

# **Effectively Enforcing Corporate Social Responsibility Norms in the European Union and the United States**

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April 19, 2009

## I. INTRODUCTION: IRRESPONSIBLE CONDUCT LEADS TO IRREPARABLE HARM

In the current market-based economy, consumers and directors all over the world are questioning whether corporations should exist solely to maximize shareholder profit. Many for-profit US and European corporations abide by the neoclassic assumption that in order for a manager to maximize profit, he must “take the wage demand as a given and produce its output at the lowest possible cost.”<sup>1</sup> Capitalism, as commonly understood to be the institution holding maximization of monetary wealth for enterprise owners as the utmost goal, has widely been criticized as a practice fostering such things as global warming, human rights abuse and labor violations.<sup>2</sup> Many of these claims are highly debatable, and aspects of profit maximization have certainly been applied positively to social betterment. However, the fact remains that much of the business world does not properly account for environmental and social impacts within third world countries.<sup>3</sup>

Some US and EU corporate directors no longer abide by Milton Friedman’s famous declaration that a corporation’s only social responsibility is to provide a profit for its owners.<sup>4</sup> Now more than ever, businesses are refusing to define the highest social good as trading wealth and prosperity freely and fairly in open markets and are choosing to hold themselves to a higher

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<sup>1</sup> Daniel T. Ostas, *Deconstructing Corporate Social Responsibility: Insights from Legal and Economic Theory*, 38 AM. BUS. L.J. 261, 285 (2001).

<sup>2</sup> Institute for Economic Analysis, *Towards the Integration of Economic Science*, available at <http://www.iea-macro-economics.org/int-ec-sci-pol.html> (last visited Mar. 17, 2007) (“[I]t has become obvious that continued depletion of economic resources at the present rate cannot be sustained indefinitely, particularly if the rest of the world attempts to achieve the present U.S. standard of waste”).

<sup>3</sup> *Id.*; see also MUHAMMAD YUNUS, *CREATING A WORLD WITHOUT POVERTY* 3-6, 18 (PublicAffairs 2007) [hereinafter “YUNUS, *WORLD WITHOUT POVERTY*”] (explaining that the “mainstream free-market-theory suffers from a ‘conceptualization failure,’ a failure to capture the essence of what it is to be human.”). Yunus further explains that people and businesses are multi-faceted and that business should not be bound to serve one single, purely-profit driven objective.

<sup>4</sup> See Milton Friedman, Op-Ed, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, at SM17.

standard of care; a “corporate social responsibility (CSR)” standard that goes beyond their legal obligations under European and American law. Appropriately, corporate directors are not legally required to abide by CSR principles. Defining CSR as a voluntary initiative essentially allows subsidiaries of EU companies to inflict human rights abuse in developing without any consequences. In order to effectively deter human rights abuse by corporations, EU parent companies should be held liable for actions committed by their subsidiaries and the EU should pass binding legislation requiring EU companies to report social and environmental harm incurred by the parent company and its subsidiaries.

## **II. A BRIEF HISTORY OF CORPORATE SOCIAL RESPONSIBILITY IN EUROPE AND THE US**

### *a. Corporate Social Responsibility in the US*

The concept of a compassionate corporation existed long before the United States of America was formed. In his earlier work, *The Theory of Moral Sentiments*, Adam Smith speaks of the need for morality and compassion in both commercial and governmental affairs.<sup>5</sup> The debate regarding whether a corporation should be socially responsible began in the U.S. in the 1930’s between Professors Aldof Berle and E. Merrick Dodd.<sup>6</sup> This debate raised the question of whether corporations owed a duty of “trusteeship” to constituencies other than shareholders.<sup>7</sup> In the end, Berle conceded that directors are not limited to running a business purely to maximize profit, but are “in fact and recognized in law as administrators of a community

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<sup>5</sup> ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* (David D. Rafael & Alec L. Macfie eds., Liberty Classics 1982) (1759).

<sup>6</sup> Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, 61 *GEO. WASH. L. REV.* 14, 21 (1992) [hereinafter “Orts, *Beyond Shareholders*”].

<sup>7</sup> *Id.*

system.”<sup>8</sup> Yet, state legislators largely ignored the outcome of this pivotal debate on the nature and purpose of a corporation until the late eighties when states enacted constituency statutes, which allow directors to take into consideration stakeholder interests.<sup>9</sup> Around this same time, companies marketing themselves as socially responsible<sup>10</sup> started to emerge, setting the stage for a movement towards a more compassionate corporation.<sup>11</sup>

The influential Business Roundtable<sup>12</sup> describes corporations as being entities that are “chartered to serve both their shareholders and society as a whole.”<sup>13</sup> Socially responsible corporations became more visible to the public in the 1980’s and 1990’s with leading companies like The Body Shop and Ben & Jerry’s. The Social Venture Network (“SVN”), which was formed in 1991 by socially responsible entrepreneurs, and Business for Social Responsibility (“BSR”) formed in 1992, brought together many of these early pioneers.<sup>14</sup>

Many people consider Ben & Jerry’s as the first “socially responsible” company by

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<sup>8</sup> ADOLF A. BERLE, JR., FORWARD, *in* THE CORPORATION IN MODERN SOCIETY ix, xii (Edward S. Mason ed., Harvard University Press 1959).

<sup>9</sup> Orts, *Beyond Shareholders*, *supra* note 6.

<sup>10</sup> This definition will be discussed in further detail *infra*

<sup>11</sup> For a more in-depth discussion on corporate social responsibility, see CORPORATE GOVERNANCE AND DIRECTORS’ LIABILITIES: LEGAL, ECONOMIC AND SOCIOLOGICAL ANALYSES ON CORPORATE SOCIAL RESPONSIBILITY 1-177 (Klaus J. Hopt & Gunther Teubner eds., 1985). *See also* David L. Engel, *An Approach to Corporate Social Responsibility*, 32 STAN. L. REV. 1 (1979); Christopher D. Stone, *Corporate Social Responsibility: What It Might Mean, If It Were Really to Matter*, 71 IOWA L. REV. 557 (1986).

