trade in such a way as to be harmful to those who do business with them.[7]

It is doubtful that these provisions, as framed at present, could be used to wind up a company involved in objectionable foreign activities through a subsidiary (or a contractor). As noted above, the courts have to be satisfied that the winding up order would be "expedient in the public interest", which the courts appear to interpret as being confined to public interest *within the UK*.[8] In theory, though, it would be open to the UK legislature to build on the Secretary of State's existing

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[6] Section 124A, inserted by the Companies Act 1989.
[7] e.g. Companies set up to obtain money from customers under false pretences (e.g. through pyramid schemes) or which fail to comply with regulations designed to protect the public (e.g. illegal gambling, giving investment advice without being authorised to do so by the FSA).
[8] *Re Titan International Inc* [1998] 1 BCLC 102.

powers to apply for companies to be wound up in the public interest to cover cases where companies are involved, through their subsidiaries, in activities that are inherently objectionable (or who fail to show sufficient regard for labour rights, the environment, or human rights generally).[9]

Reform proposal in a nutshell: *Expand existing powers of the Secretary of State to wind up in the public interest to cover cases where companies (either directly or indirectly through suppliers or subsidiaries) are involved in or have contributed to serious violations of human rights or serious environmental damage, whether in the UK or elsewhere.*

Most likely applications*: Cases involving complicity in very serious human rights abuses. Cases involving activities that are inherently objectionable and which contravene international law (e.g. prohibitions on arms sales, etc.).*

Limitations and problems: *No private rights of action (although NGOs and members of the public would be able to initiate a complaint). Whether or not to petition for winding up would be a matter for the discretion of the Secretary of State. Likely to cause significant economic harm to employees and contractors who depend on the company and therefore would only ever be used in the most serious of cases. No financial compensation for victims.*

1.2 Criminal law

Preamble: Some introductory comments on extraterritorial criminal jurisdiction. UK criminal law does not generally apply to activities that take place beyond UK borders. However, the UK does occasionally take jurisdiction over offences taking place abroad on the basis (a) that the offender (individual or corporate) was a UK national,[10] or (b) that part of the offence (e.g. the planning of it) took place within UK territory.[11]

Compared to some other states, the UK is relatively conservative as regards the exercise of extraterritorial *criminal* jurisdiction. Worldwide, a number of jurisdictions have made grave breaches of human rights an offence under their domestic criminal law, including the possibility of corporate criminal liability.[12] In some cases these laws have been given extraterritorial application to cover cases of corporate abuse abroad by corporate “nationals” of the home state.

Definitions of corporate nationality vary from state to state and from context to context. However for criminal law purposes, the nationality of a company is almost always taken to be the state in which the company was incorporated. While the precise scope of permitted extraterritorial jurisdiction over *foreign*

[9] Provided this was not an unreasonable encroachment on the legislative freedoms of other states See, further, discussion at section 1.2 below.
[10] See the Anti-Terrorism, Crime and Security Act 2001, for example, which extends UK criminal jurisdiction to cover corruption offences committed by UK nationals abroad.
[11] See Criminal Justice (Terrorism and Conspiracy) Act 1998.
[12] Ramasastry and Thompson, ‘Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law’, FAFO, September 2006.

companies is unclear, most commentators agree that home states are not permitted to regulate them directly. However, it may be possible, with the right legislative backing, to regulate subsidiaries *indirectly* through the parent, e.g. by imposing obligations on the parent company to supervise and control their subsidiaries effectively, or to make certain disclosures on their behalf. This method can be referred to as "parent-based" regulation, of which mandatory group reporting (see section 1.1.2 above) is a good example.

Parent-based extraterritorial regulation is still subject to the proviso that it not be an unreasonable interference with the domestic affairs of other states. There is no clear way of telling when a home state measure crosses this line. But, as a general rule of thumb, the greater the international condemnation of a particular practice, or the greater the international consensus on the need for regulation to combat a particular practice, the harder it will be for other states to complain.

1.2.1 Clarify criminal liability for "aiding and abetting" abuses overseas

Under existing UK criminal law it is already possible to prosecute companies (and in some cases their directors) on the basis that they had "aided and abetted" or participated in the criminal activity of others. However, given the territorial bias in UK criminal law, any extension of this possible source of criminal liability to *offshore* activities would have to be expressly provided for by way of new legislation.

The US Foreign Corrupt Practices Act ("FCPA") provides an example of a possible regulatory model. This Act applies to domestic and foreign companies ("issuers") on the basis of registration and reporting requirements under the US Securities Exchange Act. Initially, it was proposed to extend the provisions of the FCPA directly to foreign subsidiaries of issuers covered by the Act. However, jurisdiction-wise, this was considered to be one step too far and it was decided to use a "parent-based" method of regulation instead. Under this method, foreign subsidiaries would not be directly liable, but their actions could give rise to "secondary liability" for the parent company on the basis (a) that the parent company had knowingly aided or engaged in the making of the foreign payment (b) that the parent company had authorised or ratified the unlawful payment after the event or (c) that the subsidiary was acting as an agent for the parent.

Similarly, it would be possible to provide for a new source of secondary criminal liability where a UK parent company (or its directors) had aided and abetted, say, human rights violations in other countries. Attributing criminal intent to a company can be difficult under UK common law, although the Corporate Manslaughter and Corporate Homicide Act 2007 includes a test to help get around this problem. Under that Act, an organisation can be guilty of an offence "*if the way in which its activities are managed or organised* … amounts to a gross breach of a relevant duty of care …"[13].

Proposal in a nutshell: *Amend criminal law to make it a criminal offence for a parent company to aid, abet, encourage or participate in violations of core labour*

[13] Corporate Manslaughter and Corporate Homicide Act 2007, section 1.

rights, serious environmental damage or human rights abuses in other countries. Ensure that criminal liability can be imputed to a company, not only by virtue of the acts and intentions of individual directors, but also on the basis of systematic management failures.

Most likely applications: *Cases involving very serious abuse of employees, communities or consumers or very serious environmental damage by subsidiaries of UK companies.*

Limitations and problems: *No financial compensation for victims.*[14] *No private rights of action.*[15] *Likely to be used in only the most serious of cases. Only applicable where a direct causal relationship can be shown between the acts of the parent and the acts of the foreign entity (therefore arguably more applicable to parent-subsidiary relationships than the relationship of buyer and supplier). Co-operation and support from foreign law enforcement agencies may be needed to prove a crime has occurred. If law reforms are unilateral, may cause difficulties in the context of bi-lateral arrangements re co-operation in criminal matters, which usually require parity in criminal offences between the two signatory countries. At a practical level, may cause some parent companies to adopt a "hands-off" policy in relation to the activities of their subsidiaries as a tactic to avoid criminal liability. Depending on the subject matter of the law, there is the possibility that other states may object (e.g. on the grounds that it amounts to an unreasonable interference in their own regulatory freedoms).*

1.2.2 Create new statutory duties to ensure the health and welfare of workers, consumers and communities in other countries

Under the UK Health and Safety Act 1974, all employers are under a general duty to "ensure, so far as is reasonably practicable, the health, safety and welfare at work of all [their] employees". This duty is amplified by some more specific provisions relating to workplace health and safety, such as providing information and training to employees about workplace risks, proper maintenance of plant and ensuring safe access and exits. A breach of this duty is a criminal offence, unless the employer can show that all reasonable precautions were taken.

Another example of a statute providing for criminal liability for "breach of duty" is the Corporate Manslaughter and Corporate Homicide Act 2007. Under this legislation, an organisation can be "guilty of an offence if the way in which its activities are managed or organised … causes a person's death, and … amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased". (A relevant duty of care is defined as a duty owed under the law of negligence).

But these provisions only apply within the UK. In theory, it would be possible to create new statutory duties for UK companies to take reasonable steps ensure the

[14] Although this is not to suggest that parallel private (e.g. tort-based) actions would be precluded. See section 1.3 below.
[15] Although, again, parallel private (e.g. tort-based) actions may still be possible. See section 1.3 below.

health and welfare of workers, consumers and communities in other countries. However, account would need to be taken of the fact that the workers in question are likely to be employed, not by the company itself, but by its subsidiaries and suppliers. There would obviously be limitations on how far these kinds of duties could extend. For instance, they would only be fair and practical in relation to the employees of those foreign companies over which the UK parent enjoyed some influence. For this reason, it may be more realistic to limit this option to cases of abuse by *subsidiaries* of UK companies and, arguably, certain suppliers with whom the UK company had a direct and close relationship (rather than all those within the supply chain).

As under the Health and Safety Act 1974 (and the Corporate Manslaughter and Corporate Homicide Act 2007), a breach of this basic duty would be a criminal offence.

For the reasons explained in the Preamble to section 1.2 above, it would be preferable to use international standards (e.g. ILO core labour standards) as a baseline rather than regulatory standards prevailing in the UK. However, an additional complication arises by virtue of the UK's membership of the EU. Clearly, care would need to be taken to ensure that these new provisions (a) did not conflict with harmonised EU positions on issues like environmental protection, consumer issues and social and employment policy, and (b) did not indirectly result in unilateral trade restrictions, contrary to EU policies on the internal market or external trade (i.e. the "Common Commercial Policy").

Proposal in a nutshell: *Create new statutory duties requiring all UK business entities that have the ability to control or influence the social, environmental and human rights performance of subsidiaries or suppliers abroad to ensure, so far as is reasonably practicable, the health, safety and welfare of (a) employees of those subsidiaries or suppliers (b) consumers of their products and (c) communities potentially affected by their operations. This basic obligation could be fleshed out by more specific requirements derived from international standards, e.g. obligations to prepare environmental impact statements, obligations regarding the use of child labour, obligations not to discriminate against women workers, etc. The duty would be enforced under UK criminal law, although it would be open to members of the public to make a complaint, leading to an investigation by the designated authorities.*

Most likely applications: *Cases involving abuse in other countries by subsidiaries or suppliers resulting in harm to workers, communities or consumers where the parent company has failed to use its influence (whether as a shareholder or a contractor) to prevent that harm.*

Limitations and problems: *No financial compensation for victims. No private rights of action (although NGOs and members of the public should be able to initiate a complaint). Legal and logistical difficulties in monitoring and verifying performance by overseas entities. Co-operation and support from foreign law enforcement agencies may be needed to prove a crime has occurred. If law reforms are unilateral, may cause difficulties in the context of bi-lateral*

arrangements re co-operation in criminal matters, which usually require parity in criminal offences between the two signatory countries. Possibility that other states may object (e.g. on the grounds that it amounts to an unreasonable interference in their own regulatory freedoms).[16]

1.3 Private causes of action

1.3.1 Tort law: clarify the scope of parent company liability for the acts of subsidiaries, suppliers or contractors (including foreign subsidiaries, suppliers or contractors)

Access to justice in home state courts (i.e. UK courts in relation to a UK parent company) has been one of CORE's key legal reform demands. The 2005 decision by the European Court of Justice in *Owusu v Jackson* that English courts *may not* dismiss actions on grounds of *forum non conveniens* (i.e. that the English courts are not the appropriate forum for the dispute) is obviously helpful to prospective foreign litigants.

However, the scope of parent company liability under English tort law for the acts of subsidiaries and contractors abroad is still quite unclear. It is not known, for instance, to what extent a parent company owes a "duty of care" to those potentially affected by the activities of its subsidiaries. The existence of a "duty of care" is fundamental to a finding that a company has been negligent, but so far all of the UK cases that raise this point have either been settled or dismissed. In principle, it would be possible to clarify by legislation the circumstances in which a parent company would, and would not be liable. A further difficulty for claimants is proving the kinds of management and supervisory failures necessary for a finding of negligence. A possible solution to this would be to reverse the burden of proof, so that parent companies with a controlling interest in a subsidiary would automatically be liable for negligence along with that subsidiary unless it can demonstrate that it took all reasonable steps to prevent the damage or injury occurring.

But the application of reforms of this kind could be restricted by EU law governing international claims. Under rules of private international law (also known as "conflicts of law"), English law does not automatically apply to cases where the damage or injury has occurred overseas. This means that, even if they do gain access to the English courts, foreign litigants may still find their dispute governed by some other system of law.[17] There is no easy solution to this, as "choice of law" rules have been harmonised across the member states of the EU. It is still open to the UK courts to refuse to apply foreign law (and to apply English law

[16] Although states have much greater latitude in relation to extraterritorial laws designed to protect their own nationals. See *Lawson v Serco* [2006] 1 ALL ER 823 (HL) in which the House of Lords considered the extraterritorial application of the UK Employment Rights Act 1996 to British nationals working abroad.

[17] Although note that foreign law is arguably less likely to apply if the parent is alleged to have been *directly* liable due to management acts performed *in the home state*. See *Lubbe v Cape plc* [2000] 1 Lloyd's Law Reports 139 in which the question of the applicable law to the case was regarded as an "open question" at that stage (although as the matter settled, the question of the applicable law in that case was never finally determined).

instead) on the basis of a "public policy" exception.[18] However this is likely to be limited to a narrow range of serious cases. One possible scenario in which the "public policy" exception might be invoked is where to apply foreign law (instead of English law) would allow a defendant to escape liability for serious human rights abuses.

Proposal in a nutshell: *Clarify by statute the basis on which and the circumstances in which a parent company will be liable for the negligence of its subsidiaries, suppliers and contractors. In cases involving serious human rights abuses, reverse the burden of proof so that parent companies with a controlling interest in a subsidiary would automatically be jointly liable for a subsidiary's negligence unless it can demonstrate that it took all reasonable steps to prevent the damage or injury occurring.*

Most likely applications*: Cases involving abuse in other countries by subsidiaries, suppliers, distributors or other contractors resulting in harm to workers, communities or consumers where the parent company has failed to use its influence (whether as a shareholder or a contractor) to prevent that harm.*

Limitations and problems: *Reforms may have limited impact in practice, without changes to "choice of law" rules that restrict the cases to which English law would apply. May not lead to greater use of FDL claims in any event, as claimants also face numerous other financial and logistical obstacles that are also likely to weigh heavily in a decision whether or not to pursue a claim.*

1.3.2 Create new statutory rights of action

In its most recent resolution on CSR, the European Parliament repeats its calls for "a mechanism by which victims … can seek redress against European companies in the national courts of the Member states". In the UK, labour and environmental violations are largely enforced via the criminal law. In the US, though, civil enforcement of labour and environmental law by private individuals and NGOs is much more commonplace. There, private enforcement rights exist under a range of environmental statutes, including the Clean Air Act, the Clean Water Act, the Toxic Substances Control Act, and the Resources Conservation and Recovery Act. Citizens' rights to sue are bolstered further by Federal "standing" statutes, that do away with the common law requirement that in order to bring a claim a claimant must show injury personal to himself. In many cases, all that is needed is to demonstrate an "interest" in the matter, which opens the way for civil enforcement by public interest litigants and NGOs.

The key conceptual difference between statutory private rights of action and traditional tort-based litigation (see section 1.3.1 above) is that tort-based litigation is concerned with the protection of *private* rights, whereas this section 1.3.2 is concerned with civil enforcement of *public* laws. Another practical difference between the two relates to the remedies available. The main aim of tort-based remedies is to attempt to put the parties back in the position they would have

[18] See Private International Law (Miscellaneous Provisions) Act 1995, section 14.

been in (or some approximation of it) had the negligence not occurred. This is done through an order to pay damages to the claimant. However, in civil enforcement cases financial compensation may not be the main remedy, or may not even be available. Rather, the claimant will typically be seeking an injunction (e.g. to halt illegal work, or to prevent an activity from talking place without some corrective action), or a declaration as to what the rights and responsibilities of each party are. In the cases where financial compensation may be available, this will not necessarily be retained by the claimant (apart from sums to reimburse the claimant's legal costs).[19]

But the distinction between tort-based litigation and other kinds of civil enforcement may not always be so clear-cut. The US Alien Tort Claims Act, for example, is an example of a statutory right of action under which breaches of human rights are treated as a "tort" and give rise to an obligation to pay damages.

A further distinction between "civil enforcement" and tort-based litigation is that civil enforcement is not just a way of enforcing standards against companies, but may also be used as a way of scrutinising governmental decision-making. A good example of the latter is the litigation by Friends of the Earth against OPIC and the US Ex-Im Bank in the United States District Court, which challenges the validity of decisions to provide financial support to greenhouse gas-producing projects. The claimants in that case are seeking, not financial compensation but, among other things a declaration that "the defendants violated and are in violation of NEPA [i.e. the National Environmental Policy Act]" and an injunction "requiring the defendants to fully comply with NEPA". Similarly, under the UK Human Rights Act, private litigants can apply for a declaration that a public body has acted inconsistently with the claimant's rights under the European Convention on Human Rights, but in some cases may be able to claim financial compensation as well.[20]

So there is considerable scope for creativity in terms of the basic standards that can be enforced, who should be given rights of standing, who can be made a defendant to proceedings, and the appropriate mix of remedies. In practice, rights of civil enforcement of domestic regulation have so far only rarely been extended to foreign activities and impacts.[21] In US law, for instance, there is a "presumption

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[19] While most US citizen suit provisions provide for the possibility of civil damages, these are often payable to the US Treasury, and not to the claimant.

