

Corporate Social Responsibility: A Step Towards Stronger Involvement of Business in MEA Implementation?

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This article explores the relationship between multi-lateral environmental agreements (MEAs) and corporate social responsibility (CSR). It offers an overview of the linkages, a survey of relevant provisions of key MEAs, and a review of the relationship between global trade rules and MEAs. Finally, the article highlights three ongoing discussions with relevance to linkages between CSR and MEAs: (1) whether, and if so how, to identify minimum global business standards in the environmental sphere; (2) the rapidly evolving 'sub-theme' within the CSR agenda which addresses the business/development interface, and the contribution of business to poverty reduction, sustainable livelihoods and achieving the Millennium Development Goals; and (3) the development by the International Organization for Standardization of an international guidance standard on 'organizational social responsibility', which, if adopted, will become ISO 26000. The risk of seeing CSR as a new pathway to MEA implementation is that the role of MEAs in informing the development of minimum acceptable environmental norms of business behaviour will be 'watered down'. If MEAs are to learn from CSR, their competitors and often stronger counterparts in the international architecture – intergovernmental trade and investment arrangements – also need to be equipped not only to be sensitive to CSR, but actively to support it.¹

RELATIONSHIP BETWEEN CORPORATE SOCIAL RESPONSIBILITY AND MULTILATERAL ENVIRONMENTAL AGREEMENTS

The last three decades has seen the establishment of numerous international norms and standards for environmental protection. These have generally taken the form of treaties, conventions and agreements, which collectively comprise a body of multilateral environmental agreements (MEAs). Most recent MEAs promote environmental protection within the context of sustainable development. As agreements between States, their sovereignty over their own natural resources is enshrined. Provision is almost always made for financial assistance for less developed States, the transfer of environmentally sound technologies and the building of technical capacity. Most MEAs also encourage business and industry to cooperate in their implementation efforts. Given the growing importance of the private sector in driving global economic growth, this should come as no surprise. The implementation of many development-related provisions in MEAs will not be achieved through public initiative alone.²

This article explores the relationship between MEAs and corporate social responsibility (CSR). It offers an overview of the linkages, a survey of relevant provisions of key MEAs, and a review of the relationship between global trade rules and MEAs. Finally, the article highlights three ongoing discussions with relevance to linkages between CSR and MEAs before offering conclusions on the value of CSR as a step towards stronger business engagement in implementation of MEAs.

¹ The article draws on ideas in a presentation prepared by Halina Ward for the Organization for Economic Cooperation and Development workshop on multilateral environmental agreements and private investment, which took place in Helsinki, Finland, on 16–17 June 2005. A copy of her speaking notes are available at <<https://www.oecd.org/dataoecd/63/46/35173055.pdf>>. The workshop report, background paper and other materials are available at <http://www.oecd.org/site/0,2865,en_21571361_34841611_1_1_1_1_1,00.html>.

² Cross-border private investment takes the form of foreign direct investment (FDI), portfolio investment and credits. See B.S. Gentry, *Private Capital Flows and Climate Change: Maximizing Private Investment in Developing Countries under the Kyoto Protocol* (Yale/UNDP Collaborative Program on the Urban Environment, 2000).

The notion of responsible business behaviour is not new. Since the 1990s, increasing concern over the impacts of economic globalization has led to new demands for corporations to play a central role in eliminating poverty, achieving equitable and accountable systems of governance and ensuring environmental security. The agenda that has resulted from these concerns has variously been called 'corporate citizenship', 'corporate social responsibility', 'corporate accountability' or simply 'corporate responsibility'.³ Neither the corporate nor the academic worlds, let alone public policy makers, have arrived at consensus on the definition of CSR or the outcomes to which it should lead.⁴ One interpretation, adopted by the European Commission, is that 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'.⁵ But there are a number of alternative approaches too, which reflect different views on the utility of CSR in framing an understanding of the role of business in society, and the relevance of 'business impacts', 'commercial success' and 'wider societal goals' in setting the boundaries of the CSR agenda. For example, CSR could be understood as a source of competitive advantage. Alternatively, it could be understood as an effort to change perceptions of the role of business in society.⁶ In line with the European Commission's interpretation, many businesses understand CSR as encompassing only voluntary activities beyond compliance with legal requirements. On the other hand, a number of non-governmental organizations support a distinct agenda on 'corporate accountability' through law.⁷

