

**THE CORPORATE SOCIAL CONTRACT:
FROM ENLIGHTENED MONARCH TO ACCOUNTABLE DEMOCRACY**

CSR and Sovereignty

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**Assignment submitted in partial fulfillment of the requirements for the degree
MPhil in Sustainable Development Planning and Management at the University of
Stellenbosch.**

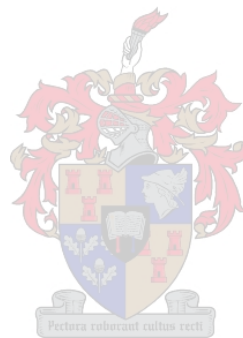
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December 2006

Declaration:

I, the undersigned, hereby declare that the work contained in this assignment is my own original work and that I have not previously in the entirety or in part submitted it at any university for a degree.

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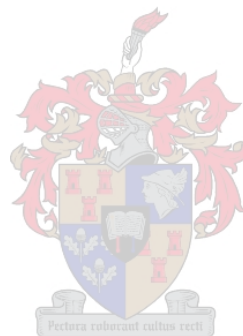
Central terms:

Sovereignty: The sum of all responsibilities, rights, obligations, powers and ultimately exclusivities of political entities. Although the functionalities of what we call sovereignty remained relatively stagnant, the manner in which geo-politics and domestic politics (or constitutions) allow such functionalities to be employed has changed significantly over time. Yet in recent decades the actual content of sovereignty itself has mutated - if not formally, at least practically - so as to make the business of being a sovereign far more complex and complicated than it has ever been throughout history.

Democratic form: A wide interpretation of democratic form, often referring to administrative accountability.

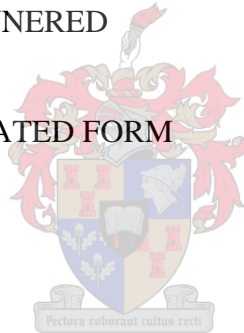
CSR (Corporate Social Responsibility): Also used as a collective term representing a wider drive to corporate accountability.

Historiographic: The use of historical process as perspective matrix.



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None are more hopelessly enslaved than those who falsely believe they are free.
Johann Wolfgang von Goethe

INTRODUCTION

The incorporated legal persona has granted humanity tremendous capacity for the mobilization of resources, both natural and human-financial. Before this, the state or state-associated structures and institutions almost exclusively dominated the history of such immense mobilization of resources (Noble 1997; Krasner 2001).

Increasing inroads by the citizenry, at least in the Western paradigm for the past half millennium, has marked the history of the state as far as accountability is concerned. This process eventually culminated in the modern republican or associated form of democratic governance. Central to this evolutionary process was the notion of the ‘Social Contract’, famously nurtured by the late Enlightenment French philosophers. This concept relies on the notion that the state is crucial for civilized life, yet its power has to be curbed to avoid draconian excesses of power.

An analogous process, it might be argued, exists in relation to the citizen-corporate social relationship: that this should come to be governed by what could be termed the ‘Socio-Corporate Contract.’

At present, the great majority of resources are mobilized by private entities, albeit at times in relation to the state, where the state plays a merely facilitating role (Cavanagh et al. 2003; Krasner 2001). This inherently goes to the core of any equity argument. The majority of

resources on the planet that are mobilized by and transformed for human consumption: democratically viewed, the citizenry should have some or other governing say over the way in which the majority of resources are mobilized and the manner in which the accrued benefits are distributed (Sachs 2002). Marxist as it may sound, the foundation of such an argument could conceivably, and probably ironically, be traced back to the same type of philosophical foundations that spawned the libertarian republicanism upon which so many of our political *Rechtstaat*-values are inherently based. From this perspective such a ‘Socio-Corporate Contract’ seems essential, if not inevitable. The form that it would take, though, will probably continue to haunt our governors and rebels alike in the decades to come¹ (Hutton 1995; Also see: The King Report on Corporate Governance in South Africa 2002).

Corporate citizenship, in whatever way one chooses to interpret it, as capitalist Jacobin or benign conserver of free-market values, would need to be eloquently adaptive in the face of increasingly severe pressures on both planet and people. The need for transformative ingenuity in an increasingly complex world seems inevitable – maybe within the next decade, maybe in 50 years. In the context of corporate citizenship, entrepreneurial spirit has taken on a whole new meaning (Ayres et al. 1996; Lovins 1999).

¹ It must be noted that over the centuries there has been a steady move towards greater or more inclusive control of corporate functions, culminating politically in the continental (especially German) form of socially more inclusive stakeholder capitalism (*Sozial Kapitalismus*), where, significantly unions hold *de lege corporate* power.

GEO-POLITICO-HISTORICAL FRAMEWORK FOR CORPORATE OVERSIGHT IN THE CONTEMPORARY ERA

Since the advent of political units² (whether tribe, city state or empire) in our species, the notion of sovereignty, although only comparatively recently speculated about, has played a central role in how we define our group identity, at least implicitly.

In pre-historic tribal societies sovereignty, as it is known today, might have been nestled in the finer egalitarian strictures, with the spatial element of sovereignty encompassing traditional hunting and gathering grounds.

As the first agricultural revolution advanced, settled societies became the norm, giving rise to both delineated geographies of exclusive power and class-based social orders (Diamond 2005; Noble et al. 1997). This manifested in the first proto-kingdoms or chieftaincies and proto-empires. The collective political identity of tribe and community from here onwards was held in custody by the upper classes and 'kings' and rulers, often tracing its lineage from supernatural structures, such as gods and creators. Such legitimizing force, together with complexes of hegemony over the functional inclusion of legal norms and violence, catapulted the incubation and eventual birth of what we could now call proto-states³. However, the theoretical development of the abstract notion of a sovereign state had to wait a few centuries for political

² One might even argue since the advent of clan-like or tribal qualities in species.

³ In the Western World the Greek city states experimented with a plethora of sovereign forms after the development of the Hoplite military culture. With the rise of the Hoplite Phalanx as military backbone of the city states, small landholder-Hoplites started demanding political power from the aristocracy. The products of this process ranged from benign autocracy, complex oligarchies to Dracus's malignant democratic form, which eventually lead to the classical Athenian *Demokratia* (Noble et al. 1997: 79-117).

theorists such as Hobbes and Rousseau of early modernity and, to a lesser extent, the earlier clerical theorists of the late medieval period (Kinder & Hilgemann 1978:11, 127).

The manifestation of such versions of societal definition, being extraordinarily efficient in mobilizing resources and power, soon became the predominant form of human habitation, displacing most hunter-gatherer societies. In later times, with the ever increasing sophistication of legal systems, state power and form was often dictated by its direct claim to grace from god (*in forma* its ruling elite), lasting well into the modern era.⁴ Sovereign rulers were entrusted with geographies of god's earthly representation, as it were. With this, the idea of a single transcendent power (Hardt & Negri 2000:65), beyond society yet encompassing it, came into existence. In the words of the French political theorist Jean-Jacques Rousseau, speaking from within a wholly different paradigm to this epoch, yet succinctly capturing the underlying essence of the sovereign idea: “[p]roperly understood, all of these clauses [of the *social contract*, which for him epitomized both form and function of sovereignty of the state] come down to a single one, namely the total alienation of each associate, with all his rights, to the whole community” (my emphasis and brackets)(Hardt & Negri 2000:85).

Yet within this sovereignty paradigm, theoretical fields of dissension became increasingly visible. The Manchurian (barbarian northerners) revolution in China, to take an oriental example, brought the necessity for the northern barbarians to legitimize their rule on the basis of something other than ancient divine lineage. Enter the notion of popular sovereignty. Sovereignty was now deduced from the collection of subjects of the empire as a whole, irrespective of lineage and historical right. As the dynasty became well entrenched, however, the

⁴ Cf. Louis XIV's claim to be God's stately representative on terra Gaia.

Manchu emperors soon reverted to the claim of divine right as sovereigns over the geographic bounds of the empire (Armesto 2003:240-1).

In the West the notion of the separation of state from church predated the conceptual revolution of popular sovereignty. It could be argued that one of the main instigating influences in this separation came from Rome's greed for power, manifesting in a sort of geographically unbounded sovereignty over religious practice. Hence the battles between the German Emperors and Popes of Rome during the High Middle Ages (Noble et al. 1997:392-9).

During the so-called classical period of Enlightenment in Europe, sophisticated forms of political theory started informing the theoretical bounds of sovereignty (Kinder & Hilgemann 1978; Noble et al. 1997). The epitome of this development was the notion of the social contract between the citizenry and its representatives in the state. Sovereignty, in theory at least, was vested in the collective of individuals (initially only of certain classes) within the geographic bounds of the state, with representatives appointed or voted into power to act as administratively bound trustees of the popular will, which in practice translated into the execution of powers rendered to them by the concept of sovereignty. From then on alternating construction of pretty much the same argument became the justification for most future execution of sovereign powers.⁵ It must be remembered that shadowing and slightly predating the concept of the social contract were the political theories of the eminent English political theorist Thomas Hobbes (Noble et al. 1997; Hilgemann & Kinder 1978; Armesto 2003).