<sup>12</sup> The Business Roundtable is an association of chief executive officers of leading U.S. companies with \$4.5 trillion in annual revenues and more than 10 million employees. *See generally* Business Roundtable Home Page, <http://www.businessroundtable.org>, for more information.

<sup>13</sup> *See* Orts, *Beyond Shareholders*, *supra* note 6, (citing The Business Roundtable, Corporate Governance and The U.S. Competitiveness, 241, 244 (Nov. 1990)).

<sup>14</sup> These include Joshua Mailman and Wayne Silby of Threshold Foundation; Ben Cohen and Jerry Greenfield, co-founders of Ben & Jerry’s; and Jeffrey Hollender and Steven Fenichell of Seventh Generation.

introducing the concept of improving the environment as a second bottom line.<sup>15</sup> Others praise Newman's Own as a pioneer for establishing itself as a private sector company to donate all profits and royalties after taxes for educational and charitable purposes.<sup>16</sup> The notion of a double bottom line reflects the understanding that a company is not merely created to make a profit, but should also account for possible deleterious effects on the environment.<sup>17</sup>

In the 1990's, social entrepreneurs in the US have adopted a sustainable corporate policy known as corporate social responsibility that attempts to benefit the society and environment in which they reside.<sup>18</sup> This model, also known as the triple bottom line, was developed by John Elkington in 1994. The triple bottom line focuses on promoting the three "P's": people (human rights), profit (efficiency), planet (environment).<sup>19</sup> This triple bottom line business model maintains fair and equitable business practices toward their employees, the community, and the region in which a corporation conducts business.<sup>20</sup>

CSR in the U.S. is "an ongoing commitment by business to behave ethically and to contribute to economic development while demonstrating respect for people, communities,

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<sup>15</sup> JEFFREY HOLLENDER AND STEVEN SENECHAL, WHAT MATTERS MOST, 12, (X ed., "publisher" 2004) [hereinafter "WHAT MATTERS MOST"].

<sup>16</sup> The Institute for Social Entrepreneurs, Evolution of the Social Enterprise Industry: A Chronology of Key Events, (2008), <http://socialent.org/documents/EVOLUTIONOFTHESOCIALENTERPRISEINDUSTRY--ACHRONOLOGYOFKEYEVENTS.pdf>

<sup>17</sup> WHAT MATTERS MOST, *supra* note 15.

<sup>18</sup> See David G. Mandelbaum, *Corporate Sustainable Strategies*, 26 TEMP. J. SCI. TECH. & ENVTL. L. 27, 30 (2007).

<sup>19</sup> John Elkington, *Towards the Sustainable Corporation: Win-Win-Win Business Strategies for Sustainable Development*, CAL. MGMT. REV., Winter 1994, at 90-100.

<sup>20</sup> Darrell Brown, et al., *Triple Bottom Line: A Business Metaphor for a Social Construct*, available at <http://www.recercat.net/bitstream/2072/2223/1/UABDT06-2.pdf>. For a more detailed analysis, see HARVARD BUSINESS SCHOOL PRESS ET AL., HARVARD BUSINESS REVIEW ON CORPORATE RESPONSIBILITY (2003); TOM CHAPPELL, THE SOUL OF A BUSINESS: MANAGING FOR PROFIT AND THE COMMON GOOD (1993); STUART L. HART, CAPITALISM AT THE CROSSROADS: THE UNLIMITED BUSINESS OPPORTUNITIES IN SOLVING THE WORLD'S MOST DIFFICULT PROBLEMS (2007); ANDREW W. SAVITZ & KARL WEBER, THE TRIPLE BOTTOM LINE: HOW TODAY'S BEST-RUN COMPANIES ARE ACHIEVING ECONOMIC, SOCIAL AND ENVIRONMENTAL SUCCESS -- AND HOW YOU CAN TOO; BOB WILLARD, THE SUSTAINABILITY ADVANTAGE: SEVEN BUSINESS CASE BENEFITS OF A TRIPLE BOTTOM LINE (2006).

society at large, and the environment.”<sup>21</sup> CSR attracts an integrated community of global citizens who feel an innate calling to be environmental stewards and are interested in sustainable development. The main problem a socially responsible company faces is how to succeed in implementing a heightened standard of “socially responsible” values without being overburdened by the financial demands from pragmatic execution of such values.<sup>22</sup>

*b. CSR in Europe*

The definition of CSR in the U.S. mirrors that in Europe to a certain extent. According to the European Commission, CSR is “a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis.”<sup>23</sup> CSR has three main features in Europe. First, it is a behavior by businesses over and above legal requirements, voluntarily adopted because businesses deem it to be in their long-term interest.<sup>24</sup> Further, it promotes sustainable development of a business by integrating the economic, social and environmental impact of their activities.<sup>25</sup> Lastly, CSR is not an optional “add-on” to business core activities; instead, it represents the way businesses are managed above and beyond its legal obligations.<sup>26</sup> Although the European and the U.S. definitions are vague, both embody a conviction that a corporation’s existence should not relate solely to making money for the sake of making money but that a

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<sup>21</sup> See WHAT MATTERS MOST, *supra* note 15, at 29 (citing *Business: The Ultimate Resource* (2002)).

<sup>22</sup> *Id.* at 192.

<sup>23</sup> *Communication from the Commission concerning Corporate Social Responsibility: A Business Contribution to Sustainable Development*, at 3, COM (2002) 347 final (July 2, 2002), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0347:FIN:EN:PDF>.

<sup>24</sup> *Id.* at 5.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

corporation has a social responsibility to contribute and improve the community in which it operates.