By and large though, the concept of CSR aims both to examine the role of business in society and to maximize the positive societal outcomes of business activity. It is about viewing business as part of society, not somehow separate from it.⁸ In essence, positions taken by different stakeholders on the key question 'what is CSR' have two underlying fault lines: first, the extent to which importance is placed on the centrality of the 'financial business case' for responsible business behaviour in defining the scope of CSR practice; and, second, the extent to which government is seen to have

a role in framing the agenda – and how it does so.⁹ These fault lines are reflected in two broad types of definitions of CSR: (1) those that focus on outcomes – including in terms of 'business impacts', 'commercial success' and wider societal goals; and (2) those that stress the voluntary nature of CSR ('voluntary' in that CSR relates to business activity that is not mandated by legislation, whether or not it is effectively 'mandated' as a matter of good practice through the action of various 'drivers' of CSR).

The CSR agenda is now increasingly being questioned, with some suggesting that it has failed to live up to expectations that it could transform business performance. Many leading companies in the UK are now choosing not to use the term CSR, preferring instead the expressions 'corporate responsibility' or simply 'business and sustainable development'. Whatever one's view on the value of maintaining an agenda that is called CSR as such, it is clear that the commercial drivers of responsible business practices differ for different sectors and in different parts of the world: for example, in many if not all parts of the world the capacity of civil society to hold companies to account is severely restricted, brands are vulnerable to external criticism by non-governmental organizations, and certainly not all see a business case for consistently 'responsible' or high standards of practice.

In light of the uncertainty over definitions and the regional nature of the drivers of CSR, a better approach to framing an enquiry into the possible role of business in contributing to effective MEA implementation might be to consider the key pillars of the 'enabling environment' for responsible business practice. In other words, to understand the relationship between MEAs and business, it is relevant to see how MEAs contribute to the enabling environment for responsible business practices. There are three principal elements in the 'enabling environment' for responsible business practices. The 'enabling environment' for CSR is a product of the *drivers*, the *tools* and the *human capacities and institutions* directed towards that goal.¹⁰ If these elements are viewed as a supporting framework, CSR is most likely to flourish when each of these underlying 'pillars' is as strong as it can be.

The *drivers* of CSR are inherently market-oriented in nature. They encompass the range of external and internal factors that generate the 'business case' for CSR, from reputational risk management, campaign pressure from non-governmental organizations, to the potential to create new business opportunities through

³ T. Bigg and H. Ward, *Linking Corporate Social Responsibility, Good Governance and Corporate Accountability Through Dialogue*, International Institute for Environment and Development, Discussion Paper (March 2004), at 3.

⁴ A. Dahlsrud, 'How Corporate Social Responsibility is Defined: An analysis of 37 Definitions', *Corporate Social Responsibility and Environmental Management* (Wiley, forthcoming).

⁵ European Commission Green Paper 2001, 'Promoting a European Framework for Corporate Social Responsibility', COM (2001) 366 final.

⁶ H. Ward and C. Smith, *Corporate Social Responsibility at a Crossroads: Futures for CSR in the UK to 2015* (IIED, 2006), at 4.

⁷ *Ibid.*

⁸ H. Ward *et al.*, *CSR and Developing Countries. What scope for Government Action?*, Sustainable Development Innovation Briefs (UNDESA, February 2007), at 1.

⁹ See H. Ward and C. Smith, n. 6 above.

¹⁰ This framework was first applied analytically in the Ring Alliance's report, *Development Dimensions of the UN Global Compact* (IIED, July 2003), available at <http://www.iied.org/SM/CR/documents/global_compact.pdf>. It was subsequently developed in H. Ward, *Public Sector Roles in Strengthening Corporate Social Responsibility: Taking Stock* (World Bank/IFC, January 2004).

socially beneficial innovation. The *tools* of CSR are then the market-based instruments and systems that are designed to foster improvements in business behaviour – including corporate codes of conduct, labelling schemes and environmental or social management systems. The *human capacities and institutions* underpin both the tools and the drivers of CSR – they allow them to take effect in their particular sectoral or geographical context. Key human capacities, for example, include the understanding and ability of all key stakeholders – from business managers to citizens – to engage in CSR. The key institutions include enforcement agencies, non-governmental organizations and teams of individuals working on CSR within businesses.

It seems hard to understand the ‘enabling environment’ as being inherently directed towards market-based or ‘voluntary’ approaches. Indeed, if responsible businesses are to flourish, they need to be able to innovate on a level playing field in which the most negative impacts of business activity are effectively outlawed. If the drivers of responsible business are to be sustained, the enabling environment needs to support market and citizen-based activism, access to information and public participation. An ‘enabling environment’ for business activity is not the same as an ‘enabling environment’ for responsible business activity.