⁵ Even the fascist and proto-fascist regimes of the early and mid-20th century justified their totalizing monopoly over state sovereignty in terms of some or other form of popular sovereignty.

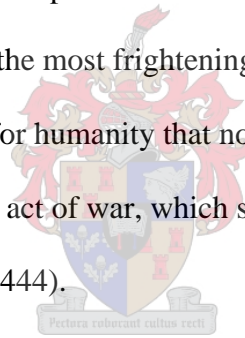
At the core of this new notion of sovereignty lay the relationship between state and citizenry, cutting the umbilical cord between individualized sovereign and divine justification. Hegel alludes, almost prophetically, to this relationship between state and citizenry, and in this foreshadows a Chicago economics school-type of argument on governance, with pointed reference to the obligation of the citizenry to the state, and the necessity of the latter to the proper functioning of the former (citizenry): “In relation to the spheres of civil law [*Privatrecht*] and private welfare, the spheres of the family and civil society, the state is on the one hand an *external* necessity and the higher power to whose nature their laws and interests are subordinate and on which they depend. But on the other hand, it is their *immanent* end, and its strength consists in the unity of its universal and ultimate end with the particular interest of individuals, in the fact that they have duties towards the state to the same extent as they also have rights” (quoted in Hardt & Negri 2000:87).



In the High Middle Ages, with banking families like the Fuggers sowing the seeds of capitalism, complex mercantile custom of the great markets of Europe detracted from the totality of sovereignty in collectives of trade jurisdictions, together embodied by the *lex mercatoria*. Despite all this, sovereignty, including its economic functions, later became the preserve of the individual state and its relations with other jurisdictions during the age of Westphalia, leading to the totalizing mercantilist policies in the age of nation states. However, this was a long time coming. Westphalia was merely the eventual culmination of the formal process, where religion, the last bastion of the trans-national operation of sovereignty, became subordinated to the whims of the state, as sovereign entity, over its territory. Religion became the ‘property of the sovereign’ (Hardt & Negri 2000:94; Krasner 2001:6). The state, as it were, became a billiard

ball in a community of billiard balls. Together with, or rather allied to, the notion of the nation, this modernist design of sovereign structure proved to be extraordinarily robust, in that it retained a certain degree of manageability, previously accomplished through complex alliances of nobility and church.⁶

This billiard ball power contestation between states culminated in the particularly ferocious nationalistic wars of the early 20th century. So rigorously constructed were the sovereign entities, and viciously contested the power struggles, that whole societies became enveloped in their worst excesses. The apex of this process was the incineration of hundreds of thousands of Japanese citizens in two blows by the most frightening weapon ever to be used by our species. So great was the collective shock for humanity that no civilized mind from then onwards could in any conceivable way glorify the act of war, which still stands, it must be noted, separate from its justification (Dugard 2001:394-444).



No longer were mere rules for civilized conflict sufficient. What was required was the differentiation between civilized conflict, misnomer as it might seem, and brute self-interested conflict. Enter the UN Charter, going beyond Geneva's rules of engagement, stipulating prerequisites of war itself. The Charter, coupled with the Universal Declaration of Human Rights, launched an era of renewed interest in natural (as opposed to positivistic/formalistic) law. The 'international human rights regime', as an abstract collective of humanity, was the first true

⁶ See Benedict Anderson for a discussion on the emergence of the nation state and the influence anti-colonial (western) revolutionaries had on its modernization.

inhibiter of national sovereignty of the modern era⁷. However, there was no capacity embedded within this regime to effectively bind states to the humane execution of their sovereignty. This was partly due to the Charters' *Grundnormliches* acknowledgement of the legal inviolability of national sovereignty.⁸ Tying into the UN system was a huge increase in international organizations, with states as members, where snippets of sovereignty were dissolved into supranational levels. Yet: "The UN organizations, along with the great multi-national finance and trade agencies, all became relevant in the perspective of the supranational judicial constitution only when they are considered within the dynamic of the bio-political production of world order" (Hardt & Negri 2000:31; Sassen 1996; Krasner 2001).

The increasing interdependence of the post-war economies of the world, however, impacted much more profoundly on the evolution of both the concept and practice of sovereignty in the latter part of the 20th century. Initially this was accomplished through the necessity to lay down trade rules, for parties to abide by bilateral trade treaties; regional multilateral trade bloc treaties followed. Eventually the liberalization of trade rules gave birth to something analogous to the medieval *lex mercatoria* (the law merchant), where the main actors were not states but banking houses, private trading partnerships and proto-companies (Dugard 2001; Noble et al. 1997). Once again profit-driven private entities were emerging as the main mobilizers of resources and increasingly acting as economically sovereign entities in themselves. Traditional economic functions of the state were increasingly devolved towards these entities and associated trade

⁷ See various conventions and multilateral treaties on the protection of Human Rights (Dugard 2001).

⁸ The debate rages over the actual existence of international law: was/is it a functional reality or mere cosmetics for the Hobbesian face of global politics (Dugard 2001).

regimes (informal and formal).⁹ During the ‘billiard-ball age’, the links between state and capital interests were directly related to the foreign policy of the former. There was an amalgamation of capital and the state, as it were. At some stages exploration and trading companies were directly chartered by state organs in the quest for economic expansion, transcending the mere formality of state boundaries. It could be argued that this still holds true. The difference lies in the language used by the proponents of trans-boundary national economic interests: ‘free-trade trickle-down, benefiting all eventually’ talk.

Under formal international law outright delegation of trade functions became a reality, after the Uruguay round of the GATT negotiations. Formally even private entities are increasingly seen as equal partners, where global economic policy decisions are concerned. This tendency is exemplified by their inclusion in the annual World Economic Forum.

All this, without even considering the formal delegations of national sovereignty, is continually and steadily chipping away at the exclusivity of national sovereign competencies. Saskia Sassen calls this process the ‘unbundling of sovereignty’ (Sassen 1996:31; Wallerstein 1974¹⁰).

In a sense national states are no longer capable of administering the complexities of modern societies (Capra 2003:113-137; Rhodes 1997)¹¹. Especially the trade competencies (Krasner, 2001), traditionally held by nation states, are functionally on their way towards being executed

⁹ Formally, of course, states represent their economically sovereign spheres. These are, however, less and less definable, where increasingly private trading entities give a far more coherent picture of economic power spheres.

¹⁰ See Wallerstein for a discussion on the early modern economic system transcending political national boundaries.

¹¹ See Fritjof Capra’s take on complex organic nature of modern organizations (*The Hidden Connections*).

by a conglomeration of states, international financial institutions and trade bodies, and probably most innovative of all, by private for-profit entities. The team of political scientists, Michael Hardt and Antonio Negri, call this composite-type of sovereignty phenomenon ‘empire’, likening it to the empires of old that made extensive use of complexes of clientism to administer sovereign functions, in their early 21st century book of the same title. So indeterminate have seats of sovereignty become that Hardt and Negri go as far as to describe the systemic administration of what was traditionally national sovereignty in the following manner: “The machine itself – validating, autopoietic – that is, systemic. It constructs social fabrics that evacuate or render ineffective any contradiction; it creates situations in which, before coercively neutralizing difference, seem to absorb it in an insignificant play of self-generating and self-regulating equilibria” (Hardt & Negri 2000:34; Capra 2003).¹²

But embedded within the finer structures of an ecstatically rapidly evolving global society, grappling with the impacts of long-term ecological damage and an information revolution, there lies the future political direction of our species (Capra 2003; Sachs et al. 2002; Ayres 1996). Here it helps to remember the regular flow of power dynamics. Rarely have we been able to pinpoint the functionally true webs of power and the invisible framework upon which it depends. Mostly, it’s the mere tip of the proverbial iceberg visible to the day-to-day awareness of citizens and consumers alike.

¹² However, as a critical caveat it must be remembered throughout that history has been riddled with attempts at extra-territorial application of sovereign powers, well into and beyond the modernist billiard-ball model of the state. This happens beyond the military costume, embodied in instruments such as the US anti-trust laws, which directly impacts, largely due to trade interdependence, on the financial-economic management of other states.

THE GLOBAL PLANE

Momentarily bringing to the fore the - for sake of argument - political dimension of corporate citizenship and accountability, and its potential impact on the notion of popular sovereignty, the argument that follows briefly traces the greater political history of globalization as the irrefutable surrounding atmosphere within which its dynamics play out. That is, for the foreseeable future, at least ignoring for argument's sake the very real impact that large-scale ecological calamities could have on the way we as a species function econo-politically.

Obviously no direct democracy in national guise would be logistically possible. What should be aimed for is an administratively fair, accountable and equitable process, through which corporations gain access to resources and markets, as opposed to the highest bidder dynamics of modern neo-liberal trading freedom. The need to regulate the behaviour of Trans-national Corporations (TNCs) has long since gone beyond mere socio-ethical necessity. We have entered a phase where it's become a geo-political imperative to strongly regulate and effectively democratise their working for the sake of international stability (Sachs et al. 2002; Held 2002; Reed 2001).