[20] Provided that the relevant court is empowered to do so and it is an appropriate case for awarding damages (i.e. the court is persuaded that this is the only way to achieve "satisfaction" as between the parties). See Human Rights Act 1998, section 8.

[21] US anti-discrimination law contains some exceptions, e.g. the US Age Discrimination in Employment Act was amended in 1984 to extend the protection of US law to overseas workers employed by subsidiaries of US companies. But these rights are limited to US citizens. In the UK, the Employment Rights Act 1996 has been held to apply extraterritorially, but only in relation to UK nationals where there are also a range of other connecting factors to the UK jurisdiction, see n. 16 above. The "climate change litigation" against OPIC and Ex-Im Bank, mentioned above, aims to establish the application of the US National Environment Policy Act ("NEPA") to decisions to grant financial support to foreign projects. However, in a recent (2007) decision, the court took the view that because the relevant decision-making took place in the US, and because the litigation is concerned with US *domestic* environmental impacts, a decision in the plaintiffs' favour would not actually be giving NEPA any extraterritorial scope.

against extraterritoriality" which, in the absence of words expressly extending rights to non-residents, gives the foreign litigant the difficult job of proving that the legislature indeed intended to grant her or him those rights. However, subject to the caveats outlined above in relation to extraterritorial regulation generally (see discussion at section 1.2 above) there is no reason in principle why a state could not grant non-residents rights of civil enforcement against its own corporate nationals.[22] As a matter of international law, this is arguably a less controversial proposition than the proposal set out at para. 1.2.2, which involves the possibility of criminal liability for the parent. However, as with the similar regulatory proposal discussed above (see section 1.2.2: "New statutory duties to ensure the health and welfare of workers, consumers and communities in other countries"), care would need to be taken that the new requirements imposed on UK companies (with regard to EU suppliers in particular) did not conflict with EU common commercial policy, rules on free movement of goods within the EU, or harmonised EU positions on issues such as environmental protection, consumer safety, or social and employment policy.

Proposal in a nutshell: *Create new statutory duties requiring all UK business entities that have the ability to control or influence the social, environmental and human rights performance of subsidiaries or suppliers or distributors abroad to ensure, so far as is reasonably practicable, the health, safety and welfare of (a) employees of those subsidiaries or suppliers (b) consumers of their products and (c) communities potentially affected by their operations. This basic obligation could be fleshed out by more specific requirements derived from international standards, e.g. obligations to prepare environmental impact statements, obligations regarding the use of child labour, obligations not to discriminate against women workers, etc.. Breach of duty would be enforced by affected parties and other public interest litigants (e.g. NGOs) able to demonstrate a sufficient interest in the matter. Claimants would be able to seek a range of remedies, including financial compensation (where appropriate), injunctive relief, or a declaration as to rights and responsibilities of the parties.*

Most likely applications: *Cases involving abuse in other countries by subsidiaries, suppliers, distributors or other contractors resulting in harm to workers, communities or consumers where the relevant parent company has failed to use its influence (whether as a shareholder or a contractor) to prevent that harm.*

Limitations and problems: *Legal and logistical problems associated with monitoring the performance of companies overseas. May be opposed at EU level on the grounds that it poses an unjustifiable interference with free movement of goods within the EU (to the extent that it poses a barrier to trade between member states), and/or is contrary to the Common Commercial Policy (to the extent that it affects imports from non-member states), or conflicts with existing EU harmonised*

[22] It is worth noting that civil enforcement was a feature of two well-known (though ultimately unsuccessful) attempts at extraterritorial regulation of the social and environmental performance of multinationals: the Code of Conduct Bill (Australia) and the McKinney Bill (US).

positions on environmental protection, consumer safety or social and employment policy.

1.3.3 Create a new complaints mechanism specifically to deal with corporate abuses taking place overseas

Victims of abuse by UK-based multinationals currently lack an accessible, transparent and affordable means of airing their grievances and, in appropriate cases, obtaining financial redress. In its 1999 Resolution on CSR, the European Parliament proposed the establishment of a new "monitoring mechanism" for multinationals which, among other things, would be empowered to hear "complaints" about corporate conduct in other countries. Although the formal mechanism contemplated by the European Parliament never materialised, it would be possible, in theory, to create something along these lines at a national level.

One possible model would be the National Contact Point ("NCP") "complaints" system under the OECD Guidelines for multinationals, although this process has been criticised for its lack of transparency, procedural vagueness and lack of effective sanctions. Clearly, improvements would be necessary. At the domestic level there are many other examples of special-purpose complaints and investigative bodies set up to deal with corporate abuse of various kinds, which would be worth exploring further in this context, e.g.

- *UK employment tribunals*. These are judicial bodies set up to hear disputes between employees and employers regarding employment rights. They are open to the public, but aim to be less formal than other courts and procedures are designed to be accessible to "litigants in person" (i.e. without formal legal representation). Tribunal members are appointed by the UK Judicial Appointments Commission. Each tribunal consists of three members, comprising a Chair (who is legally qualified) and two "lay members", one from an "employer background" and one from an "employee background".

- *The US Equal Employment Opportunity Commission ("EEOC").* This body is headed by a five-member commission, all appointed by the President with Senate confirmation. However, it does not adjudicate employment disputes as such. Rather, it investigates complaints and attempts to settle them voluntarily. But if a voluntary settlement cannot be reached, the matter may still be referred by the EEOC to the Federal Courts for enforcement action.

- *UK Information Commissioner and Information Tribunals*. Complaints about breaches of UK data protection and FOI laws can be lodged with the UK Information Commissioner, who will attempt to resolve them informally. If this does not work, a decision notice will be issued. If either party is not happy with the terms of the decision notice, it has the right to appeal to the Information Tribunal. The Information Tribunal is composed similarly to UK

Employment Tribunals (i.e. one chairman and two lay members). Appeals from Information Tribunal decisions are permitted (on points of law only) to the High Court.

- *UK Competition Commission ("CC").* The CC does not have the power to commence inquiries itself. Instead, inquiries are referred to it by other regulatory bodies like the Office of Fair Trading ("OFT"). Once an investigation into a merger or anti-competitive behaviour has been made, the CC has the power to negotiate and agree "undertakings" with the company that is subject of the inquiry. These undertakings are enforceable in the UK courts.

Ad hoc (and unofficial) precedents also exist at regional and international level, e.g.:-

- The series of hearing conducted by the European Parliament beginning in November 2000, on subjects including baby milk marketing, sourcing practices of clothing companies, conflict diamonds and construction companies in Lesotho;

- Various "International People's Tribunal" hearings, convened by the Permanent People's Tribunal on Industrial Hazards and Human Rights.[23]

An important issue for any new complaints body set up to examine cases of corporate abuse in other countries would be the extent to which the complaints body would be empowered to make orders for financial compensation. To keep the procedures as informal as possible, and avoid too much encroachment on the role of the civil courts (and to ensure that appropriate cases continue to be pointed in that direction) it may be preferable to limit the power of such a complaints body to award financial compensation to, say, making an award for costs. Other remedies, which may be just as effective at stopping the abuse, could be an injunction, a public declaration of rights and responsibilities, or remedial and publicity orders (similar to those which can already be made under the Corporate Manslaughter and Corporate Homicide Act 2007).[24] Alternatively (or in addition) the body could be empowered to negotiate undertakings with a corporation found to have engaged (either directly or through its subsidiaries) in abusive practices towards foreign workers, consumers or communities which would then be enforceable in the courts (perhaps through a system of fines).

Proposal in a nutshell: *A dedicated commission (or "tribunal" or "ombudsman") to determine disputes between UK companies and those affected by the activities of their foreign subsidiaries, suppliers, distributors and other contractors.*

[23] E.g. the series of hearings relating to the Bhopal disaster which took place in London in late 1994. See further http://www.pan-uk.org/Internat/indhaz/hazindex.htm.

[24] See section 9 (under which the court can order a convicted organisation to take specific steps to remedy the breach, and any deficiencies, e.g. to do with health and safety, which appears to have played a part). And see section 10 (under which the court can order the company to publicise the fact that it has been convicted of corporate manslaughter, details of the offence, the amount of the fine, and any remedial orders made).

Corporate behaviour would be judged by reference to international social, environmental and human rights standards, as well as domestic law standards on issues such as negligence and complicity. Commission would have the power to compel the production of documents and witnesses (subject to legal professional privilege). Commission would have the power to determine whether or not international standards had been violated, and issues regarding allocation of liability. Commission members would be appointed by the UK government and would be a mix of legally trained personnel, and "lay members" from the corporate sector, unions and NGOs. Procedures would be designed to be informal, flexible, inexpensive and accessible. Rules on "standing" would be flexible (e.g. it would not be necessary to show injury to oneself in order to bring a complaint; complaints could be launched by interested NGOs acting on behalf of the public or affected groups). Remedies would include injunctions, declaratory relief, remedial and publicity orders. The Commission would also be empowered to negotiate enforceable undertakings with companies found to have engaged in abusive or negligent behaviour. However, financial orders would be limited to orders for costs.

Most likely applications: *Cases involving abuse in other countries by subsidiaries, suppliers, distributors or other contractors resulting in harm to workers, communities or consumers where the relevant parent company has failed to use its influence (whether as a shareholder or a contractor) to prevent that harm.*

Limitations and problems: *No financial compensation for victims. Sanctions would be largely reputational. Legal and logistical difficulties in monitoring and verifying performance by overseas entities means that, practically speaking, much of the monitoring work may well fall to NGOs.*

1.4 Create new tax incentives?

The tax system is a frequently-used method of influencing choices and behaviour. Tax incentives and exemptions are popular with companies for obvious reasons, although critics argue that they are also easily manipulated, and do not necessarily bring about lasting changes in corporate practices and attitudes.

If this is the case at a domestic level, is there any chance that tax incentives could be used to deliver benefits to workers, communities and consumers further afield? While it might be possible, in theory, to design new taxation rules to reward socially and environmentally responsible parent companies (e.g. through the tax treatment given to dividends remitted back to a parent from a foreign subsidiary) in practice there are many legal, practical and behavioural problems to contend with. Legally, the lack of tax jurisdiction over foreign subsidiaries of UK companies means that the UK would not be able to offer them tax incentives directly. For all but the most closely-held corporate groups,[25] the ability of the UK to influence the environmental, social and human rights standards of foreign subsidiaries in this way would depend on (a) the actual level of influence of parent

[25] E.g. groups linked by equity ownership of 90% or more.

over the target subsidiaries and (b) the extent to which the target subsidiary's profits actually become part of the UK parent's income stream. Moreover, taxation of international corporate groups is subject to a complicated network of treaty arrangements, as well as oversight by the OECD and the EU, so it is unlikely that much could be achieved by the UK acting unilaterally. At a practical level, it is difficult to see how UK domestic tax authorities would go about monitoring claims in relation to the social, environmental and human rights performance of subsidiaries, even leaving aside the question of whether they are equipped to do so. At a behavioural level, there is the very real risk that these kinds of initiatives would just create further opportunities for avoidance and manipulation. In sum, it is likely that the benefits to foreign workers and communities would be marginal at best.

Proposal in a nutshell: *Establish a preferential rate of taxation in relation to dividends remitted from foreign subsidiaries that could demonstrate compliance with specific international social, environmental and human rights standards. Place CSR-related conditions on the availability of tax credits in relation to taxation paid on foreign earnings.*

Most likely applications*: Multinationals based in the UK with closely-held foreign operating subsidiaries.*

Limitations: *Unlikely to have a real impact on corporate behaviour, risks creating more opportunities for tax avoidance. Likely to require international co-operation. May fall foul of WTO rules as an illegal export subsidy, unless it was made absolutely clear that the tax did not apply in any way to profits gained from exports.[26] Practical and resources difficulties for tax authorities in monitoring compliance with international social, environmental and human rights standards.*

1.5 Other market-based initiatives

1.5.1 Make more use of import bans

Import bans can be a flexible and often highly effective means by which one state can exert its influence over social and environmental policies of another, although they do run the risk of challenge under World Trade Organisation ("WTO") rules and also, in the case of EU member states, under EU law.

Under WTO rules, member states are not allowed to discriminate between states with respect to border restrictions (the "Most Favoured Nation" requirement) nor may they apply different conditions as between their own domestic products and imports (the "National Treatment" requirement). These provisions are bolstered by Article XI of the General Agreement on Tariffs and Trade ("GATT"), which prohibits quantitative import restrictions. However, import bans that would otherwise not be permitted under the GATT may still be permissible on grounds they are aimed at the conservation of natural resources (Article XX(g)) or concerned with the protection of human, animal or plant life or health (Article XX(b)).

[26] Thanks to Peter Muchlinski for his thoughts on this point.

Several cases have now been brought before WTO dispute resolution bodies concerning environmentally motivated import bans. While the law is still very confusing, some general themes are beginning to emerge. First of all, importing states are more likely to be able to see off a challenge to an import ban under Article XX of the GATT where the ban is designed to protect a resource that is internationally-recognised as being under threat. Secondly, the measure must be a reasonable response to the problem, not an over-reaction by the regulating state. Thirdly, there must be "even-handedness" between the way the issue is regulated domestically and the import ban, and the requirements of foreign states should not be over-prescriptive. Finally, the regulating state should have made a reasonable attempt at finding a multi-lateral solution to the problem before resorting to unilateral measures.

But EU member states have an additional layer of regulation to contend with, in the form of trading rules under the Treaty Establishing the European Community ("TEC"). In most circumstances, a straightforward import ban on a non-member state's products could not be achieved unilaterally, not just because external trade policy is a matter of EU competence (under the "Common Commercial Policy"),[27] but because of the chances that the products in question would be indirectly imported into the regulating state's territory in any event (via another member state) under rules relating to the free circulation of goods within the Community.[28]

Proposal in a nutshell: *A ban on imports of products that were not certified as having been manufactured or produced in accordance with minimum social, environmental or human rights standards. Could also encompass products containing ingredients subject to the ban. Standards underlying certification scheme would be internationally-accepted standards (e.g. ILO core labour standards).*

Most likely applications: *Cases of serious labour, environmental or human right abuses by foreign suppliers to UK retail markets (either directly or through intermediaries).*

Limitations and Problems: *Generally speaking, could not be achieved by the UK unilaterally. Would require EU-level approval and support. May be open to challenge under WTO dispute resolution procedures on the basis that it breaches GATT rules (Articles III(4) and XX).*

1.5.2 Create mandatory labelling schemes

Social and eco-labelling refers to the practice of labelling products to make consumers aware of the social and/or environmental conditions under which those products were produced and brought onto the market. Social and eco-labelling schemes can simply allow certain products to carry a "mark" (e.g. the "Rugmark"

[27] See TEC Article 133.
[28] TEC Article 30 allows for exceptions to internal market rules where trade restrictions are justified on grounds including "protection of health and life of humans, animals or plants". However, the European Court of Justice ("ECJ") interprets these provisions very restrictively.

label or the "Fairtrade" symbol); those products then sit alongside other products on the supermarket shelves. Alternatively, they can, as part of a government-sponsored mandatory scheme, require all products to carry a mark stating whether *or not* products comply with certain criteria (e.g. EC labelling requirements for eggs sold to the public, which must show details of farming methods). Often, social and eco-labels are underpinned by a "code of conduct" that must be complied with if the right to use the label is to be retained.

Social and eco-labels are a flexible market tool that can be highly effective, especially in relation to issues, like child labour, which have attracted widespread and international public concern. In most cases they are voluntary systems. Government-sponsored mandatory systems are still fairly rare, although there is growing interest in this kind of regulation as an alternative to more traditional, interventionist, regulatory methods.

Care must be taken when designing mandatory social and eco-labelling schemes that they do not operate as an indirect barrier to trade. At the WTO level, a social and eco-labelling scheme may be open to challenge under Article III(4) of the GATT on the basis that it discriminates between imports and local products (in effect if not explicitly) and under Article 2.2 of the WTO Agreement on Technical Barriers to Trade on the basis that it creates an unnecessary obstacle to international trade. However, as with import bans (discussed above) social and eco-labelling schemes stand a greater chance of surviving a challenge if they are motivated by genuine social and environmental concerns (and preferably concerns that are global rather than national), are proportionate, non-discriminatory and even-handed in their treatment of domestic products versus imports, are not so prescriptive that they do not allow foreign producers the chance to comply, and are under-pinned by internationally agreed standards.

At the EU level, there is arguably more space for unilateral action by individual member states in relation to labelling schemes aimed at third party states than there is with straightforward import bans. But labelling schemes may still be objected to on the basis that they restrict trade between EU member states. This was the case with a Dutch proposal which would have required all wooden products placed on the Dutch market to carry a certificate stating whether or not the product originates from an area certified as being compliant with sustainable forestry practices. The proposal was notified to the Commission as required under the Directive on Notification of Technical Regulations,[29] but was then criticised by the Commission and a number of EU member states. The Commission queried the appropriateness and the proportionality of the proposed scheme, both in relation to imports from EU member states and from other non-European countries. While the Community is not opposed to the use of social labelling schemes as a method of extraterritorial regulation *per se*, it does not encourage unilateral action by member states that may have the effect of restricting trade *within* the Community itself.