MEAs have the potential to contribute to this ‘enabling environment’ for *responsible* business activity when they encourage innovative solutions to environmental problems, foster transparency through access to information and public participation requirements, or create level playing fields by ensuring that less capable (State) parties are provided with the requisite financial assistance, capacity building and technology so that they may fulfil their environmental obligations. But MEAs should never be judged in terms of their ability to contribute positively to or impact negatively on the enabling environment for business independently of a consideration of their wider environmental objectives. The business of business should not be allowed to trump the potential function of MEAs in setting minimum globally acceptable expectations of business behaviour. In forging links between MEAs and business, the potential for harnessing business to the environmental objectives of MEAs must be the focus. MEAs should not be expected to bend to the commercial objectives of business.

A BUSINESS-FACING FRAMEWORK FOR UNDERSTANDING LINKS BETWEEN CSR AND MEAS

Jane Nelson of the International Business Leaders Forum helpfully suggests that CSR can be understood,

and needs to be implemented, at three levels.¹¹ Adapting her approach slightly, these are:

- efforts to address the direct impacts of core business activity;
- efforts to address companies’ contributions to community development and social investment; and
- efforts to channel the public policy engagement and advocacy or lobbying efforts of businesses to positive social and environmental outcomes in areas relevant to the legitimate sphere of influence of businesses.

At each level, there are CSR issues that are directly relevant to the contribution business can make to MEA implementation.

As to core business impacts, examples might be business innovation to develop new technologies or products that promote MEA objectives (e.g. alternatives to ozone-depleting chemicals or greenhouses gases), or help to minimize the negative impacts of core business operations on biodiversity (e.g. in relation to the mining industry or civil engineering). The business sector possesses the essential financial and human capacity to engage in research activities aimed at promoting innovation and development of new technologies and environmentally friendly production processes.¹² According to Article 5 of the United Nations Framework Convention on Climate Change (UNFCCC), for example, research activities in the field of climate change should be ensured by providing the necessary financing as well as the necessary support for developing research capacities.¹³ Private investment aimed at improving renewable energy technologies (e.g. wind and solar energy) plays a role in mitigating climate change. As regards the Convention on Biological Diversity (CBD), private companies play a relevant role either in financing or conducting research in the biodiversity area.¹⁴ Pharmaceutical companies, for instance, are involved in studies concerning the identification and classification of species, which can contribute to both economic profit and preservation of biodiversity.¹⁵

¹¹ See J. Nelson, *Building Competitiveness and Communities: How World Class Companies are Creating Shareholder Value and Societal Value*, Prince of Wales Business Leaders Forum (UNDP, World Bank, 1998).

¹² United Nations Industrial Development Organization (UNIDO) and World Business Council for Sustainable Development (WBCSD), *Developing Countries and Technology Cooperation – An Industrial Capacity Building Initiative* (UNIDO/WBCSD, 2002).

¹³ United Nations Framework Convention on Climate Change (New York, 9 May 1992), Article 5(a).

¹⁴ United Nations Convention on Biological Diversity (Rio de Janeiro, 5 June 1992), Preamble, paras 15, 16 and 18.

¹⁵ K. Ten Kate and S. A. Laird, ‘Biodiversity and Business: Coming to Terms with the Grand Bargain’, 76:2 *International Affairs* (2000), 241.

There is also increasing awareness of the relationship between MEA objectives and the terms of 'foreign investment contracts' between foreign investors and host country governments. Provisions in these negotiated agreements may sometimes undermine MEA objectives – for example when host country governments agree to 'freeze' their environmental legislation at the point in time at which the investment takes place through so-called 'environmental stabilization clauses'.¹⁶

At the level of social investment and community development, two broad current themes in the contemporary CSR agenda are particularly relevant: the application of core business competences¹⁷ – or alternatively what has been called 'business DNA'¹⁸ – to the pursuit of MEA objectives; and the potential to align private sector community development or social investment activities with MEA objectives. Private companies can contribute to the implementation of MEAs by investing in education and training initiatives – themselves a form of technology transfer. This could, for example, include education and training on alternative production methods and processes.