The rationale for such a take on the greater issue of corporate control, governance and overview can be found in the historical analogy of previous 'waves' of globalization. In his article entitled *The G8, Globalisation, and the Last Wave*, Paul Hohnen argues that one can distinguish three distinct phases or 'waves' of globalization and then more particularly economic globalization (2005:1-5). These are pre-corporate globalization, nation state globalization and the third wave that is unfolding at present, which we could term corporate-driven globalization.

In taking such a long-term view on the process of globalization, Hohnen shows remarkable similarities with Jan Nederveen-Pieterse (Nederveen-Pieterse 2004), who describes it as a systemic culmination of a broad socio-historical process, where globalization is seen as a pattern discernable from and embedded within the larger historical matrix (Paschke 2005:1).

The first wave, according to Hohnen, came with sedentary agricultural communities, which evolved into the early proto-empires. He justifies this classification by insisting that this was the period where “‘the international’ began to have a profound impact on ‘the local.’” This period also saw the rise of the first truly cosmopolitan societies. However, it was exemplified by the brutal exploitation of both natural resources¹³ and labour (often taking the form of slavery) (Hohnen 2005:1-2).

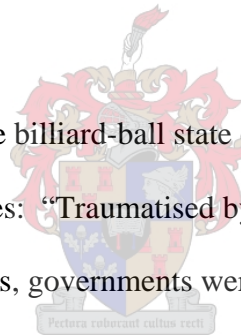


The second period came with Europe’s emergence from its so-called ‘dark age’ accompanied by the scientific and navigational revolutions into what we now know as modernity. This went hand in hand with exploration and geo-political expansion of Western European powers (Hall et al. 1994)¹⁴ and the corresponding development of the state-blessed corporate form (such as the Dutch East India Company), making private investment and financing the process of empire, both viable and highly effective, and in this way alleviating a lot of pressure on the state coffers. Empire became, essentially, if only in European guise, a business venture. Hohnen (2005:2)

¹³ Some historians see the unsustainable exploitation of natural capital as the main reason for the demise of many a civilization. These include the early Mesopotamian cultures, the Mayan culture on the Yucatan Peninsula and various others as thoroughly discussed by Jarred Diamond in his recent publication, *Collapse: Why Civilizations chose to fail or succeed* (Diamond 2005).

¹⁴ Also see Wallerstein, I. 1974. *The Modern World System: Capitalist Agriculture and the Origins of the European World Economy in the 16th Century*. Academic Press: New York.

describes this second phase, or nation state globalization, as manifesting the same moral behaviour and objectives as the first wave, namely “to secure the greatest returns at the least cost to the home state”, with economic externalities kept at arms length by the military complex of the promoter state. This stands in stark contrast to Antonio Negri and Michael Hardt’s take on the contemporary corporate-state relationship: “The activities of corporations are no longer defined by the imposition of abstract command and the organization of simple theft and unequal exchange. Rather, they directly structure and articulate territories and populations. They tend to make nation states merely instruments to record the flows of the commodities, monies, and populations that they set in motion” (Hardt & Negri 2000:31; for an alternative view see Krasner 2001).



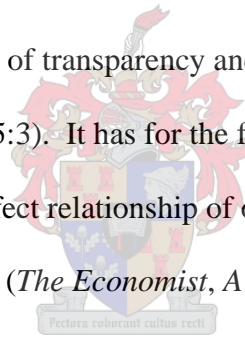
The second wave culminated in the billiard-ball state of affairs, described earlier on. Describing the end of this epoch Hohnen writes: “Traumatized by an economic depression, two world wars and [the] advent of atomic weapons, governments were forced to consider the need for a new world order. The United Nations and the Bretton Woods institutions were created, the Universal Declaration of Human Rights crafted, and the process of de-colonisation commenced” (Hohnen 2005:2). All this went a long way towards condemning, at least legalistically, the worst excesses of the previous framework, making exploitation of human beings for the sake of profit *formally* contemptible. Nature and her corresponding processes of regeneration, however, had to wait a few decades before gaining the formal acknowledgement of being worth respecting, when Lester Brown defined a sustainable society (this definition later formed the basis of the Brundtland report definition of sustainable development) (Cavanagh et al. 2003:189).

Enter the third wave. At this point corporations have grown “increasingly independent of government[s]...in [both] reach and power” (Hohnen 2005:2). At the beginning of the 21st century 51 out of the world’s 100 biggest economies are represented not by states but by transnational corporations (Anderson & Cavanagh 2000:1). This said, it must also be noted that, in spite of their increasing power, corporations have sidelined the process of democratization that ‘afflicted’ states over the past two centuries. *Formally* corporates have remained accountable only to profit-hungry shareholder-investors and to a comparatively small extent to the states of their incorporation in terms of minimal accounting requirements and tax obligations. Some writers call the payment of corporate tax the first and foremost step towards corporate citizenship. However, given the large reliance placed on corporate success for the proper functioning of the modern Western capitalist state and the very favourable trading regimes constructed since the middle of the 20th century, the state’s capacity to regulate corporate behaviour to the maximum benefit of its citizens has diminished greatly and has rather created a state-corporate relationship of overdependence, which according to some political theorists is becoming too close for comfort.¹⁵ In the third world the state’s bargaining position *vis-à-vis* TNCs resembles less a relationship of mutual symbiosis and more one of desperation in the search for direct foreign investment in this age of neo-liberal free-market fundamentalism (Chang 2002; Rhodes 1997). The resulting rewards are proportionally meagre revenues, dislocation of communities selected for investment, proportionally few jobs and an

¹⁵ [What should be aspired today, especially by progressive leftist forces, is the active politicking for a definitive separation of the state and capital. The democratic popular sovereignty argument for such a move would be analogous to; firstly the separation of church and state, and secondly the contemporary constitutional separation of powers.] For such a conception of state to have any practical validation, separation of church and state and eventual separation of the powers within state had to be accomplished. The reason being: If sovereignty was conceptually deduced from collective abstract representation of the citizenry, only those institutions that capacitated even a vague account of the population en masse could be said to embody this neo collective conception of sovereign control.

overdependence further weakening the state's capacity to determine its own macro-economic policy (Chang 2002).

Accompanying the structures of this third wave of globalization or global integration was the rise of the so-called third estate *in forma* an increasingly mobile and dynamic civil society (Krasner 2001:6). These include labour unions, NGOs and various extra-corporate, non-state stakeholder and interest groups. Then there's been what could probably be termed the most remarkable impacts on our social, political and economic behaviour on a scale not seen since the advent of the industrial revolution – the Information Technology (IT) revolution (Castells 1996)¹⁶. This has brought about unbounded levels of awareness of the causal effects of our actions, unleashing the potential for tremendous levels of transparency and corresponding accountability wherever power is propagated (Hohnen 2005:3). It has for the first time enabled us to form a truly global picture in term of the cause and effect relationship of our actions, particularly in relation to their effects on our natural environment (*The Economist, A Survey of the Company* 21 Jan 2006:4).

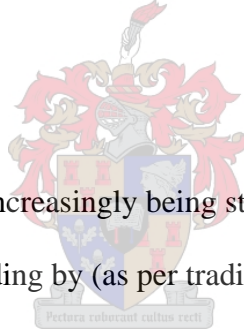


Hohnen feels that “[m]ore than any time in [our] history, humankind faces rival and increasingly incompatible viewpoints and realities, with the role of corporations front and centre.” He adds that “the market continues to carry on with a mind-set forged during the previous two eras. Finance, goods and services are exchanged worldwide in historically short periods and large volumes. Trade and economic policies are still framed as if there are boundless raw materials and on the same assumptions that externalities can be addressed by expanding economies and new technologies” (Hohnen 2005:3). The contra-argument to this last proposition is

¹⁶ See Benedict Anderson (1991) on the influence that the printing press had on the development of the nation state.

arithmetically wrong for one simple reason: even if technologies improve in terms of efficiency a thousand fold, this will only postpone the eventual crunch of natural resources especially the non-renewables. Essentially new technological improvement and resource extinction (on a finite planet) will converge (Ayres 1996:12-15; Sachs 2002:39-40). Technological innovation could merely influence the timescale.

Given this historiographic framework, one cannot avoid one pertinent reality, namely that TNCs are increasingly operating like unbounded global empires, with historically unprecedented amounts of power yielding capacity *vis-à-vis* both the state and communities, yet lacking popular controls and corresponding administrative accountability, at least in any politically meaningful way.

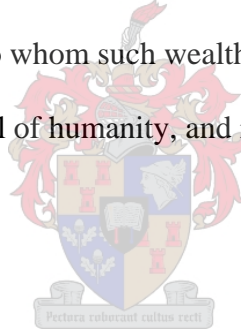


The politics of the global age are increasingly being steered away from formal governmentalism, towards a synthesis of power wielding by (as per tradition) states, civil society unions and federations, but economically more significantly, by TNCs. One succinct example of this tendency is their representation on the World Economic Forum, an annual talk-shop on global macro-economics. Four indicators, suggestive of their growing power and influence on the daily lives of the world citizenry, were summarised by Sarah Anderson and John Cavanagh:

1. 51 of the 100 biggest economies are TNCs, not states.
2. The combined sales of the top 200 TNCs are greater than the combined economies of the poorest 182 countries (than is all countries, minus the richest 9).
3. One third of the world's trade consists of mere intra-firm transactions.