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[29] Commission Directive 98/34/EEC, OJ 1998 L 204/34

Proposal in a nutshell: *Support existing established codes of conduct in relation to supply chain issues with government-sponsored mandatory social labelling schemes, requiring retailers to state whether or not certain products have been certified to be in compliance with the relevant production or environmental standards.*

Most likely applications: *Cases involving abuse (e.g. of workers, communities) by suppliers to UK retailers, especially cases where an import ban would be illegal (i.e. under regional and international trading rules), inappropriate or counterproductive (e.g. because of its effect on the income and employment prospects of foreign workers).*

Limitations and problems: *Relies on consumer awareness and activism for enforcement. Logistical and legal difficulties in monitoring compliance with codes of conduct by foreign entities in foreign countries. May be open to challenge under WTO rules. To the extent that it affects trade between EU member states, may be open to challenge under Community rules concerning the common market.*

1.6 Trade practices laws

1.6.1 Extend the geographical scope of marketing rules

Marketing controls are a way of protecting consumers where there may be a health or safety risk to the user of the product (e.g. in relation to tobacco). The marketing of baby milk substitutes (the subject of a case study by Save the Children, see Part 2 below, case study 7) is already controlled within the UK by regulations made under the Food Safety Act which implements, within the UK, two EU Directives on the subject.[30] The legislation itself does not apply outside UK borders, but it does prevent the export of infant formula and "follow-on" milk products from the UK to non-EU countries where those products do not comply with certain EU requirements as to composition and labelling rules. There are limitations to this approach, though, as the export restrictions only apply to specific products at the point of export – once exported, they are unable to control the behaviour of distributors on the ground. While, for reasons explained above, (see section 1.2) it may not be possible to regulate the activities of foreign entities directly, it may be possible to enact parent-based forms of regulation which would require, for example, UK companies to ensure that their subsidiaries and distributors in other countries adopt a responsible approach in relation to the marketing of certain products to consumers. This kind of regulation could be enforced by way of sanctions against the parent, rather than foreign companies, which partly overcomes possible objections under international law about "extraterritorial jurisdiction". Care would have to be taken, though, to ensure that foreign subsidiaries and distributors were not subject to conflicting requirements, i.e. one set of requirements imposed by the parent company under "home state " laws and a different set of requirements under the laws of the foreign states.

[30] Council Directive 91/321/EEC OJ 1991 L 175/3 and Council Directive 92/52/EEC OJ 1992 L 179/129.

Of course, the UK, as a member of the EU, must also ensure that measures like this do not (a) conflict with existing harmonised positions on consumer safety, (b) constitute a barrier to the internal market or (c) conflict with EU policies on external trade. For these reasons, proposals like these are best progressed at EU level with a view to developing some harmonised legislation on the subject.

Proposal in a nutshell: *New laws requiring UK exporting companies to take reasonable steps to ensure that their foreign subsidiaries and distributors abide by prescribed standards in relation to the marketing of certain products to consumers. Requirements would be enforced by way of criminal sanctions against the parent.*

Most likely applications: *Exporters of products which, because of their inherent nature or because of the way they may be used, carry risks to human health.*

Limitations and problems: *Limited application. Not feasible as a general measure (i.e. would have to be product specific). No financial compensation for victims. May be objected to by other states on the basis that it poses an unreasonable risk of interference with their domestic affairs. Logistical and legal difficulties in monitoring compliance with codes of conduct by foreign entities in foreign countries. Likely (legally and practically) to require coordinated EU action.*

1.6.2 Better and more participatory enforcement of false and misleading CSR related claims

False claims by companies relating to their social and environmental performance are a form of dishonesty towards consumers and as such, ought to attract some form of legal sanction. Some jurisdictions (the US and Australia, for example) allow private enforcement action in the courts against companies that make false claims about their social and environmental credentials. The case launched by Mark Kasky against Nike in the Californian Courts[31] is the best-known example of this kind of litigation, but there are others. This is not quite the case in the UK, however, where members of the public are limited to making a "complaint" about misleading advertising by companies to the Advertising Standards Authority (the "ASA"), which may, in appropriate cases, be referred for enforcement action to the OFT. (FOE has recently made a complaint to the ASA about an advertisement put out by Shell showing a refinery emitting flowers instead of smoke). But this regime has only limited scope. For instance, it does not generally apply to CSR reports, which, as a general rule, are not regarded as "advertising" for these purposes. This could (and should) be corrected.

Extending rights to complain about misleading CSR-related claims could also help deal with a related problem – the tendency of retailers to sign up to voluntary codes relating to supply chain management, and then not enforce them properly (if at all). While retailers can have all the reputational benefits that go with membership of a particular scheme, there is a lack of sanctions for non-

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[31] *Kasky v Nike* 539 US 654 (2003).

compliance, not only with the substantive standards underlying a code,[32] but also the monitoring requirements that go with it. Where a retailer publicly signs up to a voluntary code, and then fails to monitor and enforce it effectively, should not this also be treated as a form of "misleading and deceptive conduct"?

As regards sanctions, UK trade practices law traditionally favours a criminal law approach. The disadvantage of this, of course, is that there is no possibility of financial compensation if a company is found to be in the wrong. Other options for obtaining financial compensation in supply chain cases are cut off, as the involvement of the UK retailer in the circumstances leading up to the damage or injury would not in most cases be sufficient or "proximate" enough for a finding of legal liability (see section 1.3.1 above). However, the settlement in *Kasky v Nike* suggests a possible solution. In return for ending the litigation, Nike agreed to pay US$1.5 million to the Washington DC-based Fair Labor Association for "program operations and worker development programs focussed on education and economic opportunity". Likewise, financial penalties extracted from companies under the law reforms proposed here (whether classed as fines or civil damages or settlement monies) could be applied to a fund which could then be accessed by foreign trade unions, environmental NGOs, educational charities, etc. on a needs basis.

Proposal in a nutshell: *Amend trade practices laws so that false and misleading claims and conduct surrounding the social, environmental and human rights performance of companies (including the performance of their subsidiaries, suppliers, distributors and other contractors abroad) are prohibited whatever form they take. New rules would apply, not just to advertising, but also to CSR reports and claims in general. Be clear that failures to monitor and enforce codes of conduct for which a company had expressed a public commitment could potentially be treated as misleading and deceptive conduct. Create new private rights of action under which victims of abuse (e.g. by subsidiaries or suppliers), members of the public and NGOs could complain about inaccurate or misleading claims. Remedies could include financial penalties (as well as remedial and publicity orders). Money raised in this way would be applied to a fund, which could be accessed by affected groups (and organisations working on their behalf) on a needs basis.*

Most likely applications: *Many, varied.*

Limitations and problems: *Punishes, not the abuse itself, but statements made in relation to it. Could discourage (voluntary) CSR reporting. May also undermine gains made under the Companies Act 2006, i.e. fear of litigation may result in less informative and less useful Business Reviews (although for directors, this risk of litigation ought to be checked by the safe harbour provisions in the Companies Act 2006, which limit their civil liability to untrue or misleading statements which are deliberately or recklessly made). Legal and logistical difficulties in monitoring the performance of companies overseas means that, in practice, compliance monitoring will fall largely to NGOs. Could discourage participation in and*

[32] The Ethical Trade Initiative "Base Code" (and accompanying "Implementing Principles") is one example.

corporate support for voluntary codes of conduct and related schemes. Note, also, that, in relation to international CSR schemes, unilateral action by the UK government along these lines could result in foreign companies being held to lower compliance standards than UK companies, which could have an adverse affect on UK competitiveness.

1.7 Transparency and Freedom of Information

1.7.1 Create new and targeted disclosure obligations

Targeted disclosure obligations often serve multiple purposes. Not only can they be used to support wider regulatory initiatives (by ensuring that the various monitoring bodies – official and unofficial – have access to the information they need) but they can also encourage better corporate behaviour in their own right. In the environmental and health and safety fields, statutory disclosure obligations can also help people understand and protect themselves from risks. It can also assist local regulatory authorities with their own regulatory efforts.

Many examples of this kind of regulatory method already exist. An example of how disclosure can be used as a "soft" method of extraterritorial regulation can be found in the (now repealed) US Comprehensive Anti-apartheid Act 1986 under which US companies with subsidiaries in South Africa were required periodically to report on their compliance with a voluntary code of conduct on issues such as employment policies.[33] While the substantive standards were voluntary, reporting obligations created a source of pressure to improve employment practices.

"Right to know" legislation plays an important role in environmental law, particularly as regards hazardous industrial facilities. The US Emergency Planning and Community Right to Know Act 1986 requires owners and operators of particular kinds of facilities to inform citizens about chemicals located in their communities. This information must be provided to local authorities, which is then made available to the public. Failure to report (or the submission of false information) is a criminal offence. A similar scheme exists in the UK under the EU Directive on Major Accident Hazards.[34] While these two schemes do not have any extraterritorial effect, there is no reason in principle why "rights to know" could not be extended to communities in other countries. For example, OPIC (a US export assistance agency) is required, before providing financial assistance or insurance in respect of "environmentally sensitive" projects, to notify the relevant governmental authorities of the receiving state as to any international health and safety guidelines relating to the project and also of any US law which would apply if a similar project were to go ahead in the US. Similar disclosure obligations apply under several treaties on international transportation and sale of hazardous materials.[35] There is scope for greater use of "prior informed consent" procedures in relation to hazardous facilities abroad, although, for reasons explained in

[33] A similar scheme was also put in place by the EC in 1977 and in Canada in 1985.
[34] Council Directive 96/82/EEC on the control of major accident hazards involving dangerous substances, OJ 1997 L 10/13.
[35] Rotterdam "PIC" Convention on Trade in Hazardous Chemicals and Pesticides (1998); Basel Convention on Transboundary Movements of Hazardous Wastes (1971).

section 1.2 above, this kind of home state regulation is best done via obligations placed on the parent company.

Proposal in a nutshell: *In appropriate cases, back up legislation with specific disclosure obligations, to allow the necessary formal (and informal) monitoring to take place. Develop new disclosure obligations for parent companies aimed at ensuring greater public access to information regarding potential environmental and health and safety risks posed by activities of subsidiaries abroad. Failures to publish required information (or the publication of false or misleading information) would be subject to criminal sanctions (i.e. fines).*

Most likely applications: *Many, varied.*

Limitations and problems: *Defining the extent to which exceptions should be made for "commercial confidentiality". In relation to extraterritorial environmental and health and safety hazards, lack of regulatory authority over whether and how information is made available to those who need it.*

1.7.2 A general "right to know" in relation to corporate activities?

The discussion at section 1.7.1 above begs the question as to whether it might be possible to devise and enforce a general "right to know" about corporate activities, along the lines of current Freedom of Information ("FOI") legislation.

At present, domestic freedom of information ("FOI") legislation is confined to public authorities and is therefore only of limited use in obtaining information about corporate activity.[36] However, under UK FOI laws a limited number of companies – water utilities companies or waste contractors for example – are potentially subject to FOI legislation on the basis that they perform public service functions. While this sharp distinction between the *public* functions of government and the *private* nature of business is perhaps unsatisfactory, it is unlikely, for reasons of privacy and commercial confidentiality, that governments would support the idea of a *general* "right to know" in relation to corporate activities. However, it may be possible to expand the categories of companies who ought, as a matter of policy, to be subjected to FOI legislation. As with existing FOI legislation, this "right to know" would be extended to non-residents.

Proposal in a nutshell: *Extend FOI legislation to all companies performing public service functions. Clarify what is meant by public service functions (and expand existing categories). Extend rights to access information to non-residents.*

Most likely applications: *General.*

Limitations and problems: *Possible conflict with rights to privacy. Usefulness in practice would be compromised by (inevitable) exceptions relating to "commercial confidentiality".*

[36] Information held by public authorities about corporate activity may be accessible under the FOI legislation, although exceptions under the legislation (e.g. "commercial confidentiality") could be used to restrict access.

1.8 International agreements

1.8.1 New treaty regimes

The World Summit on Sustainable Development ("WSSD") Plan of Implementation includes a provision under which state parties commit to:-

"[a]ctively promote corporate responsibility and accountability, based on Rio Principles, *including through the full development and effective implementation of intergovernmental agreements and measures*, international initiatives and public-private partnerships, appropriate national regulations, and continuous improvement in corporate practices in all countries".[37]

This could be read as a commitment to develop new international agreements relating to CSR.[38] Given the complexity of international corporate groups, and the range of possible national approaches, a *general* treaty on liability for corporate abuses is an unlikely prospect at present. However, when it comes to designing a more targeted international treaty, there are a number of interesting precedents to draw from, some of which are already proving quite successful as a means of galvanising home states into action on international CSR-related issues. The OECD Bribery Convention is one example. International "prior informed consent" ("PIC") treaties relating to hazardous wastes and chemicals are also worth a look in this context.[39]

In relation to two of the case studies – conflict diamonds (case study 5) and "baby milk" marketing (case study 7), there are already international "soft law" instruments in place. While "non-binding" in themselves, these kinds of instruments can be a first step towards a binding international treaty – a way that states can test positions and develop suitable regulatory frameworks without entering into formal commitments. Although difficult and time-consuming to negotiate, international treaties can help overcome many of the legal difficulties identified with respect to the some of the unilateral options discussed above, particularly problems of jurisdiction and conflicts with international trade rules.

Proposal in a nutshell: *Work towards international treaties where possible.*

Most likely applications: *Cases involving poor social and/or environmental performance in the supply chain and serious regulatory failures at domestic level giving rise to significant international concern. Threats to global resources. Problems requiring the use of border controls.*

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[37] WSSD, Plan of Implementation of the World Summit on Sustainable Development, UN, 'Report of the World Summit on Sustainable Development', UN Doc. A/CONF.199/20, Sales No. E.03.II.A.1, para. 49, (emphasis added).

[38] Although interpretative statements issued by states since the wording was finalised suggests that it was only intended to cover existing agreements. See Calder and Culverwell 'Following Up the World Summit on Sustainable Development Commitments on Corporate Social Responsibility' (Royal Institute of International Affairs, Final Report, February 2005), p. 14

[39] See n. 35 above.

Limitations and problems: *Need for international co-operation. Time and effort involved in negotiating an effective treaty. Treaties are only binding on those countries that have signed them.*

1.8.2 Expanding existing international accountability mechanisms

Finally, there are various steps that states could take to extend existing human rights accountability mechanisms that do not necessarily involve the negotiation of new international agreements for their implementation. One option might be to extend existing Human Rights Commission complaints procedures to cover corporate abuses more explicitly and directly.[40] Other possibilities include expanding the reporting obligations of states under existing human rights instruments to cover CSR-related topics (e.g. under interpretative "General Comments").[41] Complaints procedures under individual treaties could also be expanded (e.g. to provide standing for individuals and NGOs where this is not already the case) and to cover cases of human rights abuses by companies directly (e.g. under additional agreements known as "Optional Protocols").

Proposal in a nutshell: *Explore ways of extending existing human rights supervisory and accountability mechanisms to give greater priority to problems involving corporate abuse.*

Most likely applications: *General.*

Limitations and problems: *Need for international co-operation. Time and effort involved in negotiating effective Protocols to existing human rights treaties. Generally, making private companies directly accountable to international human rights bodies risks equating companies with states for this purpose, which may have unintended results. Also, tends to ignore important conceptual distinctions between private and state responsibilities under international law.*

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[40] E.g. The '1503 procedure', established under Economic and Social Council Resolution 1503 (XLVII).

[41] See UN Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights', adopted by the UN Sub-Commission on the Protection and Promotion of Human Rights', 13 August 2003, E/CN.4/Sub.2/2003/12/Rev.2, para. 16 (and accompanying commentary). Note that state responsibilities to regulate corporate activity under a series of core human rights treaties is the subject of an ongoing investigation by Professor John Ruggie as part of his mandate as UN Secretary General Special Representative on Business and Human Rights. See http://www.business-humanrights.org/Gettingstarted/UNSpecialRepresentative.