European interest in CSR promoted the European Council in Lisbon<sup>27</sup> in March 2000 during which the European Council encouraged companies to become more socially responsible by taking into consideration “lifelong learning, work organization, equal opportunities, social inclusion and sustainable development.”<sup>28</sup> Further, the European Commission recognized that shareholder value is not achieved merely through maximizing short-term profits, but also through “market-oriented yet responsible behavior.”<sup>29</sup> Since the first EU communication on CSR, European support of CSR businesses has been increasing exponentially.<sup>30</sup> On March 13, 2006, the European Commission enacted a Resolution entitled, “Corporate Social Responsibility: A New Partnership.”<sup>31</sup> In this resolution, Europe acknowledged that CSR has become “an increasingly important concept for competitiveness both globally and within the EU, and is part of the debate about globalization, competitiveness and sustainability.”<sup>32</sup> The resolution led to the creation of the European Alliance for CSR, which recognized that all stakeholders must be taken

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<sup>27</sup> *Commission Green Paper on Promoting a European framework for Corporate Social Responsibility*, at 3, COM (2001) 366 final (July 18, 2001).

<sup>28</sup> *Id.*

<sup>29</sup> *Communication from the Commission concerning Corporate Social Responsibility: A Business Contribution to Sustainable Development*, at 5, COM (2002) 347 final (July 2, 2002), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0347:FIN:EN:PDF>.

<sup>30</sup> *Id.*; In the past decade, numerous reports have been published on CSR. “The Sustainable Development Strategy for Europe” adopted during the Goteborg European Council of June 2001 acknowledged that the long-term, economic growth, social cohesion and environmental protection go hand in hand and encouraged businesses to adopt such policies in their own bylaws. Additionally, the EU Multi-Stakeholder Forum on CSR (CSR Forum) was formed in 2002, and the European Coalition for Corporate Justice (ECCJ) formed in 2006. For more information see [http://www.corporate-responsibility.org/C2B/document\\_tree/ViewACategory.asp?CategoryID=35](http://www.corporate-responsibility.org/C2B/document_tree/ViewACategory.asp?CategoryID=35).

<sup>31</sup> *Communication from the Commission to the European Parliament, The Council and the European Economic and Social Committee Implementing the Partnership for Growth and Jobs Making Europe a Pole of Excellence on Corporate Social Responsibility*, COM (2006) 136 final (March 22, 2006), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0136:FIN:EN:HTML>. (hereinafter “2006 CSR COMMUNICATION”)

<sup>32</sup> *Id.* at 2.

into account when making business decisions.<sup>33</sup> This Alliance operates around three core principles: 1) raising awareness and improving knowledge on CSR and reporting on its achievements; 2) helping to mainstream and develop open coalitions of cooperation; and 3) enabling the environment for CSR.<sup>34</sup>

In December 2008, the European Alliance produced the first-ever tool box for CSR companies as a practical guide for implementing CSR principles in EU businesses. More recently, on February 10, 2009, the European Commission held the second multi-stakeholder forum on Corporate Social Responsibility in Europe. The European Union invited more than 250 key stakeholder groups in order to review progress on CSR in Europe and globally, and discuss possibilities for future joint initiatives. At the end of this forum, stakeholders agreed that there must be more binding legislation on accountability and reporting in the EU. Günter Verheugen, Vice President of the EU Parliament, proposed that the Commission launch a study to assess and clarify the applicable legal framework for EU companies in their operations abroad.

Commissioner Verheugen states:

“I will therefore encourage my fellow Commissioners responsible for the different aspects of this matter to further deepen our knowledge about the nature and scope of the existing EU legal framework applicable to European companies operating in third countries, for example through an analytical report with multi-stakeholder involvement. It is in our interest and in the interest of obtaining a level-playing field for our businesses to remind each and everybody that human rights are universal and should be globally respected.”<sup>35</sup>

Essentially, the study is intended to unveil the gaps that allow companies to violate human rights and environmental rights abroad. The commission has allocated until March 2010 to

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 11.

<sup>35</sup> See [http://www.corporatejustice.org/IMG/pdf/CSR\\_Forum\\_-\\_speech\\_GV\\_-\\_delivered.pdf](http://www.corporatejustice.org/IMG/pdf/CSR_Forum_-_speech_GV_-_delivered.pdf)

publish the report. This report will be one way in which to assess whether EU subsidiaries are the source of a substantial amount of human rights abuse and may inform the Commission as to whether subsequent legislation on EU parent company liability is necessary. .

### **III. THE CONSEQUENCES OF VOLUNTARY COMPLIANCE WITH CORPORATE SOCIAL RESPONSIBILITY PRINCIPLES**

#### *a. Problems with integrating CSR principles into the legal order*

Despite the adoption of CSR into the European agenda in 2002, and into the US corporate dialogue in 1984, CSR remains a voluntary initiative in both the US and Europe. In 2006, the commission took an explicit political decision to refrain from proposing binding legislation on CSR principles.<sup>36</sup> Even after the most recent multi-stakeholder forum on CSR, the EU restated its intention to keep CSR as a voluntary measure. One of the main problems with the lack of binding EU legislation on CSR is that EU companies have no incentive to abide by these norms and have even used CSR as a marketing incentive to attract more customers. Although much progress has been made, the lack of a binding regulation on CSR principles, has allowed certain EU and US companies to mislead consumers into thinking they are investing in CSR companies when, in fact, they are not. It could be argued that EU companies are bound to abide by a higher set of norms than US companies due to the strict regulations the EU legislation has implemented in the specific areas of social law, labor law and environmental law. In regards to human rights, EU companies are not obliged to implement certain principles found in the EU charter of fundamental freedoms because there is no horizontal effect of the charter. Thus, the main legislation relevant to CSR principles in Europe would fall under the EU social policy and environmental law.

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<sup>36</sup> See 2006 CSR COMMUNICATION *supra* note 31.

US environmental and social laws impose an even lower standard.<sup>37</sup> In fact, US companies may be penalized for environmental and social decisions that do not maximize shareholder profit.<sup>38</sup> Even though European companies must abide by a high standard in relation to US companies, they are not liable for human rights abuse committed by their subsidiaries abroad.<sup>39</sup> This is a huge problem for deterring companies from merely outsourcing certain operations so that it is less costly and less restrictive.