4. The combined employment provided by the top 200 TNCs is minute, a minuscule 18.8 million, which is less than a 300th of a percent of the global population (Anderson & Cavanagh 2000: 2-4).

Anderson and Cavanagh argue that this state of affairs creates what they call “global economic apartheid” and not some utopian “global village” (2000). Whether there be any truth or credit in this assertion or not, what remains certain is that corporates are undoubtedly the largest consumers of the Earth’s natural resources, especially the non-replenishables, albeit as intermediaries between resource and consumer. This more than any other point raises profound equity issues on a global scale. This only becomes more acute when one takes into account the type of wealth being created and to whom such wealth accrues - wealth effectively created with the natural capital inheritance of all of humanity, and indeed all life on Earth (Paschke 2004: class notes (Sachs W)).



This links pertinently to Wolfgang Sachs’s proposition linking the issues of ecological degradation and human rights. The central tenet of Sachs’s argument is that the rich have the financial means of buffering themselves from the worst effects of natural disasters (as recently witnessed by the world in New Orleans), coupled to the fact that it is predominantly the poor who live in ecologically vulnerable areas (often because of political and cost concerns, as in the Cape Flats, or plain historical chance, as in Bangladesh), and as a result the most fragile sections of our societies are disproportionately affected by ecological degradation, while being least responsible for the resource-greedy causes of such degradation and potential disasters (Sachs 2003).

Equity concerns, from an eagle's eye view, reinforce the geo-political stability argument for strong and dynamic cross-boundary corporate accountability. Gray (2002) argues that each and every wave of globalization was eventually followed by some or other violent reactionary and protectionist movement (not limited to trade only, but including cultural concerns). The second wave, for instance, was followed by Fascism and Nazism in Europe, Stalinism in Russia¹⁷ and Maoism in China; Gray argues that these were knee-jerk, preservationist and nationalist reactions to provide bulwark against the uncertainties and corresponding power of international capital. He views fundamentalist Sunni Islamism as an analogous movement, culturally combating unrestricted corporate globalization and what is viewed as its relentless expansion and commodification of all aspects of life, including that which is dearest to them: the prophet's unique religious culture (Gray 2002:xxi-xxiii; Rees 2005:269-271). Apart from its ethical dimension, this argument should be taken seriously by any and all who have a stake in the status quo: an imbalance of the political order has been and will continue to be the most distressing threat to those interests.

Neo liberal consensus often takes the form of extorting conditions from weak states and societies to pave the way for market exploitation by greater economic brand interests, and flooding such societies with perverse waves of competition backed by winner-takes-all type bargaining, while leaving natural resource bases of such societies open to radical market dynamics.

¹⁷ Stalinism differs geo-politically from original Bolshevism, in Trotskyite mould, in that it was primarily obsessed with the USSR and no longer actively advanced the cause of world revolution until after WWII. Stalinism was a fiercely nationalistic heresy.

In recent years this has given rise to tremendous tension, as is evidenced by the so-called anti-globalization protests around the world, shadowing most international intergovernmental and economic conferences. Here we saw the rise of multifaceted and sometimes unlikely alliances between various social- and economic justice movements, environmental groups and even conservative protectionists.

Riding on popular discontent with liberal economic trade policies, various 3rd world countries moved sharply towards the populist left, diplomatically allying themselves to both western and developing world civil society amalgamations, lending extra legitimacy to their sovereign claims in the eyes of especially the western progressives.

To carry through the central analogy of the corporate social contract, it is wise to remind oneself of the difference in structure of the establishment against which these covenants are claimed. The social contract was violently fought for and claimed against relatively insulated royal and colonial structures, by modern standards at least. This is vastly different in structure to the power complex of contemporary global economic force.

Indeed increasingly, resistance to neo-liberal Empire (as most elements and behavioural tendencies are present) are organised in webs of interrelating alliances. The collectivisation of Southern concerns at global economic talks and the rising international alliances between industrial, agricultural and service trade unions, with their almost instant capacity for mass mobilisation, have significantly increased the leverage of

resistance movements across the board, as is evidenced by the recent deadlocks of WTO discussions.

In countries like India, Brazil, Argentina, Nigeria and Bolivia countless locally organised social movements have created novel ways of mitigating against the harmful effects of corporate led globalisation. They range from co-ops and alliances of small farmers defying local and national governments, often allied to large agri-business, to down right violent insurgency, in the case of indigenous groups in the Nigerian oil delta, against both government and the oil companies with interests there.

One of the most obvious threats is that continually worsening climatic disasters tend to affect the poorest of the world's poor, those most desperate in their quest for daily survival. These are the ones, who are, as history has shown, most prone to dramatic, violent and unpredictable political behaviour¹⁸. Corporations' lack of environmental responsibility causally impacts intensely on this state of affairs (Sachs 2003).

Yet, equity issues in and of themselves provide a vivid rationale for greater accountability in an increasingly unequal global economic order. In a sense, what governments could be facing is a compromising of the whole edifice built up over the past half a century, mainly through their potentially diminished ability to provide effective facilitating roles for corporate market access and trading space, so dependent on the assurance of both property and contract rights.

¹⁸ Hence the old saying: "A hungry man is an angry man."

It is here that the left critique becomes relevant: new global finance and trade institutions have had sovereign economic functions devolved to them, yet have not been able to democratise these, as national societies have.

Private incorporated forms have overtaken Westphalian states as the central mobilisers of resources and converters of such resources into concrete wealth, albeit often in the form of resource-expensive consumables essential for the profit-motive mechanisms of the former. In many ways this market-driven mobilization of resources is unique in its capacity to transform the lifestyle of the common person with such inconspicuous political force as it does today. With the continued delegation and devolution of economic and trade competencies of the sovereign concept to supra-national institutions (with or without proper representation), private for-profit entities gain expanded global choice and corresponding bargaining strength *vis-à-vis* national sovereignties (which still to a lesser or a greater extent represent accountability potential to the broad citizenry around the globe). When taking into account the nature of the resources being mobilized, one arrives at the ecologically-centred conclusion that those resources biologically embody the proverbial family silver, required by all living systems including human society, to procreate and prosper continually into the future.

This state of affairs raises two fundamental questions. Firstly, are these new, emergent forms of functional governance accountable enough so as to complement our species' contemporary view of what civilized governance should entail; and secondly, relating to the first question, is it

ecologically sane/wise to surrender resources, integral to the procreation of life on Earth, to the whims of the global market place as it is governed at present?¹⁹

Here we start to encounter the first quirks of what ecological movements call ‘earth democracy’ (ecologically responsive democratic form)²⁰, albeit on a global rather than merely a community-engagement level. Humble beginnings in relation to for-profit incorporated entities can be found within corporate social responsibility initiatives, whether they mainly constitute public relations exercises or true experimental drives towards accountability in innovative, inclusive form, where communal goods and assets, such as ecologies, raw resources and community capital are concerned.



¹⁹ See Cullinan, 2002 for a discussion on Eco-centric Earth Jurisprudence and Earth governance. Also see Sachs 2002 for a more anthropocentric discussion of similar issues.

²⁰ “Earth democracy re-contextualizes humans as one member of the Earth family, and diverse cultures in a mosaic of cultural diversity which enriches our lives” (Cullinan 2002:138).

RESPONSIBILITY VS. ACCOUNTABILITY

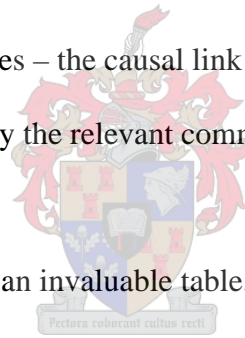
A very useful and ultimately meaningful conceptual classification is that of responsibility and accountability, as discussed by Ralph Hamman and Nicola Acutt, at the time from the University of East Anglia, and Paul Kapelus, from the African Institute for Corporate Citizenship, in their article *Responsibility versus Accountability?* (Hamman et al. 2003).

Broadly stated the former entails a sense of responsibility that comes from business being embedded within society and conversely dependent on it, which leads to the creation of voluntary mechanisms and standards by which corporations undertake to behave responsibly. Needless to say, this approach is heavily supported by, and argued for, by the business community. The crux of their argument can be summed up by Michael Spicer's words, as quoted by Hamman *at al.* (2003:28): "You can't regulate virtue." The responsibility argument is then also more closely associated with shareholder capitalism and Anglo-American economic liberalism. This group further argues that over-regulation would inhibit entrepreneurial freedom, in that a 'one size fits all' or template approach to corporate citizenship ignores the complexities and peculiarities of individual businesses (Holliday et al. 2002).