Table 1: Options for (domestic) law reform: enforcement features at a glance

	Features							
Options	Financial redress for victims	Criminal sanctions (company and/or directors)	Private rights of action	Formal standing for NGOs	Formal public complaints procedures?	Reputational risk/adverse publicity	Other incentives for compliance? (financial and/or market-based)	Moral pressure
Company law: further reforms of directors' duties (1.1.1)	✗	✗	✓	✗	✗	✓	✗	✓
Company law: mandatory non-financial reporting (1.1.2)	✗	✓	✗	✗	✗	✓	✗	✓
Company law: "winding up in the public interest" (1.1.3)	✗	✗	✗	✗	✓	✓	✗	✓
Criminal law reforms: liability for "aiding and abetting" abuses overseas (1.2.1)	✗	✓	✗	✗	✗	✓	✗	✓
Criminal law: new statutory duties (1.2.2)	✗	✓	✗	✗	✓	✓	✓	✗
Private causes of action: clarify tort law (1.3.1)	✓	✗	✓	✗	✗	✓	✗	✓
Private causes of action: create new statutory rights of action (1.3.2)	✓	✗	✓	✓	✗	✓	✗	✓
Private rights of action: new complaint/dispute resolution mechanism (1.3.3)	✗	✗	✓	✗	✗	✓	✗	✓
Tax incentives (1.4)	✗	✗	✗	✗	✗	✗	✓	?
Market-based initiatives: Import bans (1.5.1)	✗	✓	✗	✗	✗	✓	✗	✓
Market-based initiatives: labelling schemes (1.5.2)	✗	✗	✗	✗	✓	✓	✓	✓
Trade practices laws: extraterritorial marketing rules (1.6.1)	✗	✓	✗	✗	✗	✓	✗	✓
Trade practices laws: better enforcement of false and misleading CSR-related claims (1.6.2)	✓	✗	✓	✓	✗	✓	✗	✓
Transparency: new disclosure obligations (1.7.1)	✗	✓	✗	✗	✓	✓	✗	✓
Transparency: "right to know" re corporate activities (1.7.2)	✗	✗	✓	✓	✓	✓	✗	✓

Part 2: Case Studies

Case Study 1: Palm Oil (Author: Friends of the Earth)[42]

A. The Problem

The international palm oil industry is contributing to serious environmental degradation and resultant loss of habitat for endangered species.[43] The possibility of additional revenue from logging means that, when it comes to choosing new sites for palm oil plantations, pristine rainforest is often favoured over "brown field" sites. The planning of new sites has been inadequately regulated by domestic (i.e. Malaysian and Indonesian) authorities. The grant of protected status (e.g. "national parks") does not necessarily protect areas from exploitation. High levels of corruption mean that planning processes are often undemocratic and non-transparent.

There have also been human rights violations connected with the industry. Social conflict and exploitation is rife, traditional land rights have not been respected and indigenous communities have been displaced.

Palm oil accounts for around 30% of total annual world vegetable oil production and is used in the manufacture of many of the products available in supermarkets. The demand for palm oil, and hence its production, is still growing rapidly. However, supermarket owners are unable to say where their palm oil comes from, let alone whether it comes from sustainable sources. A Roundtable on Sustainable Palm Oil ("RSPO") has been established, involving palm oil growers and traders, consumer goods manufactures, retailers, banks and investors and NGOs. The aim of RSPO is to work towards a system of certification of palm oil sources. Towards this goal, an international voluntary standard for palm oil production was agreed in November 2004. The RSPO is presently finalising systems for auditing this standard, national standards and trading mechanisms. RSPO certified oil palm is expected to be available in the first quarter of 2008.

B. Key law reform objectives

Key law reform objectives are as follows:-

(i) To prevent further destruction of rainforest to make way for palm oil production;
(ii) To support the land rights of local communities and indigenous peoples who live in affected forests;
(iii) To ensure that new palm oil plantations are created using "brown field" sites only;

[42] FOE et al, 'The Oil for Ape Scandal: How Palm Oil is Threatening Orang-utan Survival", September 2005.
[43] The research underlying the case study, coordinated by FOE, focuses on the environmental consequences of palm oil production in Malaysia and Indonesia and its consequences for the orang-utan.

(iv) Generally to encourage better regulation of the palm oil industry by host state authorities;
(v) Greater transparency by palm oil manufacturers, traders, product retailers and governments about palm oil sources;
(vi) To cause UK retailers to adopt more responsible purchasing policies in relation to palm oil products; and
(vii) To prevent imports of palm oil into the UK (and the EU) which is derived from unsustainable sources.

C. Long-list of relevant reform options

- Import bans (i.e. on uncertified palm oil and products containing or using uncertified palm oil) (section 1.5.1);
- New treaty regime (regulating palm oil production and marketing) (section 1.8.1);
- Mandatory social, environmental and human rights reporting (section 1.1.2);
- Stronger and wider directors' duties (section 1.1.1);
- New statutory duties (criminal sanctions) (section 1.2.2);
- New complaint mechanisms (relating to international corporate abuse) (section 1.3.3);
- Labelling schemes (section 1.5.2);
- New disclosure initiatives (para. 1.7.1)

Note: section numbers cross-refer to discussion in Part 1.

Rationale: Because of the lack of a readily identifiable causal relationship between specific UK supermarkets and *specific* instances of environmental degradation and human rights abuse, established domestic liability regimes (criminal law and tort law) are discounted. Also discounted are initiatives that are based on some level of *investment* by the parent company in other states (i.e. through ownership of foreign subsidiaries) as these are largely irrelevant to the present case study, which is concerned primarily with regulatory deficiencies in foreign states and poor management of the supply chain. It is noted that obtaining financial redress for past damage is not a priority: instead, the emphasis is on bringing about a halt to current poor practice. Taken together, the regulatory objectives listed above suggest reforms aimed at harnessing the buying power of the large UK supermarkets, and their end customers, to bring about improvements in (a) the practices of foreign palm oil suppliers and (b) the performance of foreign regulators. Regulatory objective (vii) makes some form of import ban an obvious choice. Reforms aimed at improving corporate transparency (specifically in relation to supply chain issues) may also be useful as supporting measures, as well as initiatives that allow for some level of involvement by shareholders, consumers and interested NGOs in monitoring and enforcement. International co-operation by treaty is long-listed because of regulatory objectives (iv) and (vii) and because regulatory objective (v) seeks greater transparency from *governments* as well as companies.

D. Evaluation of options and shortlist selection

Refer to evaluation table for case study 1**.**

This evaluation suggests that the most relevant and promising regulatory responses to this case study would be:-

1. International regime (regulating palm oil production and marketing) (section. 1.8.1) (120 points);
2. Import ban on uncertified palm oil (section 1.5.1) (110 points);
3. Labelling scheme (90 points) (section 1.5.2); and
4. New statutory duties (criminal sanctions) (section 1.2.2) (89 points).

E. Comments

These results are not at all surprising, given the particular regulatory objectives. The emphasis on regulating trade and on improving foreign regulatory performance and practices clearly calls for a multilateral approach rather than a unilateral one. In practice, though, the two highest scoring solutions would work in tandem: domestic import bans are likely to be an essential part of any international treaty designed to control the sale of uncertified palm oil, and a multilateral agreement will be needed, in turn, to give the proposals legitimacy under international trade rules (see discussion at Part 1, para. 1.5.1 above).

However, there are also steps that could be taken at national level. Domestically, new statutory duties (i.e. to take reasonable steps to ensure that environment protection concerns and human rights are respected by foreign suppliers and subsidiaries) would seem to be of assistance here. (See section 1.2.1 above for a more detailed description of how such a proposal might work in practice). Transparency initiatives, while not the top scorers, did not fare badly either. Although they would not deliver the regulatory objectives sought *by themselves*, they would potentially perform an important supporting role.

F. What changes in the law need to happen?

Option 1: Develop international regime to support and give “teeth” to RSPO voluntary standard. International regime would require exporting state parties to take immediate steps to stop the destruction of rainforest to make way for palm oil plantations and would provide for (and authorise) an import ban on products derived from uncertified sources of palm oil. International regime would require annual reporting (a) from exporting parties on steps taken to regulate palm oil production within their jurisdictions and (b) from importing states on enforcement of import ban. Waiver from WTO likely to be needed (especially as regards trade with WTO state parties that have not signed up to the palm oil regime).

Option 2: Lobby for EU-wide labelling scheme for products containing palm oil. Labelling scheme would require all retailers to state clearly which products contained palm oil from certified sources (and which did not). *Note: this proposal*

may be subject to limitations under WTO rules (see further discussion at section 1.5.2 above).

Option 3: Develop proposals for new statutory duties for UK retailers under which UK parent companies would be required to take reasonable steps to ensure that all subsidiaries and suppliers (whether at home or abroad) respect basic environmental and human rights standards in their production methods. Substantive duties would be backed up by regular reporting obligations and criminal sanctions would apply in the event of breach (of duty itself and/or reporting obligations). *Note: limitations under EU law may apply. See section 1.2.2 for further discussion*.

Case study 2: Gas flaring in Nigeria (Author: Friends of the Earth)[44]

A: The Problem

Subsidiaries of international oil companies, including Shell, continue to flare gas in Nigeria, despite the clear risks to the health, environment and livelihoods of local communities. Health risks associated with gas flaring include premature death, child respiratory illnesses, asthma and cancer. The flaring of associated gas is also extremely wasteful of energy resources and is a significant contributor of greenhouse gases. The cost of gas flaring to Nigeria (in terms of wastage of resources) is estimated to be in the region of $2.5 billion annually. Primarily because of its sheer wastefulness, many countries in the world, including the UK, prohibit this practice without special governmental approvals. Strictly speaking, gas flaring has been illegal in Nigeria since 1994 without ministerial consent. However, these rules do not appear to be rigorously enforced.

In 2005 the Federal High Court of Nigeria issued an order banning Shell's Nigerian subsidiary ("SPDC") and its joint venture partner (the Nigerian National Petroleum Corporation) from further gas flaring on the basis that the practice is "a gross violation of … [the] … fundamental right to life (including healthy environment) and dignity of human person (sic) as enshrined in the [Nigerian] Constitution." The court also held that the failure of Shell and its partner "to carry out Environmental Impact Assessments … concerning the effects of their gas flaring activities is a clear violation of … [Nigerian environmental law] … and has contributed to a further violation of the said fundamental rights". However, SPDC has not ceased its practice of gas flaring and has appealed the decision on procedural grounds. A one-year extension of the timetable for compliance was granted by the court. This expired at the end of April 2007. In the meantime, Shell has made some public commitments to "eliminat[e] routine gas flaring in its operations", however it is not at all clear when this goal will be met, a situation that Shell blames partly on "reduced funding of the joint venture programme", partly on poor contractor performance and partly on the "security situation in the Niger Delta"[45]

B. Key law reform objectives

Key law reform objectives are follows:-

(i) An end to the practice of gas flaring in Nigeria;
(ii) Greater accountability of international oil companies for the adverse health and environmental and human rights impacts of the operations of their subsidiaries and contractors abroad, including the possibility of compensation for those injured and whose livelihoods have been affected by the practice of gas flaring in the past;
(iii) Generally to encourage better and more transparent regulation of the oil industry by Nigerian state authorities;

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[44] FOE 'Lessons Not Learned: The Other Shell Report 2004'; Climate Justice Programme & ERA 'Gas Flaring in Nigeria: A Human Rights, Environmental and Economic Monstrosity', June 2005.
[45] Shell, 'Shell Nigeria Report 2006: People and the Environment'.

(iv) Greater transparency by oil companies in relation to their activities in other countries, particularly in relation to their health, environmental and human rights impacts; and
(v) Generally, to cause parent companies to adopt a more responsible approach in relation to the activities of their exploration and production subsidiaries in other countries.

C. Long-list of relevant reform options

- Clarify parent company liability (section 1.3.1);
- Criminal offence of "aiding and abetting" environmental crimes and human rights abuses abroad (section 1.2.1);
- Mandatory social and environmental reporting (section 1.1.2);
- Stronger and wider directors' duties (section 1.1.1);
- New statutory duties (backed up by criminal sanctions) (section 1.2.2);
- New complaint mechanisms (section 1.3.3);
- New statutory private rights of action (section 1.3.2);
- Wider enforcement of false and misleading CSR-related claims (section 1.6.2); and
- New disclosure initiatives (section 1.7.1).

Note: section numbers cross-refer to discussion in Part 1.

Rationale: The emphasis on accountability and legal redress (and particularly on the need for some form of financial redress for those affected by gas flaring), suggests the selection of tort-based and criminal options (especially those which give the opportunity of private enforcement). Also, as this case study concerns a corporate group, apparently linked by relationships of "control", options that rely on a *causal* relationship between the policies of the parent and the activities of the subsidiary arguably become more relevant. Market-based initiatives are discounted on the basis that, unlike case study 1, it would be difficult to link the abuse complained of to particular products. However, given Shell's policies on "corporate social responsibility", the trade practices reforms discussed at Part 1, section 1.6.2 ("better and more participatory enforcement of false and misleading CSR-related claims") may well be useful.

D. Evaluation of options and shortlist selection

Refer to evaluation table for case study 2**.**

This evaluation suggests that the regulatory reform options that best satisfy the broadest range of regulatory objectives for this particular case study are as follows:-

1. Wider rights of enforcement of false and misleading CSR-related claims (section 1.6.2) (93 points);
2. Clarifying the position on parent company liability (section 1.3.1) (92 points);

3. New criminal offences of "aiding and abetting" environmental crimes abroad (section 1.2.1) (75 points).
4. New disclosure initiatives (section 1.7.1) (76 points);
5. New statutory private rights of action (section 1.3.2) (72 points).

E. Comments

The fact that a reform proposal relating to trade practices law scored more highly than more conventional tort and criminal law-based approaches is at first glance surprising, but then perhaps less so when one takes account of the fact that the particular proposal in question (explained in more detail at Part 1, section 1.6.2 above) is aimed at three of the key objectives in question, namely encouraging greater responsibility on the part of parent companies, encouraging more honest reporting and delivering some form of financial compensation to those affected. Of the two other short-listed proposals, reforms to the law relating to "parent company liability" scored the highest, over and above criminal law reforms, again mainly because of its ability to deliver financial compensation to victims. New statutory private rights of action (section 1.3.2) scored slightly less well than new criminal offences, mainly because of its lower deterrence value.

Once again, corporate transparency initiatives scored quite strongly and uniformly. The higher score achieved by *targeted* disclosure initiatives in relation to this particular case study is due to the specific nature of the problem and the assumption that a targeted disclosure initiative would be less easy to avoid, and more likely to deliver the relevant information, than the more general ones. As noted for case study 1, while transparency initiatives are not able to deliver many of the relevant regulatory objectives on their own, they play an important supporting role, first as way of encouraging better internal communication within corporate groups (and hopefully better risk management as a result) and, second, as a vital aid to external monitoring. In this case, greater "rights to know" about Shell's policies, practices and plans in relation to gas flaring would also, presumably, be useful to local residents, as a way of empowering local groups and encouraging self-help.

F. What changes in the law need to happen?

Option 1: Amend UK trade practices law to provide for wider and stronger private rights of action in relation to false or misleading CSR claims. Successful enforcement should result in financial penalties for companies, capable of being channelled to those adversely affected by human rights abuses, or poor health and safety, environmental or workplace standards (see further section 1.6.2 above). Support with stronger disclosure requirements (sections 1.1.2 and 1.7.1).

Option 2: Clarify when a parent company will (and will not) be liable under the law of negligence for the acts and/or omissions of its subsidiaries (see further section 1.3.1 above).

Option 3: Amend criminal law to provide for a new criminal offence of "aiding and abetting" environmental crimes and human rights abuses abroad (see further section 1.2.1 above).

Option 4: Consider specific disclosure requirements aimed at keeping local residents informed about company plans and policies regarding gas flaring, its progress towards phasing this practice out, environmental and health risks, and any steps that can be taken to mitigate them.

Case study 3: Tesco/orchard workers in South Africa (Author: ActionAid)[46]

A. The Problem

UK supermarkets, including Tesco, are accused of failing to take sufficient account of the workplace standards of suppliers when purchasing fresh produce for their stores. This case study concerns the poor treatment of female workers on the orchards in South Africa that supply Tesco with apples and pears. Increasingly, these workers are employed on casual, rather than permanent, terms, meaning poor pay and working conditions, and little job security. Although South African law provides for employee benefits (such as sick pay, maternity leave and annual leave) and labour brokers and employers are jointly responsible for ensuring that these conditions are met, these legal requirements are easily avoided by unscrupulous and unregistered brokers. In addition, despite domestic laws to protect farm labourers, health and safety standards in relation to pesticide use are poor. Women interviewed in connection with this case study have complained about regularly being exposed to dangerous chemicals, without having been provided with any protective clothing. The case study has also uncovered evidence of sex discrimination by orchard owners, who tend to employ males as permanent workers (with all the additional benefits that this entails) and women only on casual terms. Women may be classed as “casual” despite the fact that they work year-round on the same orchard.

Tesco is accused of failing to use its purchasing power to influence change for the better. On the contrary, by putting pressure on suppliers to keep their prices low, Tesco is accused of exacerbating the problems outlined above.

B. Key law reform objectives

Key law reform objectives are as follows:-

(i) To cause UK supermarkets to adopt more responsible purchasing policies in relation to fresh produce sourced from overseas, and in particular to use all reasonable efforts to ensure (so far as is possible) that proper labour, environmental and workplace health and safety standards (e.g. ILO core standards) are adhered to in all accredited plantations;
(ii) To provide for an accessible means of legal redress for those affected by failures to observe responsible purchasing policies, including the possibility of financial compensation;
(iii) Generally to facilitate (as far as possible) better regulation of labour standards for agricultural workers by host state authorities; and
(iv) Greater transparency by UK supermarkets about the efforts taken to monitor and improve working conditions in supplier orchards.

[46] Actionaid, ‘Rotten Fruit: Tesco Profits as Women Workers Pay a High Price’, June 2005.

C. Long-list of relevant reform options

- Labelling schemes (section 1.5.2);
- Mandatory social and environmental reporting (section 1.1.2);
- Stronger and wider directors' duties (section 1.1.1);
- New statutory duties (backed up by criminal sanctions) (section 1.2.2);
- New complaint mechanisms (section 1.3.3);
- New statutory private rights of action (section 1.3.2);
- Wider enforcement of false and misleading CSR-related claims (section 1.6.2).
- New disclosure initiatives (section 1.7.1).