Corporate social responsibility is even more difficult to enforce in the US because US companies are only governed by the corporate code of the state in which it is incorporated. Consequently, most US companies incorporate in Delaware because the company law is most favorable to the directors and to maximization of profit and therefore have a very low standard of environmental and social obligations. The most stringent regulations for maintaining a high level of accountability and transparency are imposed upon public companies.<sup>40</sup> These companies, however, do not have an obligation to abide by certain human rights norms.

*b. Encouraging voluntary adoption of CSR principles through private certification schemes*

Despite the lack of governmental regulation on businesses, US socially responsible businesses are dedicating more resources than Europe to providing social and environmental

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<sup>37</sup> Ludwig Kramer *Regional Economic Integration Organizations: The European Union as an Example* IN BODANSKY, BRUNNEE AND HEY, *INTERNATIONAL ENVIRONMENTAL LAW*, 873.

<sup>38</sup> Daniel T. Ostas, *Deconstructing Corporate Social Responsibility: Insights from Legal and Economic Theory*, 38 *AM. BUS. L.J.* 261, 285 (2001).

<sup>39</sup> European Coalition for Corporate Justice, *Fair Law: Recent proposals to Improve Corporate Accountability for Human Rights and Environmental Abuses* available at [www.corporatejustice.org](http://www.corporatejustice.org).

<sup>40</sup> 15 U.S.C. § 7262 (also known as “Sarbanes-Oxley Act 2002”). Title III of the Sarbanes-Oxley Act holds senior executives individually responsible for the accuracy and completeness of corporate financial reports. It also specifies limits on the behaviors of corporate officers and delineates the civil penalties for non-compliance. *See also* Bernhard Kuschnik; *The Sarbanes Oxley Act: "Big Brother is watching" you or Adequate Measures of Corporate Governance Regulation?* 5 *Rutgers Bus. Law Journal* 64 - 95 (2008) available at [http://businesslaw.newark.rutgers.edu/RBLJ\\_vol5\\_no1\\_kuschnik.pdf](http://businesslaw.newark.rutgers.edu/RBLJ_vol5_no1_kuschnik.pdf)

benefits.<sup>41</sup> In addition, government and social-sector organizations are beginning to emulate for-profit businesses by adopting earned-income governance models as a way to acquire the necessary capital to sustain their social mission.<sup>42</sup> The convergence of the mission and methods of these non-profit and for-profit companies is producing a new type of “CSR” company, which pursues social purposes while engaging in business activities. This CSR company emulates a new generation of value-driven consumers and shareholders who are demanding that corporations benefit their communities. In order to assess and identify businesses that are trying to position themselves in the category of CSR corporations in the US, a number of different rating systems have been developed.<sup>43</sup> One of the most comprehensive of these rating systems was developed in 2004 by S-Bar.<sup>44</sup> More recently B-labs, a 501(c)(3) non-profit corporation, developed a certification scheme, derived from S-Bar and other rating systems, which it uses to identify socially responsible for-profit businesses that it brands as “B corporations.”<sup>45</sup> In order to be “B certified,” a corporation must score eighty points out of two hundred on a test to determine whether it meets a set of social and environmental performance standards.<sup>46</sup> Once the

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<sup>41</sup> Heerad Sabeti, *The Emerging Fourth Sector* 3 (2008), [http://fourthsector.net/prepdocs/FSEExecutiveSummary\\_Draft.pdf](http://fourthsector.net/prepdocs/FSEExecutiveSummary_Draft.pdf).

<sup>42</sup> *Id.*

<sup>43</sup> See OpenSRI, <http://www.opensri.com> (last visited Sept. 18, 2008); Oekom Research AB in Germany, <http://oekom.ve.m-online.net/index.php?language=ukd#home> (last visited Sept. 18, 2008); Dow Jones Sustainable Index, <http://www.sustainability-indexes.com> (last visited Sept. 18, 2008); Ethibel, [http://www.ethibel.org/subs\\_e/4\\_index/main.html](http://www.ethibel.org/subs_e/4_index/main.html) (last visited Sept. 18, 2008); FTSE4Good, [http://www.ftse.com/Indices/FTSE4Good\\_Index\\_Series/index.jsp](http://www.ftse.com/Indices/FTSE4Good_Index_Series/index.jsp) (last visited Sept. 18, 2008); KLD’s Domini 400 Social Index, <http://www.kld.com/indexes/ds400index/index.html> (last visited Sept. 18, 2008); Corporate Governance Quotient (CGQ), [http://www.investopedia.com/terms/c/corporate\\_governance\\_quotient.asp](http://www.investopedia.com/terms/c/corporate_governance_quotient.asp) (last visited Sept. 18, 2008); and Blabs in 2007, <http://www.bcorporation.net> (last visited Sept. 18, 2008).

<sup>44</sup> The Sustainable Business Achievement Ratings (S-BAR) was created in 2004 in response to the inability of the California state legislators to agree upon a working definition of “social business.” As a result, a 2004 California bill giving state procurement preference to “social businesses” was tabled. S-bar is “the first comprehensive system with a market-based, broadly applicable, and transparent means of assessing a company’s environmental, economic and social performance.” See <http://www.sustainabilityratings.com/about/index.html>.