Their argument, however, ignores the dynamic capacity of modern legal form, which could easily facilitate a wide variety of business types and contexts. Additionally, regulation would entail upholding central and globally acknowledged duties and rights, rather than administering the daily workings of business (although guidance might play a role). As Craig Bennett, quoted

by Hamman *et al.* (2003:28), reminds one: “We [proponents of the accountability argument] want duties, not details.”²¹

The accountability side of the argument (more closely associated with stakeholder capitalism) argues with undeniable strength and lucid logic that the modern, limited liability corporation, by virtue of its legal form and the fiduciary duty of its directors towards its shareholders, would never choose broad socio-environmental responsibility above profits and share value (Cristian Aid 2004; Paul et al. 2000). In the final analysis profits and share values would under almost all conceivable circumstances be placed before responsibility. (Here it would be wise to remind ourselves that CSR might, under circumscribed circumstances, be viewed as essential elements contributing to the strength of shares – the causal link has as yet not been adequately established or at least not generally accepted by the relevant community.)



Hamman *et al.* (2003) constructed an invaluable table, with the broad policy pros and cons of each. On the responsibility side it is said that corporates could contribute significantly to sustainable development by harnessing the mechanisms and energy of the free market. Yet this conceptual position does not address the problem of ‘free-rider’ companies and the associated problematic of the tragedy of the commons, where externalities of production and consumption are not accounted for. The regulation-prone accountability argument places rigorous emphasis on prior informed consent for new developments and undermines short-sighted, short-term, exclusively profit-driven ventures, so often responsible for human rights abuses and environmental degradation. Furthermore, it at least addresses the very real problematic of the

²¹ Rules or regulations regularly ‘make’ the market, capacitating technological innovation where the environment is concerned, and consequently create niche markets with the potential to grow exponentially as regulations become entrenched as daily operational norms.

profit motive and still provides room for complementary systems, where the worst abuses and effects of business are forcefully negated. On the other hand, the accountability argument fails to adequately address the need for local and national economic development, which often necessitates negative effects for the sake of the long-term greater good. Additionally, it fails to acknowledge the difficulty of pushing accountability reforms through the often politically stale international and national legal orders.

Furthermore, regulation and the strong hand of sanctions often lead to a bad taste in the mouth of those regulated - thus inducing, it could be argued, companies to do the bare minimum through mere 'letter of the law' compliance. Successful regulation needs to include a strong element of enticement through smartly thought-out and area- and context-specific incentives. In this way the full capacity of companies is more likely to be mobilized in the service of some or other morally just or environmentally benign agenda. Given the enormous capacity of the privately incorporated legal form in assembling and activating resources for whatsoever purpose, the use of their structures and networks should not be overlooked for dogmatic reasons.

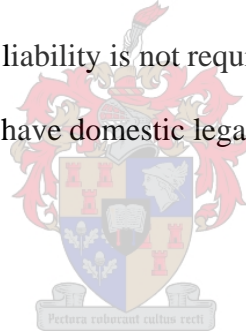
In the end Hamman *et al.* discuss a synthesis model of corporate citizenship, where core responsibilities are regulated, yet capture the virtues of free-market dynamism, to achieve the execution of socially responsible and responsive business. In light of the political omnipotence of business in modern societal structures and the ecological *cul de sac* and social stratification faced by humanity at large, a careful balance or synthesis is probably the sanest and safest route to accountability, built on a nurtured sense of responsibility, rather than just whipped into compliance.

THE LAW OF DELICT AND CORPORATE ACCOUNTABILITY

Recently a matrix form of production and intra-firm trade has increasingly become the norm, exemplified by an estimated one third of world trade accounted for by intra-firm trading (whether in products; services or finance). This is largely due to “a variety of changes in the environment in which businesses operate, particularly in communication technology, in the globalisation of production and sales, and in the large-scale shift of responsibility to outsiders for what were once considered a company’s core functions via outsourcing, joint-ventures and other sorts of alliances that involves a loosening of control over vital inputs”²² (Economist 2006:4-5; Capra 2003:113-137). This state of affairs obviously has dire consequences for any attempt to hold companies accountable for the negative effects that their production chains might have on society in specific instances and at large, and to the health of the natural environment. Passing the buck becomes legally and delicately possible and publicly reputable. The challenge to maintain corporate accountability becomes tremendous. How far or deep into the production and service networks should, and indeed can, the potential liability for morally and legally repugnant effects of the ‘instigating’ or promoter corporation reach? Going beyond the bounds of formal CSR, the law of delict - otherwise known in the Anglo-American jurisdictions as the law of torts - traditionally includes the concept of *novus actus interveniens*: meaning that the causal chain between the instigating action (outsourcing in this regard) and the eventual negative effects are legally broken by an independent act that might have changed the magnitude or direction of the causal chain, no matter how small that might have been. A further central concept in the law of

²² This occurs in conjunction with what Castells calls the rise of network societies, where the famous Milgram study of 1967 found six degrees of separation; a repeat of this study found that number to have gone down since the advent of the IT revolution to a mere 4.6, despite a significant growth in the US population, the subject of the study (Economist 2006:4).

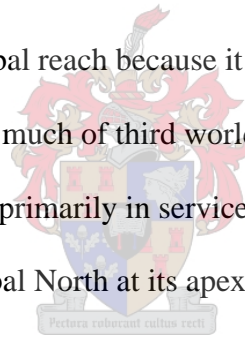
delict, and of contract for that matter, is that of the ‘reasonable man (woman or android in modern guise)’. The actions and effects of the action are attributed to the original actor if it can be judged to have been reasonably foreseeable by the abstract notion of the ‘reasonable’ person in his or her circumstances and field of knowledge (Neetling et al. 2002). In this regard it could be argued that, in spite of any *novus actus intervenius*, the average corporate board, which regularly and necessarily indulges in outsourcing of services and sourcing of raw materials from often dubious origins (like rare earth mineral mining in the east of the DRC), knows about or reasonably should have known about the ill effects of their out-/sourcing on far away communities and ecosystem. The point being, to explore the possibilities of holding trans-national corporations accountable, to some extent, to the oft dubious practices of its long and complex production chains. Strict liability is not required. A mere heightened standard of care should be aspired to, which would have domestic legal functioning, coupled to international standards of trade.²³



One transitional phase proposition to inhibit the global power execution of TNCs administratively could come in the form of limited liability of stock or share traders. The idea would be to instil ethical capital investment. Brokers could be required to declare options of so-called ‘ethical portfolios’, in which the client may or may not show an interest. Hereafter the broker must take great care to construct portfolios consistent with the clients’ wishes, as per general habit. Brokers should then be allowed to act on *prima facie* reports by corporations. The said corporation’s shares sold should in turn be allowed on *prima facie* reports by those it outsources its business functions to (whether they be primary producers, service deliverers or

²³ A standard of care, at international trade treaty level could conceivably become very powerful loci for transformation, where national “institutional reform” would work as a safeguard and prerequisite for effective membership status of trading bodies and potential candidacy for loans.

raw resource extractors). However, when it is deemed to have known, or could reasonably be expected to have known, in the usual course of business, such liability accrues to such ‘mother company’. In this way there is a tacit ethical-legal obligation placed on any primary investors in any corporate activity,²⁴ linking the primary capital generation to eventual corporate conduct, directly, without putting undue strain on the broker community and thus not hindering this highly efficient and innovative, and mutually beneficial, way of raising capital. The main advantage of this proposed mechanism of corporate oversight is that the ‘trickle down’ effect would be direct in its impact: No global consensus would be necessary. Analogous to consumer-driven standards, yet significantly reducing the class of people to be convinced globally, starting with limited shareholder activism in industrialized countries. This, if well orchestrated, would contradict other forms of truly global reach because it does not need global consensus to avoid the ‘race to the bottom’ effect. So much of third world production, services and materials extraction is in some or other way primarily in service of some or other network, with corporations domiciled in the Global North at its apex.



Even though shareholder activism has traditionally been associated with concerns over returns, both short and long term, usually spoken in the language of fiduciary duties owed them by company management, it remains a powerful tendency, if well orchestrated and coordinated, through which *de jure* owners can steer company policy along long-term trajectories. The aforementioned strategy would go a long way to integrate not only financial transparency, but also social and environmental transparency. After all, the proverbial buck could always be

²⁴ Similar mechanisms were recently tried out by larger financial institutions (primarily banks). The idea is to regulate project banks’ finances. The problem is again that this relies on reporting by the project proposers and is further limited to projects above 50 million USD, thus granting banks the opportunity to lend capital in incremental fashion to essentially the same project without activating the regulatory limitations (*Business Day Business Law Review* 2006:3).

passed on, liability-wise, to the outsourced, ‘infringing’ company or entity - unless of course the ‘mother company’ is unable to show that it did not know or could not reasonably have been expected to know in the regular course of that particular type of business of one or other particular environmental or social infringement.

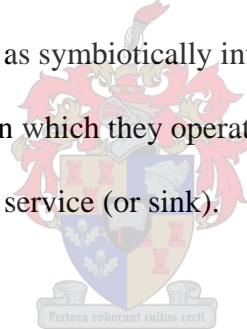
Such a type of construction would, of course, not go a long way towards guaranteeing accuracy of accounting and reporting regimes, but at least it has the potential of creating a culture of cautious investment and outsourcing, potentially leading to a ‘race to the top’ by producers and service providers in the Global South, vying for DFI (direct foreign investment) and lucrative supply contracts with big multinationals.