Note: section numbers cross-refer to discussion in Part 1.

Rationale: Market-based solutions (such as labelling schemes) seem particularly relevant here, as a way of harnessing the buying power of consumers to put more pressure on supermarkets to take proper steps to address the poor labour standards of its suppliers. As with other case studies, transparency initiatives are likely to be useful both as an aid to effective monitoring and as a way of causing supermarkets to face up to these issues more seriously. Import bans are however discounted because of the adverse impact these would have on the livelihoods of foreign workers in the short and medium term. Also discounted are the more traditional tort-based and criminal law approaches (see Part 1, sections 1.2.1 and 1.3.1) as the relationship between Tesco and its subsidiaries' employees would not normally be sufficiently close to found liability on this basis. However, the two proposals for new statutory duties in relation to foreign workers and communities are included as possibilities (sections 1.2.2 and 1.3.2) as these seem directly relevant to regulatory objective (i) above.

D. Evaluation of options and shortlist selection

Refer to evaluation table for case study 3**.** The highest scoring legal reform options in relation to this particular case study were as follows:-

1. Wider rights of enforcement of false and misleading CSR-related claims (section 1.6.2) (107 points);
2. Labelling schemes (section 1.5.2) (95 points);
3. New complaint mechanisms (section 1.3.3) (92 points); and
4. New private rights of action (section 1.3.2) (89 points).

E. Comments

Again, the trade practices proposal outlined in Part 1, section 1.6.2 appears to meet the greatest number of regulatory requirements most successfully. This is due, though, to the fact that this particular proposal has a financial compensation component. Although it does not punish the abuse itself, it could potentially create quite powerful incentives (not provided for in the current legal framework),

for companies to do much more to actually enforce the supply chain codes of conduct they have signed up to.

Labelling schemes also have the ability to be extremely influential in relation to cases such as these, provided consumer awareness is good and the underlying certification and monitoring system sound. In this case, labelling schemes have scored slightly less well than the trade practices enforcement option, primarily because they are aimed at providing market-based sanctions (rather than financial compensation) and also because of uncertainties over their compatibility with international and regional trading rules (see discussion at Part 1, section 1.6.2 below).

New complaint mechanisms (section 1.3.3) also score well in relation to this particular case study (and slightly better than new statutory private rights of action), despite the fact that this particular proposal has no financial compensation element. This is mainly because of its emphasis on flexibility and accessibility to affected groups.

Again, transparency initiatives, along with directors' duties reforms, form a cluster of lower scoring options. However, as noted above in relation to the other case studies, these have the potential to perform an important supporting role in relation to other initiatives (e.g. labelling schemes + targeted disclosure obligations).

F. What changes in the law need to happen?

Option 1: Amend UK trade practices law to provide for wider and stronger private rights of action in relation to false or misleading CSR claims. Successful enforcement should result in financial penalties for companies, capable of being channelled to those adversely affected by human rights abuses, or poor health and safety, environmental or workplace standards (see further section 1.6.2 above). Support with stronger disclosure requirements (sections 1.1.2 and 1.7.1).

Option 2: Lobby for EU-wide labelling scheme for orchard fruits sourced from abroad. *Note: this proposal may be subject to limitations under WTO rules (see further discussion at section 1.5.2 above*).

Option 3: Develop proposals for enhanced private rights of action for those adversely affected by abuses within the supply chain (see sections 1.3.2 and 1.3.3 above).

Case study 4: Anglo Gold Ashanti in Ghana (Author: ActionAid)[47]

A. The Problem

Serious pollution is claimed to have been found emanating from mining operations owned by AngloGold Ashanti ("AGA") in Obuasi, Ghana. AGA is a subsidiary of the UK mining company, Anglo American plc. Water pollution has affected the livelihoods of those living in the area: river water has become contaminated with heavy metals and is therefore unsuitable for drinking or irrigation, and fish and farm animals have died. Smallholders say they have been unable to sell their crops because of fears of contamination. Although AGA has provided alternative sources of water, local residents complain that these facilities do not meet their needs (e.g. because this water, too, is contaminated and/or standpipes are broken). Environmental management of the mines themselves is claimed to be very poor, resulting in some serious pollution incidents, especially following heavy rain and flooding (the case study mentions a case of flooding of a school with cyanide-contaminated water). Other accusations levelled at AGA include failures to rehabilitate abandoned pits properly and to a safe standard.. Villagers complain of an increase in respiratory problems and skin complaints, which they believe to be connected to AGA's mining operations. They have also been disturbed by blasting activities, which seem to be causing structural damage to housing. In addition, AGA has been accused of complicity in human rights abuses by security personnel engaged by the company against suspected illegal miners.

There is a local regulatory authority responsible for water quality in the region (known locally as the "EPA"). However, observers claim that it is under-resourced, and that AGA itself is responsible for submitting many of the water samples used by the EPA for pollution monitoring. AGA claims to have compensated villagers in some cases, while also placing the blame for some spills on illegal mining activities in the region. Longer term, the company says it is reviewing environmental management processes, and will be developing new environmental management plans.

B. Key law reform objectives

Key law reform objectives are follows:-

- (i) Significant improvements by AGA in its environmental management practices;
- (ii) To cause Anglo American plc, as parent company of AGA, to take greater responsibility for the environmental, health and safety and human rights performance of its subsidiary AGA;
- (iii) To enable the financial compensation of those whose health or livelihood has been harmed by environmental mismanagement by AGA (and lack of proper supervision of its activities by its parent Anglo American plc) or by AGA's failure to uphold human rights;

[47] Actionaid 'Gold Rush: The Impact of Gold Mining on the Poor People in Obuasi In Ghana', October 2006.

(iv) Greater transparency by mining companies in relation to their activities in other countries, particularly in relation to their health, environmental and human rights impacts; and
(v) Generally to facilitate (as far as possible) better environmental regulation of mining operations (including water quality standards) by host state authorities.

C. Long-list of relevant reform options

- Parent company liability (section 1.3.1);
- Criminal offence of "aiding and abetting" environmental crimes and human rights abuses abroad (section 1.2.1)
- Mandatory social and environmental reporting (section 1.1.2)
- Stronger and wider directors' duties (section 1.1.1)
- New statutory duties (backed up by criminal sanctions) (section 1.2.2);
- New complaint mechanisms (section 1.3.3);
- New statutory private rights of action (section 1.3.2);
- Wider enforcement of false and misleading CSR-related claims (section 1.6.2).
- New disclosure initiatives (section 1.7.1).

Note: section numbers cross-refer to discussion in Part 1.

Rationale: There are obvious parallels between this case study and case study 2 (gas flaring in Nigeria). Both concern allegations of environmental pollution (and arguably complicity in human rights abuses too) by a subsidiary of a UK parent company and failures in regulation at the host state level. There are also similarities in terms of the regulatory objectives too, i.e. the need for greater accountability of the parent company, and better mechanisms for delivering financial compensation to victims. As with case study 2, these objectives suggest the selection of tort-based and criminal options (and particularly those which give the opportunity of private enforcement). Also, as this case study concerns a corporate group, apparently linked by relationships of "control", options that rely on a *causal* relationship between the policies of the parent and the activities of the subsidiary would seem to have greater relevance. Market-based initiatives are discounted on the basis that, as with case study 2, it would be difficult to link the abuse complained of to particular products. However, given the emphasis placed on "corporate social responsibility" by group management, the trade practices reforms discussed at Part 1, section 1.6.2 ("better and more participatory enforcement of false and misleading CSR-related claims") may well be useful.

D. Evaluation of options and short-list selection

Refer to evaluation table for case study 4**.**

As with case study 2, the legal reform options best suited to dealing with the problems outlined in this case study appear to be:-

1. Wider rights of enforcement of false and misleading CSR-related claims (section 1.6.2) (93 points);
2. Clarifying the position on parent company liability (section 1.3.1) (92 points);
3. New disclosure initiatives (section 1.7.1) (76 points);
4. New criminal offences of “aiding and abetting” environmental crimes and human rights abuses abroad (section 1.2.1) (75 points);and
5. New statutory private rights of action (section 1.3.2) (72 points).

E. Comments

As with case study 2, the evaluation process suggests that amendments to trade practices legislation may be a useful way forward *in theory*. Clearly the effectiveness of this kind of regulatory strategy *in practice* will depend to a large extent on the importance to the company concerned of a good reputation for CSR. If the priority of regulatory reform is to deliver financial compensation to victims, then clarifying the position on parent company liability may well be more relevant, although it must remembered that the obstacles to obtaining compensation through this route are by no means purely legal, but logistical, financial and emotional as well. On the other hand, even if clarifying parent company liability does not suddenly result in a lot of new claimants coming forward in practice, it at least sends a strong message to parent companies as to what its legal responsibilities in relation to its subsidiaries are. Indeed it is on this basis that this particular reform initiative scores well (along with its compatibility with established remedies) rather than because of its ability to deliver compensation *per se.* On balance, new statutory rights of action (section 1.3.2) may be a more user-friendly way of enforcing parent company duties and compensating victims, although it scored slightly less well in this exercise because the potential financial awards under this initiative (and therefore its deterrence value) were presumed to be lower.

Criminal sanctions are obviously of particular interest in relation to the allegations of involvement in human rights abuses of illegal miners, although care would be needed to ensure that the law was consistent with international law principles on criminal jurisdiction (see further discussion in Part 1, section. 1.2.1 above).

F. What changes in the law need to happen?

Option 1: Amend UK trade practices law to provide for wider and stronger private rights of action in relation to false or misleading CSR claims. Successful enforcement should result in financial penalties for companies, capable of being channelled to those adversely affected by human rights abuses, or poor health and safety, environmental or workplace standards (see further section 1.6.2 above). Support with stronger disclosure requirements (sections 1.1.2 and 1.7.1).

Option 2: Clarify when a parent company will (and will not) be liable under the law of negligence for the acts and/or omissions of its subsidiaries (see further section 1.3.1 above).

Option 3: Amend criminal law to provide for a new criminal offence of “aiding and abetting” environmental crimes and human rights abroad (see further section 1.2.1 above).

Option 4: Consider specific disclosure requirements aimed at keeping local residents informed about environmental management plans and policies, progress towards implementation of environmental management plans (including environmental rehabilitation), environmental and health risks associated with existing activities, and any steps that can be taken to mitigate them.

Case study 5: Conflict Diamonds (Author: Amnesty International)[48]

A. The Problem

While the Kimberley Process has made inroads into the problem of "conflict diamonds", failures in implementation at national level have meant that the system is still open to fraud and abuse. Conflict diamonds are still being smuggled from conflict zones and given Kimberley Process certificates in countries other than their place of origin, enabling them to enter the international diamond market. Observers have pointed out a number of weaknesses in the Kimberley Process itself, including a lack of baseline standards for domestic control systems, the absence of an auditable tracking system, a lack of statistical information about production and trade in diamonds (necessary to help detect anomalies that could shed light on illicit trading) and the lack of a formal funding mechanism for the scheme.

Separately, the diamond retail industry has agreed a series of self-regulatory measures, such as adopting a "system of warranties" to enable tracking of diamonds from mine to point of sale. However, successive surveys of industry practice have raised doubts about whether this system is actually being implemented properly, with a large section of the industry failing to produce enough information to enable an assessment either way. In any event, these self-regulatory commitments fall short of requiring independent, third party auditing of warranty statements, compromising still further the ability of end-consumers to be sure that the diamonds they purchase are "conflict free". Other research has revealed a lack of awareness by staff working in retail outlets of the Kimberley Process and what it is designed to achieve. Furthermore, there is a lack of information from trade bodies about the compliance monitoring and enforcement of voluntary commitments, raising questions about whether much is being done at all at this level.

Very recently, diamond mining companies and jewellery retailers have come together to form a new "Council for Responsible Jewellery Practices", the aim of which is to set up mechanisms for establishing chain of custody through the diamond and jewellery supply chain. However detailed implementation is not to begin until 2008.

The Kimberley Process is implemented in the EU by Council Regulation (EC) No. 2368/2002 of 20 December 2002, which provides for import and export controls (including the possibility of seizure of uncertified diamonds). The Regulation also aims to support industry self-regulation through a listing system for retailers meeting compliance standards.

B. Key law reform objectives

[48] Amnesty & Global Witness 'Déjà vu: Diamond Industry is Still Failing to Deliver on its Promises', 2004; Global Witness 'Making it Work: Why the Kimberley Process Must Do More to Stop Conflict Diamonds', November 2005; Global Witness, 'An Independent Commissioned Review Evaluating the Effectiveness of the Kimberley Process', 2006.

Key law reform objectives are as follows:-

(i) A comprehensive, international, independently-audited and properly-resourced system to track diamonds from mine to end consumer, backed up by regular spot checks and clear standards on matters such as record keeping and regular stock-taking by retailers;
(ii) Better institutional oversight of governmental efforts to implement, monitor and enforce the Kimberley Process and supporting self-regulatory initiatives;
(iii) To cause UK-based retailers to adopt and adhere to effective policies to combat trade in conflict diamonds, including requiring proof (backed up by independent audits) that suppliers are buying and selling only diamonds that are "conflict free";
(iv) Systematic reporting by diamond mining, trading and retail companies on their efforts to combat trade in conflict diamonds and support the Kimberley Process, including their performance against meaningful targets;
(v) Greater transparency by trade bodies on monitoring and enforcement of member commitments, and on their own lobbying activities; and
(vi) Generally, greater co-operation by the diamond industry with law enforcement agencies.

C. Long-list of relevant reform options

- International treaty (relating to international trade in conflict diamonds, including certification of diamond sources) (section 1.8.1);
- Criminal liability for "aiding and abetting" human rights abuses abroad (section 1.2.1);
- Mandatory social, environmental and human rights reporting (section 1.1.2);
- Stronger and wider directors' duties (section 1.1.1);
- Wider rights of enforcement of false and misleading CSR-related claims (section 1.6.2);
- New, specially tailored disclosure initiatives (e.g. record keeping, stock-taking, verification of warranties and other compliance policies and practices) (section 1.7.1).

Note: paragraph numbers cross-refer to discussion in Part 1.

Rationale: The objectives relating to the regulation of international trade, harmonisation of regulatory tactics and oversight of governmental initiatives (see (i) and (ii) above) make an international regime on conflict diamonds an obvious choice. A well-designed (and well resourced) international regime has the potential to help overcome many of the problems with the current non-binding process, such as lack of uniformity in national implementation and lack of adequate supervisory mechanisms. Clearly, implementation would also include national import bans on uncertified diamonds: this has not been long-listed here as a reform option as it is already part of EU law. Current difficulties of gathering information about self-regulatory initiatives justifies the inclusion of new

transparency initiatives in the "long-list". While detailed implementation of the regime is likely to require the creation of a number of new and specific criminal offences (not considered in Part 1) reform of the general law in relation to "aiding and abetting" criminal activity abroad could also be relevant in this context (e.g. where a parent company was involved in attempts by a foreign subsidiary to circumvent the scheme).

D. Evaluation of options and short-list selection

Refer to evaluation table for case study 5**.**

According the scoring system used, the regulatory options which appear to best satisfy the most number of requirements are:-

1. International treaty (relating to international trade in conflict diamonds, including certification of diamond sources) (section 1.8.1) (153 points);
2. New disclosure initiatives (section 1.7.1) (117 points); and
3. Criminal liability for "aiding and abetting" environmental crimes and human rights abuses abroad (section 1.2.1) (99 points).

E. Comments

The results are hardly surprising, given the regulatory objectives involved. Clearly, an international treaty would be the most comprehensive solution to the problems identified. While this would be a huge challenge, there is already strong political will to deal with the problem of "conflict diamonds" and much of the regulatory groundwork has already been done. Import bans have already been implemented within the EU, and in many other countries. While legally problematic if undertaken on a unilateral basis, (see Part 1, section 1.5.1), multilateral agreements serve to legitimise import bans under WTO rules, at least as far as parties to the import/export control treaty are concerned. (It is worth noting here that a waiver has already been granted by WTO members in relation to the Kimberley Process).

Because of the emphasis on transparency, new disclosure requirements also score well – although it is likely that disclosure requirements would feature prominently in a new treaty regime (and in its domestic implementation) in any event. Leaving the treaty option aside, it is possible that reforms in the area of extraterritorial criminal law (section 1.2.1) may be helpful in relation to the problem at the root of this particular case study (namely the criminal activity that serves to undermine the Kimberley Process in the first place), however a more targeted sanctions regime specifically in support of KP objectives is likely to have far more impact.

F. What changes in the law need to happen?

Option 1: Lobby for an international treaty to regulate the international diamond trade. Treaty would be based on existing Kimberley Process, but would contain much stronger institutional oversight of governmental implementation, including

strengthened peer review mechanisms and follow-up. Treaty would also lay down the ground rules for tougher regulation of the diamond retail industry, under which an auditable tracking system for diamonds (backed up by external verification requirements and criminal sanctions for non-compliance) would be minimum requirements.