<sup>45</sup> “B corporation” is a trademark of B-lab

<sup>46</sup> See <http://www.bcorporation.net>.

corporation has passed this initial test, it must institutionalize stakeholder responsibility by inserting certain language into its corporate bylaws that allows managers to consider the interests of employees, the community and the environment, which may, in some cases, require companies to reincorporate into a state with a constituency statute allowing for such an amendment.<sup>47</sup> B-Lab's founders adopted their stakeholder accountability approach from Upstream 21, a holding company which pioneered the idea of incorporating stakeholder language in the articles of its portfolio companies.<sup>48</sup> Once the corporation has become a B corporation, it must donate one-tenth of one percent of its revenue to B-labs.<sup>49</sup>

The idea of certification remains an initiative implemented on a national level in Europe. For example, BV-SERM is rating system by Bureau Veritas, an international company based in Belgium, and SERM Rating Agency, a UK based company, which analyzes the financial impact of safety, environmental and social risks to be quantified for individual companies.<sup>50</sup> Another popular ratings system is Vigeo, a French limited liability company established in 2002. Vigeo took over Arese, the first Socially Responsible Index (SRI) rating system in France and assesses the environmental, social, societal and corporate governance objectives of corporations and public companies.<sup>51</sup> All these systems are important, but are insufficient because there is no governmental body that certifies the ratings systems used. Moreover, the lack of a uniform CSR definition gives a wide range of interpretation on what counts as "CSR" activity. In essence, the

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<sup>47</sup> Hannah Clark, *A New Kind of Company*, Inc. Mag., July 2007, available at <http://www.inc.com/magazine/20070701/priority-a-new-kind-of-company.html>

<sup>48</sup> *Id.* Upstream 21 was co-founded by Leslie Christian. For more information see <http://www.upstream21.com/>

<sup>49</sup> *Id.*

<sup>50</sup> <http://www.prnewswire.co.uk/cgi/news/release?id=62138>

<sup>51</sup> <http://www.vigeo.com/csr-rating-agency/business-and-values.html>

ratings systems criteria are easy to achieve and therefore, do not achieve the goal of holding companies to a higher standard of social and environmental responsibility. Something must be done on a European level to raise the level of corporate responsibility.

#### **IV. FINDING A SOLUTION: ENFORCEMENT OF SOCIAL RESPONSIBILITY THROUGH MANDATORY ACCOUNTABILITY AND REPORTING STANDARDS**

One way to indirectly enforce CSR norms is to hold companies accountable for reporting human rights and environmental abuse. In general, companies rely on reputation and quality to sell a product or service to consumers. Thus, if a company is required to be transparent about the types of human rights abuse that it has committed through a reporting requirement, it will have less incentive to continue its abuse in fear that consumers will no longer buy its product or use its services. Europe has initiated some binding reporting on CSR related issues. The Accounts Modernisation Directive<sup>52</sup> requires European public companies to report “...where appropriate, non-financial key performance indicators relevant to the particular business, including information relating to environmental and employee matters.”<sup>53</sup> Although a company must report on information relating to environmental and human rights issues, this obligation is qualified by the condition that the information is relevant to the particular business operations. Thus, for the most part, reporting on human rights abuse will not be required.

Additionally, a company may be held liable for misleading consumers under Directive 2005/29/EC on Unfair Commercial Practices<sup>54</sup>; however, this directive does not provide any

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<sup>52</sup> Directive 2003/51/EC of the European Parliament and of the Council of 18 June 2003 amending Directives 78/660/EEC, 83/349/EEC, 86/635/EEC and 91/674/EEC on the annual and consolidated accounts of certain types of companies, banks and other financial institutions and insurance undertakings. (*OJ L 178, 17.7.2003, p. 16–22* )

<sup>53</sup> See Article 46 of Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54 (3) (g) of the Treaty on the annual accounts of certain types of companies, and Article 36 of Seventh Directive. (*OJ L 222, 14.8.1978, p. 11–31* )

<sup>54</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council . (*OJ L 149/22, 11.6.2005, p. 22-39*)

relief for damages for human rights abuse; it merely provides relief for a lack of transparency. As was mentioned, *supra*, the lack of proper EU legislation on accountability and reporting was properly recognized by Vice president Günter Verheugen in his closing speech at the second European Commission's Multi-stakeholder Forum on CSR. Appropriately, the commission has undertaken a study on whether or not EU companies are committing human rights abuse abroad in order to assess whether more stringent reporting standards are needed. Holding subsidiaries accountable is of equal importance to European company transparency because most of the human rights abuse takes place in developing countries where the labor laws and human rights standards are lower than developed countries. In this respect, the European Court of Justice has held that parent companies are required to include subsidiary undertakings in the annual accounts summary under the European Seventh Company Directive on Consolidated Accounts.<sup>55</sup>

The aforementioned EU legislation is a step in the right direction, but more binding legislation is needed on social and environmental reporting. The European Coalition for Corporate Justice (ECCJ), the largest civil society network devoted to European corporate accountability and established in 2006, realized the need for such legislation and recently drafted legislation that will hold European parent companies liable for human rights abuse committed by their subsidiaries.<sup>56</sup> In this draft, ECCJ proposes three main amendments to EC law: 1) strict liability of parent companies for abuses of their subsidiaries; 2) establish a duty of care to prevent abuses in the corporate sphere of responsibility; and 3) mandating environmental and social reporting.<sup>57</sup> ECCJ is correct to conclude that one of the most effective ways to improve

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<sup>55</sup> Seventh Council Directive 83/349/EEC of 13 June 1983 based on Article 54 (3) (g) of the Treaty on consolidated accounts (*OJ L 193, 18.7.1983, p. 1–17*).

<sup>56</sup> Fair Law: Recent proposals to Improve Corporate Accountability for Human Rights and Environmental Abuses available at [www.corporatejustice.org](http://www.corporatejustice.org).

<sup>57</sup> *Id.* at pg 10.

human rights and environmental standards is to require both the parent company and its subsidiaries to abide by the same reporting and accountability standard. In fact, the ECCJ's proposal for holding a parent company correlates to the current standard in the US. The American Disabilities Act<sup>58</sup> and the 1964 Civil Rights Act<sup>59</sup> imposes an obligation for corporations to monitor their subsidiaries in foreign countries so that they will comply with US law.<sup>60</sup>

In the US, Robert Hinkley, a corporate securities attorney, claims that one way to encourage corporations to abide by human rights norms is to amend the corporate code in every jurisdiction.<sup>61</sup> According to Hinkley, under the current corporate code, "corporations are established for one purpose – to make money for shareholders."<sup>62</sup> Consequently, under Hinkley's "Code for Corporate Citizenship Amendment" ("Hinkley Amendment"), a director will still have a duty to make money for shareholders "but not at the expense of the environment, *human rights*, the public safety, the communities in which the corporation operates or the dignity

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<sup>58</sup> 42 U.S.C. § 12101 (1990).