At this point, for the sake of argument, I would like to make a distinction between corporate social responsibility (CSR) and corporate social investment (CSI). CSR is integral to the daily functioning of a business. Some argue that mere payment of taxes is the first step towards socially responsible corporate behaviour. Given the profit-driven, benign legal nature of the incorporated persona, it could be argued that only regulation and the application of legal sanctions can truly and effectively internalise such behaviour. As for the “it’s good business to be socially responsible” argument, that is all that it is: good business in line with the profit motive. In contradiction to this, CSI, i.e. those things done beyond the core business of the corporate, would more likely be done as public relations (PR) exercises, where voluntary binding charters would fall under “it’s good business”, beyond regulation (Roberts 2003).

EMBEDDED SYMBIOSIS: RESPONSIBILITY DEDUCED

A business as an entity is by virtue of its material existence necessarily embedded in micro, mid or macro society, depending on which level of its operations is being referred to. These structures encapsulate spheres of impact. Jörg Andriof and Malcolm McIntosh (2001) neatly reduce the areas of impact that CSR must operate around to four distinct categories: the environment (presumably in the narrow sense of the word), the workplace, the community and the marketplace (2001:15). Some of these have been directly addressed by legislation and regulation in most countries, to varying degrees. Workplace safety, mandatory employee participation councils and competition legislation are among the well-established features of this. Ideally business should view itself as symbiotically interdependent on societies (whether bio-physical or cultural in form), within which they operate and have an impact on, the latter being viewed as providing an absorption service (or sink).



According to Andriof and McIntosh (2001), businesses, having crossed a similar conceptual paradigm in relation to how they propagate their enterprise in a responsible fashion, are “underscored by a series of new beliefs”, which could be used as summary for the business case for CSR. These beliefs include the following: employees’ productivity is dependent on their quality of life, both within and outside of their work environment; companies’ long-term functioning is better in stable communities (e.g. environmentally and socially healthy, skilled and strong); environmentally courteous companies tend to be more resource efficient, create higher-quality outputs and reduce the risk of litigation; company reputation is becoming increasingly vital (in a branded world) and this leads to company incentives to take longer-term

views, compromising short-term profits for the sake of continued strength and performance (2001:16).

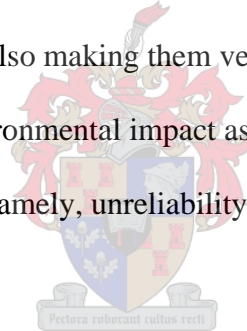
These virtuous points of reference, however, simply don't apply to the many high-risk-high-return ventures, nor do they apply to the all too prevalent notion of 'wanting to make a quick buck', to which even those corporations in the limelight are not immune – under the surface at least. In an era of increasing fluidity of capital, produce and services, construing one's operation so as to avoid such strenuous commitments and yet still save face where it matters becomes increasingly possible – given the right level of managerial ingenuity. On the flip side, however, an increasingly communicatively connected globe makes slip-ups more dangerous, especially where brand value comes into play, as Shell's Nigerian endeavour proved with stunning impact (McIntosh 2001:14).



In this regard, internalisation of CSR could obviously hold significant benefits for good corporate citizens. For one, they would probably notice a dramatic decrease in legal costs. McIntosh lists further possible benefits, including reputational value, the growth of social capital, both intra- and extra-corporational, and easier access to capital (McIntosh 2003:97). However, on the last point it must be said that finance institutions are rarely motivated by abstract norms in a game where risk and return turn the cogs of the industry.²⁵ At this point the need for interactive and mutual CSR acceptance and operation becomes obvious. Otherwise, shifting the blame up or down the distribution channels and supply chains, while keeping one's own conscience happy, becomes just too much of a temptation.

²⁵ See Green Banking initiatives and its problems at footnote 18 above.

Since its conceptual inception, corporate citizenship has come a long way. From its beginnings as ‘chequebook philanthropy’ right through to the countless principles, guidelines, codes of conduct and initiatives since proposed, accepted and agreed upon. Reliant as they are on voluntarism, most of these lack truly broad transformative power. Additionally, their multiplicity gives rise to mutual inconsistencies around central aspects of CSR and downright avoidance of others (McIntosh 2003:96). Without coherence corporate support of codes never goes beyond just that – it remains mere lip-service support. For voluntarism to truly function effectively and capacitate the drive of CSR into a new era of true internalisation of given norms, globally, acutely effective audits are needed. Audits, given the wide and often nebulous norms imbedded in the various codes, are extremely difficult to devise so as to be indicative of the true nature and extent of compliance (also making them very expensive, at best). Audits thus suffer from the same syndrome that environmental impact assessments regularly suffer from – as a formality paid for by the client – namely, unreliability (Cape Times 21 Jan 2005).



Then there are those initiatives that integrate various concerns and norms from the distinct areas of CSR impact (McIntosh 2003:121). One such example, discussed by McIntosh, is the International Social and Environmental Labelling Alliance (ISEAL), whose members include, *inter alia*, the Fair Trade Labelling Organization (FLO), the Forestry Stewardship Council and the International Federation of Organic Movements (McIntosh 2003:121). ISEAL strives to synergize and fuse audit methodologies and standards. Some of these initiatives, such as FLO, have been firmly integrated into supply-chain mechanisms. Mostly consumer driven, these are premised on primary products being produced under socially just and environmentally sound conditions (Paschke 2005:7). Where a product is certified, it relies on the philanthropic guilt-

free shopper's sense of the eventual (mostly) Northern consumer, for which a premium is paid (Paschke 2005:7). Part of the premium is relayed towards the upliftment of communities involved in the primary production, with the rest being dissipated and going towards certification and administration costs.

Still reliant on what is a fundamentally unequal trading relationship, some of these initiatives, because of the direct monetary benefits and implicit assurance of specific market sector (ethical consumers) access, come closest to truthfully advancing broad-based and structurally internalised CSR in practice. The business of these (accredited) businesses is not CSR through business, but business through CSR.

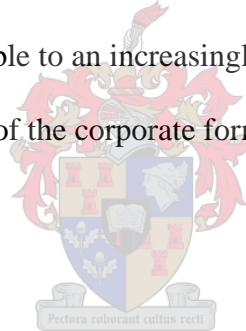
However, various commentators contend that no matter how fashionable such labelling becomes, the large section of consumers simply don't give a damn, leaving a proportionally small percentage of reasonably wealthy consumers to supposedly, drive change. According to Deborah Doane's article *The Myth of CSR*, a meagre 9 percent of the US consumer population embody the so-called "True-Blue-Greens...most likely to walk their environmental talk", with the rest denying that individual action has any effect²⁶ (Doane 2005: 4).

Such models, although miniscule in comparison to global free trade, have become big business in their own right. What makes them special is that their true enforcement relies more directly on the market itself than most CSR initiatives do. This is special, because it begins to address fundamental inequalities (social and environmental) in contemporary trading regimes, making

²⁶ Joel Makower has traced 'green consumerism' since the advent of the 1990s, relying primarily on Roper ASW data, which state that "the truth is, the gap between green consciousness and green consumerism is huge" (Doane 2005:4).

this model pregnant with opportunities for developing more equitable trading systems (Paschke 2005:7; McIntosh et al. 2003:121-125). In fact ‘fair trade’ could become a template of sorts for ways and means of structuring benign free-trade regimes of the future. As with most things of global, momentous and possibly historic proportions, political will remains a perpetual problem, where vested interests often drive the political decision-making process. A lot of voter PR needs to be done, especially with potential labour cuts (wanting to save costs with increased expenditure ensuring compliance) that would accompany more benevolent ways of keeping the proverbial till ringing.

No matter how ingenious such CSR attempts might be, they remain mild and reformist, something which is quite unpalatable to an increasingly vocal group calling for a radical transformation and even overhaul of the corporate form and corresponding profit-chasing culture.



It could be argued that corporate governance and responsibility mechanisms are best suited for incorporation into free-trade agreements²⁷ (Sachs et al. 2002) and rules of international competition, possibly reinterpreting environmentally risky and socially irresponsible corporate behaviour as anti-competitive. Such a view becomes more acute when taking into account the weakened bargaining power of states *vis-à-vis* corporations (especially traditionally third world states), at least individually, and the rise of multi-nodal global networks of production and service provision. Corporate regulation in one state would mean precious little if not coupled to the broader corporate matrix, operating in trans-boundary ways. Pushing responsibility up and

²⁷ A great deal of attention, time and political capital needs to be devoted to the hierarchy of international agreements – as they measure up according to overriding values, where some naturally carry both ecological and implicitly humane predominance.

down the production chain or rather further away into the legally unconnected matrix would be far too easy. In other words, the only feasible way for CSR to infiltrate the whole matrix of corporate operation would be for states to work collectively in some way. Ultimately, especially with the impotence of contemporary UN structures, trade relationships and multilateral agreements on trade are the closest thing we have to such a global legal/regulatory regime on which to superimpose CSR.