Case study 6: Cut flower industry (Author: War on Want)[49]

A. The Problem

Workers on flower plantations that supply UK supermarkets experience poor working conditions and low job security, putting their health and livelihoods at risk. The problem is exacerbated by the absence of trade unions, with the result that the bargaining position of workers is very weak and local law enforcement generally poor. This case study focuses on standards on flower farms in developing countries such as Colombia and Kenya, although it also reflects systemic problems in the cut flower sector.

The health risks experienced by these workers are primarily "repetitive strain injuries" ("RSI") and injuries resulting from exposure to pesticides. Pesticide-related injuries include skin lesions and allergies, respiratory problems, fainting, headaches and chronic asthma. The chemicals used are also known to cause miscarriages and congenital malformations. Chemicals are used which are banned in richer industrialised countries such as the US and the UK. In many cases, training in the safe use of chemicals is non-existent. Workers have also complained that basic requirements, such as safe drinking water, are not always met.

Despite the presence of laws guaranteeing a right of freedom of association, only a tiny proportion of the workforce in the cut flower workforce is unionised, due to poor enforcement of labour laws and the hostility to unions by plantation owners. Joining a union can result in discrimination, threats and job losses.

Numerous voluntary standards and codes of conduct have been developed to deal with problems of poor labour standards in the cut flower industry. However, little is done to ensure that these are actually complied with, and the lack of trade unions and independent monitoring means that there is little pressure on plantation owners to improve their performance. The auditing that does take place does not comply with best auditing practice – for instance, plenty of advance notice is given, workers are coached in what to say and a supervisor is present during the interviews with workers. Certification schemes (e.g. "Floraverde") have been set up in recent years to provide assurance to buyers of better environmental and labour standards. But while these schemes have attracted some interest among supermarket buyers, research on the ground suggests that they offer no real guarantees that workers are treated fairly, labour rights respected and environmental standards upheld.

B. Key law reform objectives

Key law reform objectives are as follows:-

(i) To cause UK retailers to adopt more responsible purchasing policies in relation to cut flowers sourced from overseas, and in particular to do

[49] War on Want 'Growing Pains: The Human Cost of Cut Flowers in British Supermarkets', March 2007.

much more to ensure that key labour and workplace health and safety standards (e.g. ILO core standards) are adhered to by all suppliers (e.g. by making this a condition of supplier contracts and enforcing it rigorously);

(ii) To ensure that UK retailers comply fully with the codes of conduct they sign up to;

(iii) To enable enforcement by private individuals of rights which are provided for under flower standards or other supply chain initiatives (e.g. the ETI);

(iv) Generally, to provide for some *accessible* means of legal redress for those affected in cases where responsible purchasing policies are not observed, including the possibility of financial compensation;

(v) Generally to facilitate (as far as possible) better enforcement of labour and workplace health and safety standards for agricultural workers by host state authorities; and

(vi) Generally, greater transparency by UK supermarkets about the efforts taken to monitor and improve working conditions in supplier plantations.

C. Long-list of relevant reform options

- Labelling schemes (section1.5.2);
- Mandatory social and environmental reporting (section 1.1.2);
- Stronger and wider directors' duties (section 1.1.1);
- New statutory duties (backed up by criminal sanctions) (section 1.2.2);
- New complaint mechanisms (section 1.3.3);
- New statutory private rights of action (section 1.3.2);
- Wider enforcement of false and misleading CSR-related claims (section 1.6.2).
- New disclosure initiatives (section 1.7.1).

Note: section numbers cross-refer to discussion in Part 1.

Rationale: As with case study 3, market-based solutions (such as labelling schemes) seem particularly relevant, as a way of harnessing the buying power of consumers to put more pressure on supermarkets to take proper steps to address the poor labour standards observed by its suppliers. Transparency initiatives, too, are likely to be useful both as an aid to effective monitoring and as a way of causing supermarkets to face up to these issues more seriously. Import bans are however discounted on the basis of the adverse impact this may have on the livelihoods of foreign workers in the short and medium term. Also discounted are the more traditional tort-based and criminal law approaches (see Part 1, sections 1.2.1 and 1.3.1) as the relationship between UK supermarkets and the employees of its subsidiaries would not normally be sufficiently close to found liability on this basis. However, the two separate (but related) proposals for new statutory duties in relation to foreign workers and communities, and the proposal for new complaints mechanisms, are all included as possibilities (see sections 1.2.2, 1.3.2 and 1.3.3 above) as they all seem directly relevant to regulatory objectives (iii) and (iv) above.

D. Evaluation of options and shortlist selection

Refer to evaluation table for case study 6**.**

According the scoring system used, the regulatory options which appear to best satisfy the most number of requirements are:-

1. Wider enforcement of false and misleading CSR-related claims (section 1.6.2) (128 points);
2. Labelling schemes (section 1.5.2) (114 points);
3. New statutory private rights of action (section 1.3.2) (112 points); and
4. New complaint mechanisms (section 1.3.3) (106 points).

E. Comments

Again, the trade practices proposal discussed in Part 1, para. 1.6.2 scored well because of the particular emphasis in the regulatory objectives on private enforcement rights and compliance with existing commitments (i.e. getting UK supermarkets to live up to their promises). As explained in the summary in section A above, one of the main problems highlighted in this particular case study is not so much the lack of standards, but the lack of opportunity to enforce them. The evaluation suggests that labelling schemes are also worth considering here, although in practice they do vary greatly in effectiveness, depending on levels of consumer awareness and activism, and the quality of monitoring. It is worth noting that some cut flower products pass through the flower markets in the Netherlands before reaching UK markets. Because of this, and the potential difficulties under EU law (see further the discussion at Part 1, section 1.5.2 above) new labelling proposals would be better developed at the EC level, rather than by the UK unilaterally. Overarching statutory duties for UK parent companies, on the other hand, could potentially be developed unilaterally, provided that they did not conflict with harmonised EU positions on health and safety and environmental issues, and did not constitute barriers to trade (within the EU or externally). For this case study, statutory duties backed up by *private* rights of action appeared to respond better to the particular regulatory objectives than duties backed up criminal sanctions.

New, less formal, complaints mechanisms (under which affected workers could complain about non-compliance with voluntary standards, see further Part 1, section 1.3.3) also scored well because of their greater accessibility to claimants than existing redress mechanisms (and their compatibility with existing rules on extraterritorial jurisdiction) although less well than the suggested trade practices reform because of the lack of a financial compensation element.

F. What changes in the law need to happen?

Option 1: Amend UK trade practices law to provide for wider and stronger private rights of action in relation to false or misleading CSR claims. Successful enforcement should result in financial penalties for companies, capable of being channelled to those adversely affected by human rights abuses, or poor health

and safety, environmental or workplace standards (see further section 1.6.2 above). Support with stronger disclosure requirements (sections 1.1.2 and 1.7.1).

Option 2: Lobby for EU-wide labelling scheme for cut flowers sourced from abroad. *Note: this proposal may run into problems under WTO rules (see further discussion at section 1.5.2 above*).

Option 3: Develop proposals for enhanced private rights of action for those adversely affected by abuses within the supply chain (see sections 1.3.2 and 1.3.3 above).

Case study 7: "Baby milk" marketing (Author: Save the Children)[50]

A. The Problem

Despite a long-standing international code of conduct on the marketing of breast milk substitutes (the "WHO Code"), manufacturers of infant formula milks are still, according to campaigning NGOs, using manipulative marketing techniques that are having an adverse affect on breastfeeding rates around the world and are contributing directly to increased rates of infant sickness and mortality. Whereas breastfeeding has many positive effects on the health of mothers and babies, bottle-feeding can increase risks of serious infection, particularly in developing countries where water quality and sterilisation facilities may be poor. In addition, bottle feeding is extremely expensive, meaning that poorer parents may be tempted to dilute formula milk to the extent that babies do not get the nutrients and fats that they need to develop properly. Unfortunately, the decision to bottle-feed exclusively becomes irreversible as time goes on, locking parents into an expensive and often unnecessary practice that is potentially risky to their young child's health. Despite this, surveys of maternal attitudes both in the developed and developing world suggest that formula marketing is extremely effective, subliminally (and in some cases overtly) promoting the idea that formula milk is as good as, or even better than, breast milk. Additional research into marketing practices suggests that violations of the WHO code are common and widespread, not just in developing countries but in richer countries like the UK as well.

Most of the countries that have adopted the WHO Code have put in place some implementing measures, frequently by enforceable legislation, but also, in some cases, using voluntary means. In the UK, for instance, marketing of breastmilk substitutes is governed by the *1995 Infant Formula and Follow-On Formula Regulations*. Internationally, though, implementation and enforcement of the WHO Code (technically a "non-binding" instrument) is patchy. Differences in interpretation have given rise to a fair amount of variation in the way the WHO Code has been implemented at national level, and the lack of a dedicated and properly resourced institutional and supervisory structure for the WHO Code means that the progress of individual countries in meeting their commitments under the code is not assessed as regularly and systematically as it might be. Finally, although the WHO Code is directed at *companies* as well as national governments, monitoring the compliance of companies is regarded by the WHO as outside its mandate. This means that much of this work falls to NGOs, which is costly in terms of time and resources and can never be fully systematic.

B. Key law reform objectives

Key law reform objectives are as follows:-

(i) Greater consistency in the interpretation and implementation of the WHO Code by individual states;

[50] Save the Children, Media Briefing 'A Generation On: Baby Milk Marketing Still Putting Children's Lives at Risk', October 2006; IBFAN, 'Case Studies: Using International Tools to Stop Corporate Malpractice – Does it Work?', January 2004.

(ii) Better access to information on compliance with the WHO Code by states *and* corporations;
(iii) Stronger monitoring and enforcement of WHO Code provisions at national level;
(iv) Greater transparency by corporations on lobbying activities at national and international level;
(v) More resources for public education to help counteract the effects of misleading advertising by the formula milk industry;
(vi) Generally, to cause manufacturers of formula and follow-on milk to adopt and adhere to more responsible marketing policies, and to cause their subsidiaries and distributors in other countries to do the same.

C. Long-list of relevant reform options

- International treaty regime (on marketing of breast milk substitutes) (section 1.8.1);
- Extraterritorial regulation of marketing tactics (section 1.6.1)
- New statutory duties (backed up by criminal sanctions) (section 1.2.2);
- New statutory private rights of action (section 1.3.2);
- New complaint mechanisms (section 1.3.3);
- Mandatory social and environmental reporting (section 1.1.2);
- Stronger and wider directors' duties (section 1.1.1);
- Wider enforcement of false and misleading CSR-related claims (section 1.6.2).
- New disclosure initiatives (e.g. in relation to lobbying activities, 'research' and sponsorship schemes) (section 1.7.1).

Note: section numbers cross-refer to discussion in Part 1.

Rationale: The focus on state obligations in objectives (i) and (ii) above, and the references to the WHO code in particular (as opposed to more general human rights concerns) makes a dedicated international treaty regime a necessary choice. Leaving aside the treaty option, extraterritorial marketing controls (section 1.6.1) are also highly relevant, although extraterritorial labelling schemes are discounted because of they are already provided for to some extent by EU law. Traditional tort-based methods of determining liability are discounted because of the inherent difficulties in proving fault and causation in cases involving suspect marketing techniques (as opposed to a faulty product). However, the two options relating to the creation of new statutory duties relating to corporate performance abroad (paras. 1.3.2 and 1.2.2) may well be useful. Reform suggestions relating to transparency are also included, not only because of their value to monitoring activities but because but of their potential for positive impacts on CSR generally.

D. Evaluation of options and shortlist selection

Refer to evaluation table for case study 7**.**

According the scoring system used, the regulatory options which appear to best satisfy the most number of requirements for this particular case study are:-

1. International treaty regime (on marketing of breast milk substitutes) (section 1.8.1) (138 points);
2. Extraterritorial regulation of marketing tactics (section 1.6.1) (98 points).
3. Wider enforcement of false and misleading CSR-related claims (section 1.6.2) (96 points); and
4. New disclosure initiatives (section 1.7.1) (89 points);

E. Comments

Not surprisingly, an international treaty emerges as clearly the most promising solution, in principle, to the particular problems highlighted by this case study. The proposal to open up enforcement of CSR-related claims to the public and NGOs (section 1.6.2) also meets many of the relevant requirements and, given the importance of consumer trust to the particularly companies concerned, has the potential, albeit indirectly, to bring about changes in behaviour. While new disclosure initiatives would probably form a part of any regime to implement an international treaty, they also scored extremely well on their own: partly because of the emphasis on the need for greater transparency in the regulatory objectives themselves and partly, too, because companies working in this industry are already under pressure from campaigning groups, and therefore can expect any information they produce relating to the problems outlined in this case study to be scrutinised closely.

But a word of caution is needed about the runner-up option, extraterritorial marketing controls. While it appears highly relevant (and scored well for this reason) as a unilateral UK measure it may have little impact on the problem in practice due to the (non-UK) nationality of most of the companies involved in this industry. Although there may be precedents elsewhere, trying to regulate foreign companies because of other links to the UK jurisdiction (e.g. UK stock exchange listing) would be pushing the international law rules on criminal jurisdiction too far and would certainly be a major departure from current UK practice. In addition, this may be an area in which the UK is excluded from acting unilaterally by virtue of EC trading rules and export policy (see discussion at section 1.6.1 above). For these two reasons, this is likely to be an option that could (and should) only be pursued at Community level.

F. What changes in the law need to happen?

Option 1: Develop proposals for an international treaty on Baby Milk marketing, which would be based on the WHO Code but with much stronger state obligations and institutional oversight. New treaty regime would harmonise corporate obligations and provide for effective enforcement at state level. New treaty regime would also include provisions requiring disclosure by companies of policies regarding marketing, research, lobbying and promotional activities, backed up by criminal sanctions.

Option 2: Lobby European Commission for new EU legislation imposing extraterritorial marketing controls on Baby Milk companies (but see further discussion at section 1.6.1 above).

Option 3: Amend UK trade practices law to provide for wider and stronger private rights of action in relation to false or misleading CSR claims. Successful enforcement should result in financial penalties for companies, capable of being channelled to those adversely affected by human rights abuses, or poor health and safety, environmental or workplace standards (see further section 1.6.2 above). Support with stronger disclosure requirements (sections 1.1.2 and 1.7.1).

Case study 8: Garment Workers in Bangladesh (Author: War on Want)[51]

A. The Problem

Employees of suppliers to well-known UK supermarket chains like Primark, Asda and Tesco are subject to poor pay and working conditions, a problem which is exacerbated by the absence of trade unions. Payment of a living wage is necessary to enable workers to access education and health care, as well as daily essentials such as food, clothing, transport and housing. But workers only receive around half or less of what even a conservative estimate of a "living wage" would be. For this small amount of pay, workers are required to work excessive hours (often 80 hours per week) in a working environment that is often cramped and poorly ventilated. Overtime is often not paid, partly to save money and partly to ensure that pay records are consistent with fraudulent records regarding working hours, set up to conceal breaches of labour laws and voluntary codes of conduct. There is great hostility to trade unions, and even joining one can carry the risk of dismissal.

Women face particular problems in the workplace. Vulnerable, socially stigmatised and often lacking the educational background of their male colleagues, they are systematically exploited and discriminated against.

UK supermarkets are accused of contributing to the mistreatment of garment workers in developing countries by their unreasonable pricing demands and their constant pressure on suppliers to keep reducing their prices still further. Although Asda, Tesco and Primark have all signed up to a multi-stakeholder initiative on labour standards, the standards laid down in these codes do not seem to be systematically enforced. While these supermarkets may claim to carry out audits, their auditing procedures, according to observers, fall far short of best practice, with ample notice given to enable factory owners to prepare, and workers coached and intimidated into "saying the right things". Workers do not view auditors as concerned with their own interests, and often prefer to keep silent, lest the information they give is passed back to their employers and they are punished as a result. Critics claim generally that the auditing process itself is superficial, and owes more to a desire to keep Western consumers happy than any real commitment to improving workplace conditions.

Key law reform objectives

(i) To cause UK supermarkets to adopt more responsible purchasing policies in relation to clothing sourced from overseas, and in particular to do much more to ensure that core labour standards (e.g. ILO core standards) are adhered to by all suppliers (e.g. by making this a contractual condition and enforcing it rigorously);

(ii) To enable enforcement by private individuals of core labour rights, which should include financial compensation for unfair dismissal or injuries sustained at work;

[51] War on Want, 'Fashion Victims: The True Cost of Cheap Clothes', December 2006.

(iii) Generally to facilitate (as far as possible) better regulation of labour and workplace health and safety standards for garment workers by host state authorities; and
(iv) Greater transparency by UK supermarkets about the efforts taken to monitor and improve working conditions in supplier factories.

C. Long-list of relevant reform options

- Labelling schemes (section 1.5.2);
- Mandatory social and environmental reporting (section 1.1.2);
- Stronger and wider directors' duties (section 1.1.1);
- New statutory duties (backed up by criminal sanctions) (section 1.2.2);
- New complaint mechanisms (section 1.3.3);
- New statutory private rights of action (section 1.3.2);
- Wider enforcement of false and misleading CSR-related claims (section 1.6.2).
- New disclosure initiatives (section 1.7.1).