<sup>59</sup> 42 U.S.C. § 2000 (1964).

<sup>60</sup> See *Oil Spill by Amoco Cadiz off Coast of France*, 699 F.2d 909 (7th Cir. Ill. 1983) (finding a parent corporation to be liable for environmental damage off the coast of France caused by its subsidiary).

<sup>61</sup> Hinkley, *Redesigning Corporate Law Business Ethics*, available at <http://www.mailarchive.com/sustainableorgbiofuel@sustainablelists.org/msg32019.html>; see also Robert Hinkley, *Citizenship: Oxymoron or Necessity*, available at <http://www.commondreams.org/archive/2007/11/30/5521/>; see e.g., <http://www.c4cr.org/>.

<sup>62</sup> *Id.*

of its employees.”<sup>63</sup> After more than seven years of advocacy, California and Minnesota attempted to enact legislation to incorporate Hinkley’s Amendment but to no avail.<sup>64</sup>

Although the Hinkley Amendment is a promising solution to the problem of human rights abuse by corporations, in fact, amending state corporate codes is extremely difficult. For example, a 2004 California Assembly bill which would preclude directors from making decisions that will cause deleterious effects on, *inter alia*, the environment, human rights, and public health and safety,<sup>65</sup> was tabled. A new bill was proposed in 2008 that would allow directors to take stakeholder interests and the environment into consideration when making business decisions.<sup>66</sup> After the bill was approved by both the Assembly and Senate, it was rejected by the Governor on September 30, 2008 because it allowed directors to consider factors other than the strict financial interest of corporate shareholders.<sup>67</sup> Although Governor Schwarzenegger condoned strict adherence to the shareholder primacy doctrine, he also urged the California legislature to consider and study “alternative models of corporate governance.”<sup>68</sup>

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<sup>63</sup> Robert Hinkley, *28 Words to Redefine Corporate Duties: The Proposal for a Code for Corporate Citizenship*, available at <http://www.multinationalmonitor.org/mm2002/02july-aug/july-aug02corp4.html>; see also Ron James, *President Bush’s Economic Reform* (2002), available at <http://www.c4cr.org/ethicalbiz.html>; Gili Chupak, *The Code for Corporate Responsibility: Widening the Perspective of Management* (2004), available at <http://www.c4cr.org/paper01.html>.

<sup>64</sup> California Senate Bill (SB) 917, available at [http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb\\_0901-0950/sb\\_917\\_bill\\_20030221\\_introduced.pdf](http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb_0901-0950/sb_917_bill_20030221_introduced.pdf) (amends section 309 of California’s Corporate Code, requiring corporate directors to ensure that profits do not come at the expense of the environment, human rights, public health and safety, the welfare of communities, and employee dignity); Minnesota also tried to enact a similar bill: Bill S.F. 1529, available at <http://www.revisor.leg.state.mn.us/bin/bldbill.php?bill=S1529.0&session=ls83>. (Both bills have been tabled and are no longer active as of 2004.).

<sup>65</sup> *Id.*

<sup>66</sup> See California Assembly Bill 2944 available at <http://info.sen.ca.gov/cgi-bin/postquery>.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

Hence, California is currently drafting a new chapter to the corporate code and will propose the draft to California legislators in May.

Despite this window of opportunity in California, drafting a new chapter to the California corporate code will take time and may be subject to opposition from powerful interest groups that will lobby to table the bill or kill it in the process.<sup>69</sup> Additionally, it is uncertain whether courts will uphold legislation inherently contrary to case law that offers large deference to the director in making business decisions.

Assuming Hinkley's Amendment is enacted, the final amendment may end up significantly different from the original proposition due to the common compromises and filibusters as seen in California's enactment of the Hinkley Amendment.<sup>70</sup> California's amendment may even pose a threat to For-Benefit corporations because of its vague and over inclusive terms.<sup>71</sup> Many states have proposed new "hybrid" forms including the Socially Responsible Corporations (SRC's) proposed in Hawaii and Minnesota in 2007,<sup>72</sup> the Non-profit Limited Liability Company enacted in Tennessee and Kentucky,<sup>73</sup> and the Low-profit Limited

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<sup>69</sup> Minnesota legislation has tabled the bill in the judiciary and no further action has been taken to bring the amendment back to life.

<sup>70</sup> In addition to the twenty-six word amendment, the California Assembly inserted subsections (d) through (k) that indicate a director may be personally liable for a violation of the Hinkley Amendment in addition to any person that is under his control.

<sup>71</sup> Section 309 subsection (d) through (i) asserts that an individual director may be sued as well as anyone under his control unless the director can somehow prove that he voted against such action or the decision was made prior to his entrance on the board. Subsection (j) gives the attorney general broad discretion in determining when a corporation has violated its duty to stakeholders and what appropriate penalties will be imposed. Vague terms such as "human rights" or "employee dignity" are spread throughout the amendment without any real clarification.

<sup>72</sup> See Minnesota Responsible Business Corporation Act, ch. 304A, § 2(2), 84th Legis. Sess. (Minn. 2006), *available at* <http://www.revisor.leg.state.mn.us/bin/bldbill.php?bill=S3786.0.html&session=ls84>; *see also* H.B. 3118, § 2, 23d Leg. (Haw. 2006), *available at* <http://www.capitol.hawaii.gov/site1/archives/2006/getstatus.asp?query=HB3118&showstatus=on&showtext=on&showcommrpt=on&currpage=>.