Most MEAs encourage the involvement of the private sector in public education and awareness-building efforts. The Montreal Protocol,¹⁹ for instance, states the relevance of the cooperation of parties in 'promoting public awareness of the environmental effects of the emissions of controlled substances and other substances that deplete the ozone layer'. At the eighth meeting of the Conference of the Parties to the UNFCCC, the 5-year 'New Delhi Work Programme'²⁰ was adopted with the goal of undertaking activities 'at the national level in order to enhance climate-focused education and training programmes and increase the availability and dissemination of information on climate change, thereby improving public understanding and participation in climate change issues'.²¹

¹⁶ See, generally, L. Cotula, *The Legal Arrangements Underpinning Project Finance: Tensions between the International Protection of Foreign Investors' Property Rights and Evolution in Human Rights and Environmental Standards* (unpublished, 2007).

¹⁷ See, for example, the web-based information of the Programme on Business and Development Performance at the Overseas Development Institute, London, available at <http://www.odi.org.uk/iedg/Business_Development_Performance/Overview.html>.

¹⁸ Shell Foundation, *Enterprise Solutions to Poverty: Opportunities and Challenges for the International Development Community and Big Business* (Shell Foundation, March 2005), available at <http://www.shellfoundation.org/download/pdfs/Shell_Foundation_Enterprise_Solutions_to_Poverty.pdf>.

¹⁹ The Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal, 16 September 1987).

²⁰ New Delhi Work Programme on Article 6 of the Convention, Decision 11/CP.8 (1 November 2002), found in *Report on the Conference of the Parties on its Eighth Session, held at New Delhi from 23 October to 1 November 2002* (FCCC/CP/2002/7/Add.1, 28 March 2003).

²¹ UNFCCC, *Education and Outreach (Article 6 of the Convention)* (UNFCCC, 16 January 2007), available at <http://unfccc.int/cooperation_and_support/education_and_outreach/items/2529.php>.

Finally, with regard to the direct public policy role of business, there is considerable ongoing discussion on the positive public policy potential of 'responsible' business lobbying and advocacy – for example in relation to the climate agenda. And there is also unexplored potential to engage with the positive public policy role of business in the context of national sustainable development-related strategies – for example those developed pursuant to the CBD or the UNFCCC.

ANALYSIS OF SELECTED MEAs

MEAs have the potential to influence economies because they call for the modification of the collective conduct of governments, private investors and other stakeholders in the pursuit of certain environmental objectives.²² MEAs, from this perspective, can be classified into two main categories. First, certain conventions are directly related to the protection of the environment and as such can either directly or indirectly affect the economy of a country. There is a long list of examples of this first category of MEAs, which includes conventions aimed at the prevention of global warming (UNFCCC and the Kyoto Protocol²³), the conservation of biological diversity and the sustainable use of its components (CBD), combating desertification and mitigating the effects of drought (UN Convention to Combat Desertification (UNCCD)),²⁴ reducing the worldwide emissions of certain anthropogenic substances that deplete the stratospheric ozone layer (Montreal Protocol), and protecting endangered animals and plant species (Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)).²⁵

The second category of MEAs deals with the connection between environmental protection and the regulation of other global processes, most notably trade. This second category of MEAs also has significant potential for impacting the economic performance of a country. It includes conventions designated to regulate the movement of wastes (Basel Convention on the Control of Transboundary Movements of Wastes and their Disposal)²⁶ and the export of certain products or materials which are produced using potentially unsound or

²² Working Party on Global and Structural Policies, *Multilateral Environmental Agreements and Private Investment: Business Contribution to Addressing Global Environmental Problems*, Organization for Economic Cooperation and Development (OECD) Background Report (ENV/EPOC/GSP(2004)4/FINAL, 19 April 2005).

²³ Kyoto Protocol to the UNFCCC (Kyoto, 11 December 1997).

²⁴ UN Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (Paris, 17 June 1994).

²⁵ Convention on International Trade in Endangered Species of Wild Fauna and Flora (Washington, 3 March 1973).

²⁶ The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel, 22 March 1989).

untested environmental practices, such as genetically modified organisms (GMOs) (Cartagena Protocol on Biosafety ('Biosafety Protocol'))²⁷.

While it may appear at first sight that MEAs set limits on natural resource use and development, they can also work to generate new business opportunities, for example by stimulating the opening of new markets, the development of alternative products, production processes and new technologies. Most famously, the establishment of the Montreal Protocol effectively created a new international market for chemical products and equipment that replaced ozone-depleting substances, as well as the related ancillary services (e.g. training, planning and consultancies). Private companies are especially likely to be motivated to support policies for the implementation of MEAs when they find investment opportunities with minimal business risk in terms of cost, and a high potential for sales and replication, while maximizing return on investment.