Note: section numbers cross-refer to discussion in Part 1.

Rationale: As with case studies 3 and 6, market-based solutions (such as labelling schemes) seem particularly relevant, as a way of harnessing the buying power of consumers to put more pressure on supermarkets to take proper steps to address the poor labour standards of its suppliers. Transparency initiatives, too, are likely to be useful both as an aid to effective monitoring and as a way of causing supermarkets to face up to these issues more seriously. Import bans are however discounted on the basis of the adverse impact this would have on the livelihoods of foreign workers in the short and medium term. Also discounted are the more traditional tort-based and criminal law approaches (see Part 1, sections 1.2.1 and 1.3.1) as the relationship between UK supermarkets and the employees of its subsidiaries would not normally be sufficiently close to found liability on this basis. However, the two proposals for new statutory duties in relation to foreign workers and communities are included as possibilities (sections 1.2.2 and 1.3.2) as these seem directly relevant to regulatory objectives (ii) and (iii) above. Of these two, only the latter would deliver financial compensation. This would not be to compensate the claimant for unfair dismissals or injuries directly (as this would be, in theory at least, the responsibility of the employer under local law), rather the compensation would be a remedy for "breach of duty" by the UK company in relation to its sourcing arrangements from abroad.

D. Evaluation of options and shortlist selection

Refer to evaluation table for case study 8.

According to this evaluation exercise, the most promising reform options to deal with the particular problems highlighted in this case study are as follows:-

1. Wider enforcement of false and misleading CSR-related claims (section 1.6.2) (128 points);

2. Labelling schemes (section 1.5.2) (114 points);
3. New statutory private rights of action (section 1.3.2) (112 points); and
4. New complaint mechanisms (section 1.3.3) (106 points).

E: Comments

These results mirror the results for case study 6 (cut flowers) for similar reasons. The proposal regarding enforcement of false and misleading claims (Part 1, section 1.6.2) scores well, mainly because of its emphasis on the enforcement of existing CSR-commitments (and because it responds well to the importance placed by UK supermarkets on reputational issues) but also because this particular proposal has a "financial compensation" component too. The evaluation suggests that labelling schemes are also worth considering here, although any concrete proposals would need to take account of potential difficulties under EU and WTO law (see further the discussion at Part 1, section 1.5.2 above). Again overarching statutory duties (backed up with private rights of enforcement) are capable of delivering on many of the regulatory objectives relevant to this case study, particularly if there is a compensation mechanism attached.

F. What changes in the law need to happen?

Option 1: Amend UK trade practices law to provide for wider and stronger private rights of action in relation to false or misleading CSR claims. Successful enforcement should result in financial penalties for companies, capable of being channelled to those adversely affected by human rights abuses, or poor health and safety, environmental or workplace standards (see further section 1.6.2 above). Support with stronger disclosure requirements (sections 1.1.2 and 1.7.1).

Option 2: Lobby for EU-wide labelling scheme for clothing sourced from abroad. *Note: this proposal may run into problems under WTO rules (see further discussion at section 1.5.2 above*).

Option 3: Develop proposals for enhanced private rights of action for those adversely affected by abuses within the supply chain (see sections 1.3.2 and 1.3.3 above).

Part 3: General observations, analysis and conclusions

3.1 Corporate abuse in 2007: Common threads, Common solutions?

3.1.1 At the outset it is important to note that all the case studies raise problems of *extraterritorial* abuse. This gives rise to particular problems when it comes to designing regulatory responses. Historically, home states have been reluctant to regulate corporate activity taking place outside their borders, except in relation to state-centred areas like tax, anti-trust and sanctions. State practice in relation to the extraterritorial regulation of social, environmental and human rights issues is still thin on the ground, so there are few regulatory precedents to work from, and little guidance as to the extent to which this kind of regulation is actually permitted under international law.

3.1.2 A further complicating factor is the (albeit controversial) doctrine of "separate corporate personality". While subsidiaries, suppliers, contractors and subsidiaries may all be involved in the same commercial enterprise, legally speaking they are treated as having separate personalities and nationalities, thus further limiting the ability of the "home state" to regulate the group effectively.

3.1.3 The case studies are drawn from a broad spectrum of commercial sectors and activities, ranging from the purchasing policies of UK supermarkets to the international diamond trade; from the environmental practices of oil and mining companies to the marketing of baby milk to new mothers. Each case study raises its own set of problems. However, there are a number of common themes that flow through all of these case studies. They are:-

Failures of existing regulation: In many of the cases, regulation exists, but is not being utilised properly or enforced. For instance, Indonesia and Malaysia both have planning laws and legislation regarding designation of protected areas, but the legal protections that could be provided to rainforest areas from the palm oil industry are undermined by corruption and other inadequacies in regulatory processes (case study 1). Nigeria has laws in place regarding gas flaring, but these do not seem to be systematically enforced, if at all (case study 2). South Africa has developed laws specifically designed to protect agricultural labourers hired through brokers but, again, regulatory authorities are weak and under-resourced (case study 3). International soft law regimes have already been put in place to deal with problems of conflict diamonds and baby milk marketing, but gaps in implementation and enforcement create loopholes that unscrupulous companies and individuals can readily exploit (case studies 5 and 7).

This gives rise to an important question of policy – whether it is better for home states of multinationals to try to fill these gaps themselves with new

extraterritorial "fixes", or to invest more in education and capacity building so that foreign (domestic) regulators are better equipped to meet the challenges before them. Clearly, a balance is needed. While home states do have a responsibility (ethical if not yet legal) to ensure that parent companies operating under their jurisdiction do not (directly or through subsidiaries or their contractual arrangements with suppliers) contribute to serious environmental damage or labour or human rights abuses abroad, this should not compromise the ability of regulators working at domestic level to develop and improve on their current performance.

The other message to take away from these case studies, relevant to the current project, is that law reform is not an end in itself. New legislation is of limited use on its own – what is also needed are the resources, commitment and knowledge to implement and enforce it effectively.

Double standards: This refers to the practice of multinationals applying (or taking advantage of) standards that would not be tolerated in their home state. One of the best examples arising from the case studies is the persistence of the practice of gas flaring in Nigeria, a practice that is strictly controlled in many other states (including the UK) on environmental grounds. Another example of "double standards" dramatised by the case studies is the lack of protection from pesticides afforded to agricultural workers in orchards in South Africa (case study 3) or flower plantations in Colombia and Kenya (case study 6). In the latter case, workers risk being exposed to chemicals banned in other states, including the UK, on health grounds.

Exploitation and poor treatment of foreign workers, communities and consumers (esp. in developing countries): This is unfortunately illustrated by all of the case studies to varying degrees, perhaps most graphically by the allegations in the materials underlying case study 4 (AngloAshanti in Ghana) and case study 8 (garment workers in Bangladesh).

Lack of regard for poor social and environmental standards within the supply chain: While others may be more directly responsible for poor standards, UK companies are failing to use their influence to improve matters. On the contrary, unreasonable demands of foreign suppliers (e.g. with respect to delivery timescales or price) can make a bad situation worse. The case study that best illustrates this is case study 8 (garment workers in Bangladesh), but it is a common theme in other case studies as well. Case study 7 (Baby Milk marketing) illustrates some consequences of poor supervision *down* the supply chain (i.e. of foreign distributors).

Lack of transparency by corporations: Most of the case studies raise the issue of lack of transparency by corporations on specific issues, which can make it difficult to monitor corporate performance (e.g. case study 7, baby milk marketing) and to assess the practical effect of different regulatory tactics (e.g. case study 5, conflict diamonds). Worse, lack of information can also prevent local residents from being able to take steps to protect

themselves (case study 4, AngloAshanti in Ghana). The poor quality of information about industry practice and corporate compliance was a particular theme of case study 5 (conflict diamonds).

Problems associated with "secondary liability": Finally, all of the case studies concern allegations of abuse, not by UK parent companies directly, but by their foreign subsidiaries, suppliers, distributors and other contractors. This creates particular challenges under traditional methods of allocating liability (e.g. through the tort or criminal law systems) as theories of "secondary liability" (i.e. liability for the acts of third parties) still lack definition in the context of multinational group activity, despite the recent upsurge in "foreign direct liability" ("FDL") litigation against parent companies.[52]

3.1.4 The fact that the case studies have so many common themes begs the question: might there be common solutions to these problems, despite the diversity of sectors involved? This ought to be the case. However, traditional methods of allocating corporate liability under tort and criminal law, which rely on concepts such as "causation" and proximity", tend to place a fair amount of emphasis on the types of corporate relationships involved. With this in mind, it is useful to divide the case studies into three groups, based on the extent and nature of the involvement of UK companies in the particular abuse complained of, i.e.:-

***The "supply chain abuse" cases*:** i.e. case study 1 (palm oil production), case study 3 (Tesco/orchard fruits), case study 6 (cut flower industry), case study 7 (baby milk marketing) and case study 8 (garment workers in Banglasesh).

These are cases concerning abuses by foreign suppliers to UK companies, or by their foreign distributors. UK companies are not the most directly responsible parties, but are accused, at best, of failing to use their influence to improve the situation and, at worse, of recklessly imposing commercial pressures on suppliers and distributors that make the abuse situation worse.

***The "subsidiary abuse" cases*,** i.e. case study 2 (gas flaring in Nigeria), case study 4 (AngloAshanti in Ghana) and case study 7 (baby milk marketing).

These are cases concerning allegations of abuses by subsidiaries of parent companies where the parent company has (or ought to have) sufficient influence over the subsidiary (by virtue of its shareholding) to be able to rectify the situation, but fails to do so.

The "system abuse" cases, i.e. case study 5 (conflict diamonds) and case study 7 (baby milk marketing).

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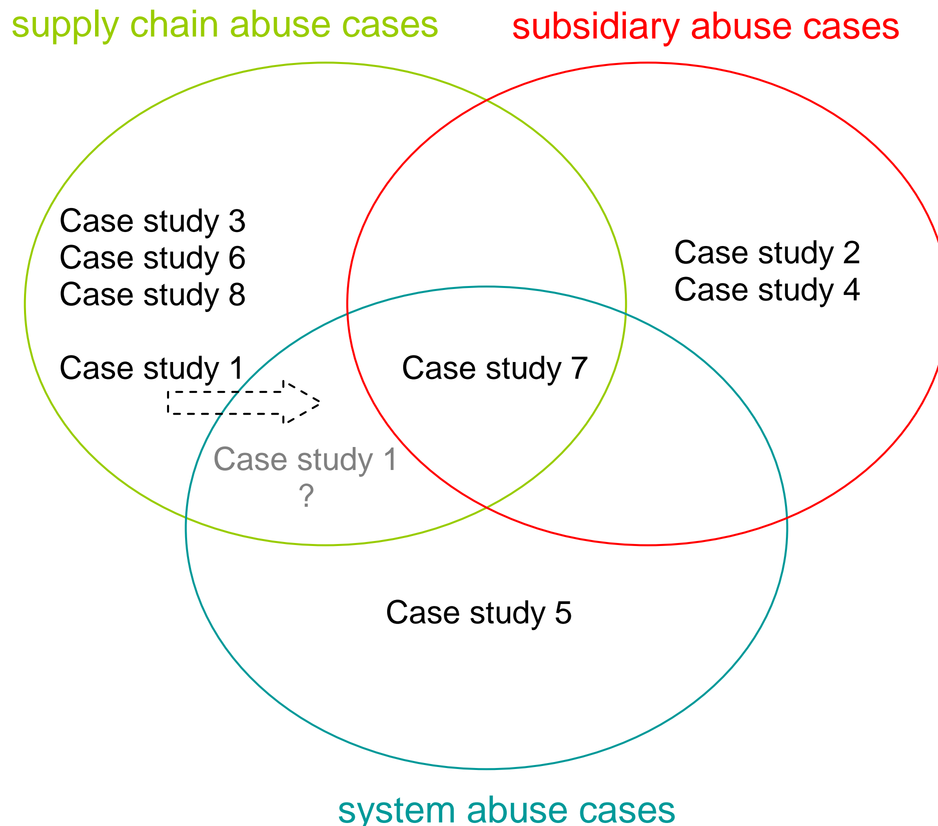
[52] Particularly in the US, under the US Alien Tort Claims Act.

These are cases where some international "soft law" regulation has been put in place, but it lacks proper coordination and oversight, creating opportunities for companies to abuse the system.

Diagram 1. Corporate abuse cases: a typology



(Note that there are potential overlaps, e.g. case study 7 (baby milk marketing) which is clearly a "system, abuse case", but which also raises allegations of abuses by both subsidiaries and distributors. Also, cases can progress from other category to the other, e.g. case study 1 (palm oil production) where efforts to develop a new "soft law" certification system are already underway.

3.2 Towards better regulation: what do the case study evaluations tell us?

When it comes to identifying optimal regulatory solutions, patterns emerge depending on whether the particular case study is a "supply chain abuse case", a "subsidiary abuse case" or a "system abuse case", i.e.

"Supply chain abuse cases" call for parent-based methods of regulation that target policies in relation to foreign suppliers and create greater incentives to take CSR commitments seriously and give labour, environmental and human standards much greater prominence in decisions about where and with whom to do business. Although the supermarket or retailer may not be the "front line abuser" it should not, as a matter of policy, be able to enjoy the reputational benefits of participating in CSR initiatives and then not be prepared to monitor or enforce the relevant standards effectively. A consumer law remedy (e.g. the right to bring a public interest claim for damages for "misleading and deceptive conduct") seems an appropriate response to this problem.

Secondly, new statutory private rights of action against retailers can help to fill the enforcement gap that presently exists for workers where local law enforcement is weak: i.e. they are unable to enforce the law themselves, nor are they able to compel supermarkets to enforce producer standards or other initiatives entered into, supposedly for their benefit.

Thirdly, labelling schemes emerge as a possibility, although their performance and usefulness depends on a number of variables (specifically, the level of consumer awareness and activism). There may also be difficult legal and bureaucratic hurdles to overcome if there is any risk that the labelling scheme could constitute an illegal barrier to regional or international trade (see further discussion at Part 1, section 1.5.2 above). Finally, these schemes tend to be product-specific and do not suggest a general platform for legal reform.

"Subsidiary abuse cases" on the other hand call less for market-based initiatives and more for liability-based schemes (criminal and tort-based) that are designed to penalise wrongdoing and compensate victims. This is because, generally speaking, the level of knowledge and the relationship of control that exists (or ought to exist) between parent and subsidiary makes a causal relationship between the parent company and the harm easier to establish, and therefore more likely to attract blame.

"System abuse cases" call for governments to *work together* to close existing regulatory gaps and tighten standards. These cases highlight both the strengths and weaknesses of the "soft law" approach to international regulation. The strengths are flexibility and inclusiveness. Typical weaknesses, though, are lack of resources and supervisory capacity. Both of the "system abuse cases" featured in this report (conflict diamonds and baby milk marketing) demand multilateral, not unilateral, action to close off loopholes and increase transparency and credibility. (These comments could arguably be applied to case study 1, palm oil production, as well). At the domestic level, import and export bans are key in each case but, for reasons explained at Part 1, section 1.5.1 above, this is safest done as part of a multilateral project.

3.3 "Cross-cutting" solutions?

Three regulatory solutions emerge as potential "cross-cutting" solutions, in that they could potentially have an impact (a) both in terms of redress *and* deterrence

and (b) regardless of whether the particular abuse arises out of poor supply chain management ("supply chain abuse cases"), or poor supervision of subsidiaries ("subsidiary abuse" cases). These are:-

(i) *Wider and more participatory rights of enforcement of false and misleading CSR-related claims* (see Part 1, section 1.6.2 above)

Compared to some of the regulatory proposals outlined in Part 1, this is a "softer" measure in that it penalises, not the abuse itself, but false and misleading corporate claims made in relation to it. Incorporating private rights of action and the possibility of financial penalties into the proposal has the potential to increase both its deterrence value and its usefulness to affected groups. However, as noted above, care would need to be taken to ensure that the proposal did not cause companies to abandon voluntary CSR initiatives and enhanced CSR reporting altogether for fear of the legal risks.

(ii) *New statutory private rights of action* (see Part 1, section 1.3.2 above).

This also emerged as a potential "cross-cutting" solution, and scored well because it its accessibility, flexibility and its potential ability to deliver financial compensation to those affected by extraterritorial corporate abuse. The proposal's impact could possibly be widened further by combining it with the parallel "criminal law" proposal set out at Part 1, section 1.2.2 above. Under this hybrid arrangement (which draws from precedents in US environmental law) the basic statutory duties could be enforced *either* by public regulatory bodies *or* by private or public interest litigants. However, potential problems under EU law (see section 1.3.2 above) mean that this is an option perhaps best approached at EU level (and at the very least would require input from an EU law specialist to develop further).

(iii) *New complaints mechanisms* (see Part 1, section 1.3.3 above).