<sup>73</sup> Enacted in Kentucky in 1994, revised in 2007 KRS §§275.025-275.540; enacted in Tennessee in 2001, revised in 2004 Tenn. Code Ann. §48-101-801-809; *see generally* James M. McCarten & Kevin N. Perkey, *Tennessee Nonprofit LLCs -- A New Option*

Liability Company (L3C) proposed in North Carolina in 2007<sup>74</sup> and enacted in Vermont in 2008.<sup>75</sup> Although these propositions are a step in the right direction, all fall short of a fully-realized For-Benefit corporation.

After much pressure from the Corporate Responsibility Coalition, the United Kingdom enacted the Companies Act,<sup>76</sup> similar to the Hinkley Amendment. The Companies Act requires directors to take into account how their business activities will affect employees, communities and the environment.<sup>77</sup> Although this act is a positive turn in the right direction, companies have received no pragmatic guidance or help as to how exactly they should respond. Moreover, corporations are left unsure as to whether they will be held liable for a breach of their fiduciary duty to stakeholders in addition to shareholders.

Similar encouragement for corporations to acknowledge stakeholder interests is expressed in European Union. In March 2005, the European Council acknowledged that “in order to encourage investment and provide an attractive setting for business and work, the European Union must complete its internal market and make its regulatory environment more business-

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*for Tax-Exempt Organizations*, 3 Transactions 15 (2001). See also Larry E. Ribstein, *Reverse Limited Liability and the Design of Business Associations*, 30 Del. J. Corp. L. 199, 212-13 (2005).

<sup>74</sup> See also B. 91, 2007 Gen. Assem., Reg. Sess. (N.C. 2007), available at <http://www.ncleg.net/sessions/2007/Bills/Senate/PDF/S91v5.pdf>; H.B. 39, 2007 Gen. Assem., Reg. Sess. (N.C. 2007), available at <http://www.ncleg.net/sessions/2007/bills/house/PDF/H39v1.pdf>; see also Michael Gottesman, *From Cobblestones to Pavement: The Legal Road Forward for the Creation of Hybrid Social Organizations*, 26 YALE L. & POL'Y REV. 345, 353 (2007).

<sup>75</sup> See H.B 0775 available at <http://www.leg.state.vt.us/database/status/summary.cfm>.

<sup>76</sup> Section 172(1) of the Companies Act 2006 states that: (1) A director of a company must act in a way that he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to (a) the likely consequences of any decision in the long term, (b) the interests of the company's employees, (c) the need to foster the company's business relationships with suppliers, customers and others, (d) the impact of the company's operations on the community and the environment, (e) the desirability of the company maintaining a reputation for high standards of business conduct, and (f) the need to act fairly between the members of the company. Companies Act, 2006, c.46, §172 (United Kingdom).

<sup>77</sup> See *Marking the Moment: Implementation of The Companies Act*, <http://www.corporate-responsibility.org/C2B/PressOffice/display.asp?ID=86 &Type=2>.

friendly, while business must in turn develop its sense of social responsibility.”<sup>78</sup> In the Integrated Guidelines for Growth and Jobs (2005-2008), the Council urged Member States to “encourage enterprises in developing their corporate social responsibility.”<sup>79</sup>

Moreover, the European Parliament has passed resolutions to encourage CSR businesses, notably in its resolutions of 2002<sup>80</sup> and 2003.<sup>81</sup> In a 2006 resolution, the European Commission recognized that although the market based economy opens up new jobs and business, it “also creates a corresponding need for self-limitation and mobilisation on the part of the business community, in the interest of social stability and the well-being of modern democratic societies.”<sup>82</sup> This resolution, *inter alia*, extends the responsibility of the board of directors to encompass the duty of minimizing any harmful social and environmental impact of companies’ activities, seeks to improve working conditions, encourages a multi-stakeholder approach to governance, and aims to resolve issues of corporate transparency and communication.<sup>83</sup> In addition, it requires corporations to create their own CSR reports, bringing forward a proposal for social and environmental reporting to be included with financial reporting requirements.<sup>84</sup> A year later, the European Parliament reaffirmed these guidelines, calling on the commission to

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<sup>78</sup> See *supra* note 31, at 4.

<sup>79</sup> *Id.*

<sup>80</sup> P5\_TA(2002)0278.

<sup>81</sup> P5\_TA(2003)0200.

<sup>82</sup> See *supra* note 31, at 2.

<sup>83</sup> *Id.* at 12.

<sup>84</sup> *Id.* at 11.

implement a mechanism by which victims, including third-country nationals, can seek redress against European companies in the national courts of the Member States.<sup>85</sup>

Despite the resolution's enumeration of new alternatives for stakeholder-based business decisions, European companies will not be liable for breach of the resolution's provisions because the resolution is not binding and cannot be enforced under the European Court of Justice.<sup>86</sup> Nevertheless, this resolution may be referred to in the European Court of Justice as a way to explain a law or prove additional support for a corporation's decision to look to stakeholder interest business decisions.

The shareholder primacy doctrine, the antithesis of the stakeholder interest doctrine, is considered by many scholars as a purely Anglo-American concept.<sup>87</sup> In fact, most industrialized countries besides the U.S. and Great Britain have a stakeholder model integrated into their corporate governance model.<sup>88</sup> The reason why the stakeholder movement is of little concern in non-U.S. countries is because of a lack of the shareholder primacy doctrine, the rarity of shareholder derivative suits, and the lack of hostile takeovers.<sup>89</sup> "In a non-U.S. environment, the director may be more concerned with the effect of a decision on employees or the local economy than would a U.S. director."<sup>90</sup> Accordingly, there is no need to enact constituency statutes

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<sup>85</sup> Corporate social responsibility: implementing the partnership for growth and jobs INI (2006) 2133 (Mar. 13 2007).

<sup>86</sup> See, e.g., [http://eur-lex.europa.eu/en/droit\\_communaire/droit\\_communaire.htm#1.3](http://eur-lex.europa.eu/en/droit_communaire/droit_communaire.htm#1.3).