MEAs have implications for the private sector in a variety of different ways, depending upon their objectives and the framework created for meeting those objectives. Under some MEAs, governments set out goals to be achieved through legal obligations. This is the case with the Montreal Protocol, where private sector participation has been intense in terms of developing financially sound and environmentally sustainable alternatives to banned ozone-depleting substances.²⁸ On the other hand, there are certain agreements which do not contain binding legal commitments and fixed targets, instead setting forth broad objectives and responsibilities for States that may or may not be translated into national policy. The UNFCCC is a case in point. The setting of fixed greenhouse gas reduction targets occurs only in the Kyoto Protocol. The CBD and UNCCD lay down various non-binding rules, but provide parties with guidelines for implementing these rules at national level.²⁹

²⁷ Cartagena Protocol on Biosafety to the Convention on Biological Diversity (Montreal, 29 January 2000).

²⁸ Despite the fact that the Montreal Protocol itself does not explicitly refer to the role of the private sector, Article 10 provides for the establishment of a Multilateral Fund for the implementation of the agreement, which involves the private sector in developing countries phasing out activities of ozone-depleting substances. The Multilateral Fund offers opportunities for private engagement and seeks measures to improve the generation of private investment in general: United Nations Environment Programme, Multilateral Fund for the Implementation of the Montreal Protocol: Policies, Procedures, Guidelines and Criteria (UNEP, November 2006), available at <<http://www.multilateralfund.org/files/Policy50.pdf>>.

²⁹ Differently from the texts of the Montreal Protocol and the UNFCCC, the CBD and the UNCCD explicitly mention the private sector in their text and directly involve it in the implementation process. Article 21.3 of the UNCCD, for example, highlights the importance of private sector participation in raising funds, as well as elaborating and implementing programmes that contribute to the objectives of the Convention. See UNCCD, n. 24 above.

In the case of the UNFCCC and the Kyoto Protocol, there has been a tremendous amount of innovative private sector activity that has taken on a life of its own. Indeed, limiting greenhouse gas emissions under the Kyoto Protocol requires developed countries to modify their primary economic structures, including making transformations within the energy, transportation, manufacturing, agriculture and investment sectors.³⁰ Business and industry, in both the developed and developing worlds, have been and will continue to be the most notable emitters of greenhouse gases; and curbing greenhouse gases emissions without hobbling economic growth has been at the heart of the negotiating process since its inception. In order to comply with treaty obligations and reduce the cost of emissions reductions, the Protocol provides three key flexibility mechanisms whose implementation directly involves the private sector: Joint Implementation,³¹ the Clean Development Mechanism (CDM)³² and Emissions Trading.³³ CDM projects, for instance, allow developed countries to meet Kyoto Protocol commitments by providing financial assistance to developing countries to promote sustainable development and to underwrite projects that produce certified emission reductions.³⁴

The connection between the CBD and the private sector appears less obvious. While the CBD may seem to relate to a purely environmental set of issues, it has far-reaching potential to influence the global economy by affecting decisions on what might be produced, harvested, extracted and exported. The Preamble of the CBD acknowledges that 'the provision of new and additional financial resources and appropriate access to relevant technologies can be expected to make a substantial difference in the world's ability to address the loss of biological diversity'.³⁵

³⁰ The Kyoto Protocol promotes the UNFCCC goal of 'stabilizing of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system'. Accordingly, Kyoto creates legally binding obligations for developed countries that require them to reduce gradually human-induced greenhouse gas emissions to an average of 5.2% below their 1990 emissions levels. See Kyoto Protocol, n. 23 above.

³¹ *Ibid.*, Article 6.

³² *Ibid.*, Article 12.

³³ *Ibid.*, Article 17.

³⁴ It is worth noting that the WBCSD – founded after the 1992 Rio Earth Summit to involve business in sustainability issues – discusses the engagement of the private sector in the CDM as well as other initiatives. See WBCSD, Business Role Focus Area (WBCSD, undated), available at <<http://www.wbcsd.org>>.