Finally, the establishment of new, less formal, complaints mechanisms emerged as a potentially attractive solution, particularly in relation to the "supply chain abuse cases". This was primarily because of its accessibility and flexibility, and also its compatibility with existing approaches to CSR-related issues and problems, domestically and internationally. However, this proposal scored less well in relation to the "subsidiary abuses cases", because of a lack of financial compensation and lower deterrence value of the particular proposal set out in Part 1. For these kinds of cases, the evaluation system seemed to favour the more traditional, tort-based and criminal law-based approaches – something that should be taken account of if it is decided to develop this idea further.

Appendix 1: Explanation of scoring methodology

(To be read in conjunction with the evaluation tables)

1. Each "requirement" (LH side) is weighted according to whether it is a "demand" ("absolutely necessary") or a "wish" ("would be nice to have"). Demands are automatically given a score of 5. Wishes are given a weighting of 1-3, depending on the strength of the wish.

2. Each long-listed reform option is then scored according to how well it meets each requirement.

   0 = not at all
   1 = to some extent
   2 = quite well
   3 = very well.

3. The total score for long-listed reform option is the weighted sum of the scores given for each requirement, calculated as follows:-

   $TS = [(S_1 \times W_1) + (S_2 \times W_2) + (S_3 \times W_3) \ldots]$

   Where:-

   TS is the Total Score
   S is the score in relation to a particular requirement; and
   W is the applicable weighing for that requirement.

Appendix 2: Case Study Summary Tables

Case study 1: Palm oil

Requirements	**Demand / Wish**	**Weighting**	*Options* Import ban (on uncertified palm oil and products) (para. 1.5.1)	International regime (regulating palm oil production and marketing) (para. 1.8.1)	Mandatory S,E and HR reporting requirements (para. 1.1.2)	Stronger and wider directors duties (para. 1.1.1)	New statutory duties (criminal sanctions) (para. 1.2.2)	New complaint mechanisms (para. 1.3.3)	Labelling schemes (para. 1.5.2)	New disclosure initiatives (para 1.7.1)
Ability to influence environmental practices of producers abroad	demand	5	3	3	1	1	1	1	2	1
Ability to influence foreign regulatory policies and practices	demand	5	3	3	1	1	1	1	2	1
Ability to cause UK retailers to adopt more responsible purchasing policies	demand	5	3	3	2	2	3	2	2	2
Ability to cause UK retailers to seek and provide more information about palm oil sources	demand	5	3	3	3	1	3	2	3	3
Compatibility with international law principles on extraterritorial jurisdiction	demand	5	3	3	3	3	1	3	3	3
Compatibility with international and regional rules on trade and investment	demand	5	1	3	3	3	3	3	2	3
Prospects for systematic enforcement	wish	3	3	3	1	1	1	1	3	2

Ease of compliance monitoring	wish	3	1	2	1	1	1	2	1	1
Effective sanctions in case of non-compliance	demand	5	3	3	1	2	3	2	2	1
Score			107	116	76	71	81	79	92	79

CORPORATE RESPONSIBILITY
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**Case study 2:
Gas Flaring in
Nigeria**

			Options								
Requirements	**Demand / Wish**	**Weighting**	Parent company liability (para. 1.3.1)	Criminal offence of "aiding and abetting" environmental crimes and HR abuses (para. 1.2.1	Mandatory S,E and HR reporting requirements (para. 1.1.2)	Stronger and wider directors duties (para. 1.1.1)	New statutory duties (criminal sanctions) (para. 1.2.2)	New statutory private rights of action (para. 1.3.2)	New complaint mechanisms (para. 1.3.3)	Wider rights of enforcement of false and misleading CSR-related claims (para. 1.6.2)	New disclosure initiatives (para 1.7.1)
Ability to influence S, E and HR performance of subsidiaries abroad	demand	5	3	3	2	2	2	2	2	3	2
Ability to influence foreign regulatory policies and practices	wish	3	1	2	1	1	1	1	1	1	1
Ability to cause UK parent companies to adopt more responsible policies in relation to the management of their subsidiaries	demand	5	3	3	2	2	3	2	2	3	2
Ability to deliver compensation to those adversely affected by poor standards of subsidiaries operating abroad	demand	5	2	0	0	0	0	2	0	1	0
Greater transparency from UK companies about the S, E, and HR	wish	3	1	1	2	1	1	1	1	1	3

performance of subsidiaries abroad											
Compatibility with international law principles on extraterritorial jurisdiction	demand	5	3	1	3	3	1	1	3	3	3
Compatibility with international and regional rules on trade and investment	demand	5	3	3	3	3	3	3	3	3	3
Prospects for systematic enforcement	wish	3	1	2	1	1	2	1	1	2	2
Ease of compliance monitoring	wish	3	2	1	1	1	1	1	2	2	1
Effective sanctions in cases of non-compliance	demand	5	1	2	1	2	2	2	1	2	1
Score			**90**	**78**	**70**	**70**	**70**	**72**	**70**	**93**	**76**

Case study 3: **Tesco/ orchard workers in South Africa**										
Requirements	**Demand / Wish**	**Weighting**	*Options*							
			Labelling schemes (para. 1.5.2)	Mandatory S,E and HR reporting requirements (para. 1.1.2)	Stronger and wider directors duties (para. 1.1.1)	New statutory duties (criminal sanctions) (para. 1.2.2)	New statutory private rights of action (para. 1.3.2)	New complaint mechanisms (para. 1.3.3)	Wider rights of enforcement of false and misleading CSR-related claims (para. 1.6.2)	New disclosure initiatives (para 1.7.1)
Ability to influence S, E and HR performance of primary producers abroad	demand	5	2	1	1	1	2	1	2	2
Ability to facilitate better regulation by foreign regulatory authorities	wish	1	2	1	1	1	1	1	1	1
Ability to cause UK retailers to adopt more responsible purchasing policies in relation to presh produce sources from abroad	demand	5	2	2	2	2	2	2	3	2
Ability to deliver other forms of redress	wish	3								

Ability to deliver compensation to those adversely affected by failures to adhere to responsible purchasing policies	wish	3	0	0	0	0	2	0	1	0
Ability to deliver other forms of redress	wish	3	2	1	1	3	2	2	2	1
Greater transparency from UK retailers as regards purchasing policies and performance against stated CSR-related goals	wish	3	3	2	1	1	2	1	1	3
Compatibility with international law principles on extraterritorial jurisdiction	demand	5	3	3	3	1	2	3	3	2
Compatibility with international and regional rules on trade and investment	demand	5	2	3	3	3	3	3	3	3
Prospects for systematic enforcement	wish	3	2	1	1	2	1	1	2	2

Ease of compliance monitoring	wish	3	1	1	1	2	1	2	2	1
Effective sanctions in cases of non-compliance	demand	5	2	1	2	3	2	2	2	1
Score			**81**	**66**	**68**	**75**	**80**	**74**	**90**	**72**

Case study 4: Anglo Gold Ashanti in Ghana											
			Options								
Requirements	**Demand / Wish**	**Weighting**	Parent company liability (para. 1.3.1)	Criminal offence of "aiding and abetting" environmental crimes and HR abuses (para. 1.2.1	Mandatory S,E and HR reporting requirements (para. 1.1.2)	Stronger and wider directors duties (para. 1.1.1)	New statutory duties (criminal sanctions) (para. 1.2.2)	New statutory private rights of action (para. 1.3.2)	New complaint mechanisms (para. 1.3.3)	Wider rights of enforcement of false and misleading CSR-related claims (para. 1.6.2)	New disclosure initiatives (para 1.7.1)
Ability to influence S, E and HR performance of subsidiaries abroad	demand	5	3	3	2	2	2	2	2	3	2
Ability to influence foreign regulatory policies and practices	wish	3	1	2	1	1	1	1	1	1	1
Ability to cause UK parent companies to adopt more responsible policies in relation to the management of their subsidiaries	demand	5	3	3	2	2	3	2	2	3	2

Ability to deliver compensation to those adversely affected by poor standards of subsidiaries operating abroad	demand	5	2	0	0	0	0	2	0	1	0
Greater transparency from UK companies about the S, E, and HR performance of subsidiaries abroad	wish	3	1	1	2	1	1	1	1	1	3
Compatibility with international law principles on extraterritorial jurisdiction	demand	5	3	1	3	3	1	1	3	3	3
Compatibility with international and regional rules on trade and investment	demand	5	3	3	3	3	3	3	3	3	3
Prospects for systematic enforcement	wish	3	1	2	1	1	2	1	1	2	2
Ease of compliance monitoring	wish	3	2	1	1	1	1	1	2	2	1

Effective sanctions in cases of non-compliance	demand	5	1	2	1	2	2	2	1	2	1
Score			**90**	**78**	**70**	**70**	**70**	**72**	**70**	**93**	**76**

Case study 5:
Conflict Diamonds

Requirements	Demand / Wish	Weighting	*Options*									
			International treaty (relating to trade in conflict diamonds) (para. 1.8.1)	Import ban (on uncertified diamonds) (para. 1.5.1)	Criminal offence of "aiding and abetting" human rights abuses abroad (para. 1.2.1))	New statutory rights of action (para. 1.3.2)	New complaints mechnisms (para. 1.3.3)	Mandatory S,E and HR reporting requirements (para. 1.1.2)		Stronger and wider directors duties (para. 1.1.1)	Wider rights of enforcement of false and misleading CSR-related claims (para. 1.6.2)	New disclosure initiatives (para 1.7.1)
Ability to support and enhance effective implementation of KP	demand	5	3	3	2	1	1	1	1	1		2
Ability to prevent imports and sales (within the UK) of non-certified diamonds	demand	5	3	3	2			1	1	1		2
Ability to prevent imports and sales (within the UK) of non-certified diamonds	demand	5	3	3	2			1	1	1		2
Ability to influence foreign regulatory policies and practices	demand	5	3	3	1	1	1	1	1	1		1

Ability to cause UK retailers to adopt more responsible purchasing policies	demand	5	3	3	3	2	2	2	2	2	2
Possibility of private enforcement, including standing for NGOs	wish	3	0	0	0	3	3	0	0	3	0
Systematic reporting by UK diamond mining, trading and retail companies on their efforts to combat trade in conflict diamonds	demand	5	3	3	1	1	1	2	1	1	3
Compatibility with international law principles on extraterritorial jurisdiction	demand	5	3	1	1	2	3	3	3	3	2
Compatibility with international and regional rules on trade and investment	demand	5	3	1?	3	3	3	3	3	3	3

Prospects for systematic enforcement	wish	3	3	3	2	2	1	2	1	2	2
Ease of compliance monitoring	wish	3	3	2	1	1	2	1	1	2	2
Effective sanctions in case of non-compliance	demand	5	3	3	3	2	1	2	1	2	2
Score			**138**	**117**	**97**	**78**	**78**	**74**	**71**	**80**	**105**

Case study 6: Cut flower industry

Requirements	Demand / Wish	Weighting	*Options*							
			Labelling schemes (para. 1.5.2)	Mandatory S,E and HR reporting requirements (para. 1.1.2)	Stronger and wider directors duties (para. 1.1.1)	New statutory duties (criminal sanctions) (para. 1.2.2)	New statutory private rights of action (para. 1.3.2)	New complaint mechanisms (para. 1.3.3)	Wider rights of enforcement of false and misleading CSR-related claims (para. 1.6.2)	New disclosure initiatives (para 1.7.1)
Ability to influence S, E and HR performance of primary producers abroad	demand	5	2	1	1	1	2	1	2	2
Ability to facilitate better regulation by foreign regulatory authorities	wish	3	2	1	1	1	1	1	1	1
Ability to cause UK retailers to adopt more responsible purchasing policies in relation to cut flowers sourced from abroad	demand	5	2	2	2	2	2	2	3	2

Ability to apply greater pressure to UK retailers to take serious steps to implement voluntary codes and flower standards more fully	demand	5	3	1	1	2	3	2	3	2
Ability to deliver compensation to those adversely affected by failures to adhere to responsible purchasing policies	demand	5	0	0	0	0	2	0	1	0
Ability to deliver other forms of redress for breaches of flower standards	demand	5	2	1	1	3	2	2	2	1
Greater transparency from UK retailers as regards purchasing policies and performance against stated CSR-related goals	wish	3	3	2	1	1	2	1	1	3
Compatibility with international law principles on extraterritorial jurisdiction	demand	5	3	3	3	1	2	3	3	2
Compatibility with international and regional rules on trade and investment	demand	5	2	3	3	3	3	3	3	3

Prospects for systematic enforcement	wish	3	2	1	1	2	1	1	2	2
Ease of compliance monitoring	wish	3	1	1	1	2	1	2	2	1
Effective sanctions in cases of non-compliance	demand	5	2	1	2	3	2	2	2	1
Score			96	71	73	85	95	84	105	82

Case study 7: Babymilk marketing

Requirements	Demand / Wish	Weighting	*Options*								
			International treaty (on marketing of breast milk substitutes) (para. 1.8.1)	Extraterritorial regulation of marketing tactics (para. 1.5.1)	New statutory duties (criminal sanctions) (para. 1.2.2)	New statutory rights of action (para. 1.3.2)	New complaints mechnisms (para. 1.3.3)	Mandatory S,E and HR reporting requirements (para. 1.1.2)	Stronger and wider directors duties (para. 1.1.1)	Wider rights of enforcement of false and misleading CSR-related claims (para. 1.6.2)	New disclosure initiatives (para 1.7.1)
Ability to deliver greater international consistency in standards for the marketing of breast milk substitutes, and in their implementation	demand	5	3	1	1	1	1	1	1	1	1
Ability to influence foreign regulatory policies and practices	demand	5	3	1	1	1	1	1	1	1	1
Ability to cause manufacturers to adopt more responsible marketing policies for themselves and their foreign subsidaries and distributors	demand	5	3	3	3	2	2	2	2	3	2
Possibility of private enforcement, including standing for NGOs	wish	3	0	0	0	3	3	0	0	3	0

Greater transparency by UK companies on issues such as promotions, sponsorships, grants and lobbying	demand	5	3	3	1	1	1	2	1	1	3
Compatibility with international law principles on extraterritorial jurisdiction	demand	5	3	1	1	2	3	3	3	3	2
Compatibility with international and regional rules on trade and investment	demand	5	3	1?	3	3	3	3	3	3	3
Prospects for systematic enforcement	wish	3	3	3	2	2	1	2	1	2	2
Ease of compliance monitoring	wish	3	3	2	1	1	2	1	1	2	2
Effective sanctions in case of non-compliance	demand	5	3	3	3	2	1	2	1	2	2
Score			**123**	**80**	**74**	**78**	**78**	**79**	**66**	**91**	**82**

Case study 8: Garment workers in Bangladesh

Requirements	Demand / Wish	Weighting	*Options*							
			Labelling schemes (para. 1.5.2)	Mandatory S,E and HR reporting requirements (para. 1.1.2)	Stronger and wider directors duties (para. 1.1.1)	New statutory duties (criminal sanctions) (para. 1.2.2)	New statutory private rights of action (para. 1.3.2)	New complaint mechanisms (para. 1.3.3)	Wider rights of enforcement of false and misleading CSR-related claims (para. 1.6.2)	New disclosure initiatives (para 1.7.1)
Ability to influence the labour standards of garment manufacturers abroad	demand	5	2	1	1	1	2	1	2	2
Ability to encourage better regulation by foreign regulatory authorities	wish	1	2	1	1	1	1	1	1	1
Ability to cause UK retailers to adopt more responsible purchasing policies in relation to cheap garments sourced from abroad	demand	5	2	2	2	2	2	2	3	2
Ability to deliver compensation to those adversely affected by failures to adhere to responsible purchasing policies	demand	5	0	0	0	0	2	0	1	0

Greater transparency from UK retailers as regards purchasing policies and performance against stated CSR-related goals	wish	3	3	2	1	1	2	1	1	3
Compatibility with international law principles on extraterritorial jurisdiction	demand	5	3	3	3	1	2	3	3	2
Compatibility with international and regional rules on trade and investment	demand	5	2	3	3	3	3	3	3	3
Prospects for systematic enforcement	wish	3	2	1	1	2	1	1	2	2
Ease of compliance monitoring	wish	3	1	1	1	2	1	2	2	1
Effective sanctions in cases of non-compliance	demand	5	2	1	2	3	2	2	2	1
Score			**75**	**63**	**65**	**66**	**78**	**68**	**86**	**69**

Appendix 3: Abbreviations

AGA	AngloGold Ashanti
ASA	Advertising Standards Authority
CC	Competition Commission
CSR	Corporate Social Responsibility
DTI	Department of Trade and Industry
EC	European Community
ECJ	European Court of Justice
EEOC	Equal Employment Opportunity Commission
EU	European Union
FCPA	Foreign Corrupt Practices Act
FOE	Friends of the Earth
FOI	Freedom of Information
FSA	Financial Services Authority
GATT	General Agreement on Tariffs and Trade
NCP	National Contact Point
NEPA	National Environmental Policy Act
NGO	Non-Governmental Organisation
OECD	Organisation for Economic Co-operation and Development
OFT	Office of Fair Trading
OPIC	Overseas Private Investment Corporation
RSPO	Roundtable on Sustainable Palm Oil
SPDC	Shell Petroleum Development Company of Nigeria
TEC	Treaty Establishing the European Community
WSSD	World Summit on Sustainable Development
WTO	World Trade Organisation