REASONS FOR PESSIMISM IN THE PROPAGATION OF MILD-MANNERED CSR

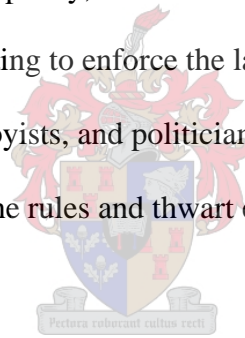
Probably the most profound reason to doubt the eventual effectiveness of CSR of the voluntary kind lies in the inherent legal structure of the incorporated form, where the manager class owes allegiance less to the legal owners' ownership than to the latter's profit-motive interests. This - no matter how noble intentions might be - overrides all when it comes down to choosing a direction at some or other T-junction. "When it comes to corporate behaviour, form [by legal and brute necessity] determines function" (Cavanagh *et al.* 2002:128).

The incorporated persona remains, through its legal biology, a slave to three basic principles, as discussed by Cavanagh *et al.*:

1. "The absolute imperative to make a profit";
2. "The imperative to continuously grow and expand territorially and functionally";
3. "The need to control regulatory, investment, and political climates – locally and globally – to remain as unrestricted as possible in behaviour, geographical reach, and access to markets, resources, and labour" (2002:130).

The average corporate position in relation to CSR codes and practises, even those backed by sanction of the law, was succinctly and with a touch of brutal honesty summed up by the right-wing free-marketeer, Robert Monks, in his book *The Emperor's Nightingale*: "From the perspective of company management today the decision whether to obey the law [read other regulatory CSR endeavours as well] is simply a cost-benefit calculation. The corporation in effect asks whether the costs of disobedience – discounted by the probability of being

discovered, prosecuted, and fined (there is almost no risk of jail) – equal the costs of compliance. In many cases, the costs of disobedience are lower than the costs of compliance, and so many corporations find it to their advantage to break the law... Corporations are not people; they have no conscience. Although corporate acts are carried out by individuals, even individuals with high moral standards often find themselves caught up in a corporate action that is beyond their control – or even, in some cases, their knowledge” (Cavanagh et al. 2002:135). Additionally, even if “[s]uch efforts go far beyond voluntary codes of corporate conduct and reduce the organizing burden on consumers and stockholders (so prevalent with voluntary mechanisms) ...they do not change the nature of the corporation itself, and they leave governments [fashionably reduced in size and capacity, and ironically more dependent on the private sector] saddled with the burden of attempting to enforce the law against institutions that are able to spend millions ... on lawyers, lobbyists, and politicians [especially in the US and traditionally third world countries] to weaken the rules and thwart enforcement actions” (Cavanagh et al. 2002:135).



Even when those affected by unscrupulous corporate acts have all the legal artillery on their side, litigation remains expensive and laborious at best, where corporates ‘with deep pockets’ can keep irritating thorns in the flesh in court for years, most likely outlasting them and viewing the expense as incidental to profitable business (an overhead as such).

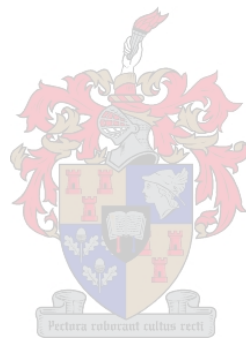
Slightly removed from these perspectives, yet abiding to similar origins (reason d’etré), are more radical opinions on what one could broadly term corporate governance. Most of these perspectives use a theoretically more political slant to justify their take on what they deem is

required to curb the increasing socio-political power wielded by corporations in general and TNCs in particular. Generally the proponents of these perspectives have it against the primary legal structure of the corporate form, analogous to democratic revolutionaries of the last two centuries, rather than merely against the way in which corresponding power is utilised and executed. In this their arguments tend to speak to the jurisprudential and politico-philosophical elements connected to corporate-social dynamics. Often this entails a reassessment of wealth (and the generation thereof – the primary reason for the existence of the fictitious incorporated persona). Here the primary notions employed in the reassessment process are those common to the ecological economics movement.

Ecological economics, in a nutshell, is concerned with externalities of production and service delivery, especially externalities that form part of the ecological processes of nature (Costanza 1997). The argument goes: so much of what we produce relies on the exploitation of nature's services and raw resources (often leading to irreparable environmental degradation), yet we do not account for them in price or produce (Ayres et al. 1996; Lovins 1999). Thus, economically, someone or something has to pay for it. Usually that someone or something is nature itself and future generations of *Homo sapiens*²⁸. This makes contemporary cost accounting frivolous in the greater scheme of things. It by no means shows us the true health and future potential of our economic capacity; it merely, dare I say it, lightens the load of the taxman, whose system doesn't take account of all the production factors either (Ayres et al. 1996). In short conventional economics and its corresponding accounting system does not take account of the *hidden costs* of

²⁸ Especially the poor sections, as argued by Wolfgang Sachs in the article "Environment and Human Rights" (2003).

economic activity (Biophile 2006)²⁹. I do not want to elaborate too much on eco-economics, for the sake of staying within the ambit of this article, except to say that eco-economics would have to play a central part in any attempt to reconfigure the legal structure of any form of incorporated business entities, if we want them to carry on creating wealth in the way they have for the past few generations on an ecologically finite planet (De Wit M 2005 Lecture, Sustainability Institute, University of Stellenbosch class notes; Dillick et al. 2002).



²⁹ Far more ominously and possibly prophetically the Norwegian Oystein Dahle cautioned: “Socialism collapsed because it did not allow prices to tell the economic truth. Capitalism may collapse because it does not allow prices to tell the ecological truth.”(Biophile 2006:9).

RETHINKING THE INCORPORATED FORM

The negation of personal responsibility often leads towards the undermining of moral imperative (Evans 2003:99). Wide-ranging abuse of corporate power infiltrates every nook of contemporary social form (Evans 2003:100). Yet limited liability has facilitated the creation of so much that underpinned this social form, including: perpetual transference of enterprise, and stock markets leading to the possibility of mass participation in enterprise and financial risk sharing (Evan 2003:100). All this has given society the capacity for rapid creation and accumulation of wealth, albeit often only for the select few. However, where risk is diffused and capacity is speeded up, the sponge effect diverts that risk, at some point, to society at large. Thus, Roger Warren Evans argues that the opportunity to use such a powerful legal vehicle should be properly viewed not as a commercial right of sorts, but as a privilege granted upon such terms and conditions that take the interest of the broader society into account (Evans 2003:101). In his article, ominously entitled *The Rise of the Abdroids*, Evans proposes a five-point reform agenda for the limited liability corporate persona.

First on his agenda is the curtailing of privacy requirements, where shady dealings can at present mostly be covered by recourse to ‘trade secrecy’ agreements. Although many countries, including South Africa through laws such as The Promotion of Access to Information Act 2 of 2000, facilitate public scrutiny, the burden of both evidence and cost, lie disproportionately on the inquirer. Greater transparency does not entail giving away your game; it merely gives an option of recourse to those affected, where your game is played disingenuously.

Secondly, he proposes the curtailment of boardroom power, gained by default and legal loophole (Evans 2003:101), granting greater right of recourse to shareholders, the *de jure* owners of the enterprise. After all, limited liability refers to the shareholders, not the directorship. Fiduciary duty should expand to all those, whose vital interests are concerned in the production of wealth. The burden of evidence as to what exactly vital interest entails should be fairly high, so as to avoid legal uncertainty and possible chaos.

Thirdly, formation requirements should be more stringently enforced, where the goal and purpose, plan and social positioning are evaluated against broader social norms. For this reason Evans has it in for the buying up of so-called ‘Shelf’ companies (as they are known in South Africa) (Evans 2003:102). Elsewhere he also associates to the idea of periodic re-evaluations of company purpose and corresponding right to legal persona.

Additionally, around this concept others argue for proper checks and balances to be incorporated into the administration of companies in the form of continued statutory monitoring beyond mere cost accounting, capacitating communities and corresponding governmental localities to expel corporations with predatory tendencies, in the interests of society (Cavanagh et al. 2002:136). Some argue for a three-strikes-and-you’re-out mechanism, as was passed into law in the Pennsylvania Wayne Township. According to this law, a corporation may be expelled from further economic activity within this jurisdiction if it violated regulatory norms 3 times within any 7-year period (Cavanagh et al. 2002:136).

As far as greater liability for holding companies of subsidiaries is concerned, suffice it to say that limited liability concerns natural persons and should not extend to liability limitation of fictitious personas.

Lastly, Evans argues, especially under the Anglo-American jurisdictions, fictitious entities have gained the right to absolute property rights, as any natural person, and tend to exercise such rights arbitrarily. He proposes a high standard of reasonability in the exercise of property rights, measured (in constitutional fashion) against the broader norms set by society, with judicial scrutiny as moderating function (Evans 2003:103).