<sup>87</sup> Mark J. Loewenstein, *What Can We Learn from Foreign Systems?: Stakeholder Protection in Germany and Japan*, 76 TUL. L. REV. 1673, 1674 (2002).

<sup>88</sup> *Id.*; see also Roberta S. Karmel, *Implications of the Stakeholder Model*, 61 GEO. WASH. L. REV. 1156, 1171 (1993) (the non-anglo-saxon stakeholder model is "premised on the theory that groups in addition to shareholders have claims on a corporation's assets and earnings because those groups contribute to a corporation's capital.").

<sup>89</sup> Mark J. Loewenstein, *What Can We Learn from Foreign Systems?: Stakeholder Protection in Germany and Japan*, 76 TUL. L. REV. 1673, 1680-82 (2002) (explaining that Germany has relatively few hostile takeovers as compared to the United States and Great Britain. Further, shareholder derivative suits are unknown to German companies.).

<sup>90</sup> *Id.* at 1674.

because the stakeholder doctrine is already embedded within the corporate governance.

One example of such stakeholder model is found in Germany. Germany's stakeholder corporate governance doctrine emerged with the aid of the Reform Act of 1870 ("German Reform Act").<sup>91</sup> The German Reform Act created the Aufsichtsrat, an intermediary outside board between Vorstand, the management team.<sup>92</sup> The Aufsichtsrat was created in order to take into account stakeholder interests including the "investors, workers, the state, and others."<sup>93</sup> After World War II, the government reaffirmed the importance of stakeholder interests by enacting the Codetermination Act of 1976, which requires "all stock corporations, Actiengesellschaft (AG), and all other business entities over a certain employee base, to have a two-tiered board structure that includes significant employee representation on the supervisory Aufsichtsrat board."<sup>94</sup> Arguably, the Aufsichtsrat board oversees the Vorstand board to the same degree that a board of directors oversees corporate officers in a company based in the U.S.<sup>95</sup> Having a board made up of non-shareholder constituencies creates the implicit assumption that non-shareholder interests must also be upheld when making business decisions.

Moreover, U.K. corporations are now moving towards a more stakeholder centered model of governance.<sup>96</sup> The recent enactment of The Companies Act of 2006 ("British Companies Act")

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<sup>91</sup> *Id.* at 1675.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 1675.

<sup>94</sup> *Id.* at 1676-77.

<sup>95</sup> *Id.* at 1677. ("For entities that have between 500 and 2000 employees, one-third of the supervisory *Aufsichtsrat* board must consist of employee representatives. For entities with 2000 or more employees, one-half of the supervisory *Aufsichtsrat* board must be employee representatives, and some of these must be representatives of the unions. Typically, if the company has more than 20,000 workers, the *Aufsichtsrat* board consists of twenty members, of which ten represent the shareholders, seven the workers, and three the unions.").

<sup>96</sup> Andrew Keay, *Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's 'Enlightened Shareholder Value Approach'*, 29 SYDNEY L. REV. 577, 595 (2007).

incorporates a provision that is consistent with the American version of a constituency statute.<sup>97</sup> Section 172(1) of the British Companies Act allows directors to take into consideration the long-term interests of the corporation, including those affecting the company's employees, suppliers, customers, the community and the environment. According to the Commission, European businesses should "provide products and services that add value for society and to deploy entrepreneurial spirit and creativity towards value and employment creation."<sup>98</sup>

International Governmental Organization's (IGO's) are also following in step with the European Union and the U.K., in promoting socially responsible companies.<sup>99</sup> The overall support of CSR companies worldwide should be an encouragement to directors of For-Benefit corporations who intend to expand their business abroad because they will effectively be equipped with many tools to support decisions made in the interests of non-shareholders. Indeed, much more work is left to be done in the EU as well as the respective Member States.

## V. CONCLUSION: ENFORCING CORPORATE RESPONSIBILITY IN EUROPE AND THE US

In a 1999 Environics International Millennium Poll, where more than 25,000 citizens across six continents were interviewed, two out of three citizens wanted companies to go beyond the historical role of making a profit.<sup>100</sup> The international community is ready for companies to

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<sup>97</sup> *Id.* at 594-95.

<sup>98</sup> *See supra* note 31, at 3.

<sup>99</sup> United Nations Global Compact published a code of social conduct for large businesses in 2000 which requires businesses to consider stakeholder interests such as human rights, labor rights and environmental rights, *available at* <http://www.unglobalcompact.org/>; *see also* the UN's research program seeking to promote research and policy discussions about CSR in developing countries, *available at* <http://www.unrisd.org/engindex/research/busrep.htm>; *see also* ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, *available at* <http://www.ilo.org/public/english/employment/multi/tridecl/index.htm>; ILO database on Business and Social Initiatives, *available at* <http://oracle02.ilo.org:6060/vpi/vpisearch.first> (database on Business and Social Initiatives relating to social and labor conditions where corporations are located); OECD Guidelines for Multinational Enterprises (MNEs), *available at* <http://www.oecd.org/daf/investment/guidelines/> (2000); *see also*, OECD Principles for Corporate Governance, *available at* <http://www.oecd.org/daf/governance/principles.htm> (1999).

<sup>100</sup> WHAT MATTERS MOST, *supra* note 15, at 47.

contribute to broader societal goals, and more binding US and EU regulation is needed to fulfill these needs. The EU must implement a binding measure for social and environmental reporting so that there is a higher standard for transparency. In order to effectively enforce CSR principles in Europe, parent companies must be liable for human rights abuse committed by their subsidiaries. In the US, state corporate codes should require public and private annual reporting on social and environmental reporting for the parent company and its subsidiaries. Instead of CSR being a voluntary code of conduct that goes beyond the legal obligations of a corporation, it should become an obligatory standard so as to reduce the amount of social and environmental harm caused by EU and US companies. As Woodrow Wilson so gracefully states: “You are not here merely to make a living. You are here to enrich the world - and you impoverish yourself if you forget the errand.” Companies are legal persons and have a legal duty to act accordingly.

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