The great significance of the proposals developed by Evans lie in their pragmatic applicability, with many softer versions already included into many corporate law regimes around the world. This is vital for two reasons. One, it gives parliaments and judiciaries concrete connections between company form and CSR; and two, it highlights the ‘tightrope’ that governments have to walk between regulation and capital flight (an implicit risk in any attempt at tampering with business as usual).

From an ecological and socially responsive and responsible perspective, such a reorientation of the way in which we grant incorporation would entail an internalisation of ecological economic theory into the structure of corporate operation and administration (i.e. accounting standards),

analogous to, but going beyond the *Sozial Kapitalismus*.³⁰ In short the corporate social contract should become part of its institutional design.



³⁰At this point it is highly relevant to re-quote, *Supra 37*, Oystein Dahle: “Socialism collapsed because it did not allow prices to tell the economic truth. Capitalism may collapse because it does not allow prices to tell the ecological truth” (*Biophile* 2006:9).

CONCLUSION

To retrace the analogy between CSR and the ‘social contract’: voluntarism and the responsibility argument, although of immense importance, are analogous to an enlightened monarch or benign dictator – good as they may be, and often vital for the articulation of more accountable forms of governance – they are simply not democratic enough. That is not to say that a strong accountability regime will be without fallibility, much like the format of modern republican regimes that often make governance a gruelling and laborious process. Challenging as it might sound, in the greater politico-historical context; it is a challenge that must be faced by all concerned. Concerned, we are all. The company form has successfully colonised so much of our society that its effects permeate our whole social being. Given the increasing complexity of our social dialectics, reforming our relationship with incorporated personas, requires ingenuity. Originality of form and design, coupled with the extraordinary virtues surrounding a true entrepreneurial spirit, need to generate alternatives that balance accountability and the mobilizing capacity of private enterprise. The resultant effect could produce vehicles through which dramatic change for the greater good could be driven³¹.

Corporate citizenship should not only detonate responsible corporates analogous to other citizens with rights and obligations properly executed (which, incidentally, they lack to any full extent because of the doctrine of limited liability). Given corporates’ effectively unbounded expansion in terms of political clout, affected parties should be slowly but surely allowed rights analogous to those of citizens towards the state, where their rights are at stake. At present the only true recourse for parties affected by corporate behaviour is through conventional, highly expensive

³¹ All we need is a little guts, and the glory will follow, albeit with bruises and scars as proof of our efforts.

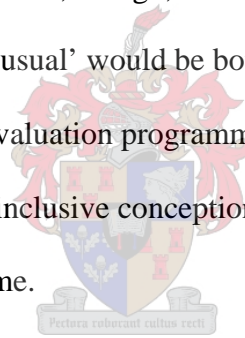
delictual actions. The traditional social contract laid the foundation of the Enlightenment revolution that transformed the way we govern ourselves. By analogy, the introduction of corporate-social contract can achieve what the social contract achieved but within a new socio-economic context. Even though calls proclaiming the eclipse of the state abound, specifically with the liberalization of global markets, state guarantees of both contract and property rights remain crucial for the certainty and efficacy of commerce. In a sense rules around ‘fair play’ and mutual respect for distinct notions capacitate free trade as we know it. The free market is created by the certain application of rules, *contra* intuitive as this might sound. Lawyers have always known that it is the rules that set you free³².

The International Forum on Globalization, in their report entitled *Alternatives to Economic Globalization*, pithily describes the socio-political duty on human society’s shoulders in relation to the new political paradigm where TNCs play such a central role, especially referring to the inherent problematic of their legal structure, as follows: “We must dramatically change the publicly traded, limited liability corporation, just as previous generations set out to control the monarchy” (Cavanagh et al. 2002:123-4). Enter the socio-corporate contract.

Rather than putting all our regulatory eggs in the basket of second-line defence against unscrupulous corporate behaviour, we should re-evaluate the structure and operational form of the incorporated entity, without negating or fundamentally compromising its capacity to generate wealth and prosperity. Yet within such a re-evaluation exercise it becomes crucial to

³² For example: in a well-policed state the fact that there’s a rule against stealing gives one the liberty to go for a swim with the sound expectation that your towel will still be there on your return.

reconceptualise wealth and more particularly what type of wealth it is that we want created. Since their inception in the West, these institutions have surpassed any other in their capacity for resource mobilisation and wealth creation - albeit almost exclusively in the service of a limited few, aiding their march to power, whether at times benign or not, but almost always to the exclusion of the majority and in self-indulgence (see Sachs 2002:35-47, for a discussion of resource use and equity). Given the enormity of the scale and sheer numbers of things and people (living largely in poverty) that contemporary society has to deal with, we can ill afford to discard, as some radicals contend, the whole concept of the private/public incorporated form and its corresponding, yet mostly still dormant, potential to spread its wealth-generating wand. Given the limitations of our blue planet, though, conventional theory and functional structure would not do. In fact 'business as usual' would be both politically and ecologically risky, if not downright dangerous. Such a re-evaluation programme needs to be both brave and innovative, revolving around a new and more inclusive conception of what human wealth might entail in years, decades and centuries to come.



One thing remains clear and that is that corporate accountability, governance and even the mild-mannered responsibility versions, are about far more than merely corporate issues and transforming them into benign money-making operators; they have become much too integrated into our governance and socio-political structures for that.³³

³³ Ecological, leftist articulation of alternatives to the changing format of sovereignty tends to espouse localism, in almost romantic guise, implicitly referring to ideas of pre-modern egalitarian utopias, inhabited by the proverbial eco-wise 'noble savage'. What leftist alternatives in the post-modern age have not been able to devise is a policy strategy to deal with the geo-political complexities of contemporary power structures, both transcending and employing conventional state structures.

Has the progressive Left been baffled by the enormity of the globalization process, so as to imagine itself only capable of localized solutions, combating the former process? Are they relying on the wheel of Fortune eventually providing, by some form of divine grace, the only viable alternative, after the

The democratic idea, in its infancy, started with the top tiers of society, eventually gaining the confidence of the ruling classes and transforming itself into something that is far more than the primitive ‘one man (or woman), one vote’ concept, integrating itself within the totality of the sovereign idea. Administrative law, regularly coupled to constitutional and human rights, can be seen as the epitome of this process. In fact, the latter has made democracy in its contemporary incarnation about much more than merely citizen-state relations, it has gained horizontal application. In other words, democracy as we know it now is not only about the citizenry having a direct stake in government, or even the state having to be nice to the citizenry, it is also about more powerful citizens having to be nice to their weaker and less endowed fellows. Given the enormity of the corporate impact on post-modern society, it is about time to bring corporates firmly into this system, imperfect as it might be. Effective political power has long since not been exercised within the exclusive capacity of formal governance structures; private coalitions and networks are increasingly encroaching on this once exclusive competency. In essence, we need to reconceptualise democracy, for our own sake and for that of future generations.

As with the social contract, as envisioned by Jean Gerson, where the power of sovereigns, whether embodied by royalty, revolutionary councils or parliaments, owes its right to rule to entrustment by the people rather than divinity (Armesto 2003: 193), so it should come to be with the ‘socio-corporate contract’. Here the company, trading and transforming natural, human and financial capital through limited liability incorporation and free flow of production elements,

globalizing juggernaut has capsized due to overloading? Otherwise it might be a case of mere timidity, of their being unwilling to send their elite warriors into the proverbial belly of the beast. They seem to be unwilling to learn to understand the intricacies of its power dynamics functionally and ally their informal global webs of progressive grassroots and civilian unions and localized community-economic innovations with dissenters within ‘Empire’.

should come to owe its *Existenz Recht* to broad environmental and societal interests, rather than mere limited interest, profit and trade motive, endorsed by the cumbersome stamp of technical legal form. As the social contract laid the theoretical basis for the state from the early modern age into the contemporary, the socio-corporate contract could transcend more primitive notions of incorporation, analogous to the ancien regime and implant a populist theoretical basis for trade and the transformation of the various forms of capital, quintessential to our environmental and societal being.

Franklin D Roosevelt, arguably the most pragmatic yet dynamic of the US presidents, is reputed to have said that “[t]he liberty of a democracy is not safe if the people tolerate the growth of private power to a point where it becomes stronger than their democratic state itself. That, in its essence, is fascism...” (<http://www.therightiswrong.us/pyramid.htm>)

Global players and interested parties, in various guises, have already enunciated themselves vividly over the past decade or so, yet very few if any global economic decision making round tables include their concerns. These social movements, unions, trans boundary civil society player and collectives have their ears much closer to the heartbeat of global society than the often administratively antiquated governmental ministries and consular delegations representing their needs at global talks, setting out the rules of the trading game. So much so that alternative talk shops have opened representing civil concerns ranging the whole spectrum of social, environmental and economic justice, of which the World Social Forum is at the helm. However, without at least some link to sovereign capacity, it means precious little, other than long-term inductive power.

The time is ripe for radically inclusive democratic form. The corporate-social contract can potentially play a leading role in the transformation of global culture from an unreflective resource-hungry unequal one, which is losing the battle against greed, global climatic catastrophe and reactionary geo-politics, to one than might save us from extinguishing ourselves through a downright unsuccessful survival strategy.



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