³⁵ In 1997, the WBCSD and the International Union for the Conservation of Nature and Natural Resources (IUCN) produced *Business and Biodiversity: A Guide for the Private Sector* (WBCSD/IUCN, 1997). The document makes a strong case for business to become involved in the biodiversity debate. In that context, WBCSD and IUCN note that business has not so far actively involved itself in the evolution of the CBD, notwithstanding the potential commercial significance of its impacts and the opportunities that it offers. See H. Ward, 'Introduction and Overview', 76:2 *International Affairs* (April 2000), 213. See also International Finance Corporation,

To achieve its three goals – conservation of biodiversity, sustainable use of its components and sharing the benefits arising from the utilization of genetic resources in a fair and equitable way – the Convention identifies a range of measures, including the use of economic incentives. Incentive measures, according to the Conference of the Parties to the Convention, ‘are essential elements in developing effective approaches to the conservation and sustainable use of biological diversity, especially at the level of social community’.³⁶ The private sector has become heavily engaged in a number of biodiversity-related sectors, which include tourism, agribusiness, aquaculture, forestry and pharmaceuticals. In each of these sectors, business can work to the benefit of biodiversity by adopting methods that support sustainable development and by minimizing environmental and social impacts.³⁷ Private sector businesses involved in biodiversity-related sectors have the potential to divert pressure from critical biodiversity resources by creating new economic value from ecosystems and genetic resources, practising low-impact methods of cultivation to generate sustainable yields, extending natural habitats, etc. Companies have begun to shift their business activities to comply with the CBD, and the relevance of the pro-biodiversity business agenda has led to a growing demand for natural products, certified organic agriculture, certified forest products, among others.

Although CITES does not make explicit reference to economic incentives in reaching its goals, its Conference of the Parties has adopted a number of decisions to engage the business sector in the conservation of plants and wildlife. CITES focuses principally on conserving listed species (approximately 5000 species of animals and 25,000 species of plants) by protecting them from over-exploitation through international trade. Both at the national and international levels, the institution of economic incentives such as property and use rights, tradable catch and export quotas and export taxes offer policy options that can lead to the protection of species. The CITES Strategic Plan, in the context of enhancing *the ability of parties to implement the Convention*, states that ‘for trade to be responsible and based on sustainable use, social and economic incentives are needed to bring local communities and local authorities into partnership with government under an appropriate legislative policy and financial framework’.³⁸

In 1997, the first Conference of the Parties to the UNCCD established the Global Mechanism (GM). Its mandate is ‘to increase the effectiveness and efficiency of existing financial mechanisms . . . and to promote actions leading to the mobilization and channelling of substantial financial resources to affected developing country Parties’.³⁹ The role of the GM is to operate as a broker and partnership builder amongst governments, non-governmental organizations and the private sector, mobilizing financial capital to address the nexus between land and natural resources degradation, rural development and poverty reduction.⁴⁰

Despite the difficulties of operating businesses in dryland areas, economic activity is fundamental to the prevention of desertification, and investment opportunities exist for the development of innovative technologies including those that convert intense solar radiation to solar energy, the development of the aquaculture sector and the cultivation of high price dryland commodity products (e.g. nuts, fruits and vegetables). In order to improve the GM’s ability to attract private investment, the Conference of the Parties to the UNCCD has recommended the creation of a joint venture with the World Bank and the International Fund for Agricultural Development (IFAD) to explore ways and means of raising carbon financing for drylands management projects.⁴¹

There are a growing number of examples of MEA-driven private sector initiatives. In this regard, the CBD provisions on access and benefit sharing, which aim to ensure parity along the supply chain in the commercialization of genetic resources, provide an illustrative case.⁴² According to these provisions, the commercialization of indigenous products, which originated in developing countries thanks to knowledge handed down from generation to generation, requires companies to invest resources in further research in order better to understand their active elements and develop new technologies, thus intensifying value to the product. Access and benefit-sharing arrangements have the objective of ensuring that people providing access to indigenous biological resources may share the benefits arising out of the commercialization of these resources.⁴³ The issues of intellectual property

A Guide to Biodiversity for the Private Sector: Why Biodiversity Matters and How it Creates Business Value (International Finance Corporation, 2006), available at <<http://www.ifc.org/biodiversityguide>>.

³⁶ CBD, Scientific and Technical Cooperation and the Clearing-House Mechanism (Article 18) (Decision V/14, 10 April 2003), para. 4.

³⁷ M.C. Rubino, ‘Biodiversity Finance’, 76:2 *International Affairs* (April 2000), 223.

³⁸ *CITES: The Convention on International Trade in Wild Animals and Plants: Strategic Vision through 2005* (Doc. SC.42.5, 1 October 1999), Annex 1, available at <<http://www.cites.org/eng/com/SC/42/42-5a1.pdf>>.

³⁹ UNCCD, Organization to House the Global Mechanism and Agreement on its Modalities (Decision 24/COP.1, 10 October 1997).

⁴⁰ UNCCD, Collaborative Institutional Arrangements in Support of the Global Mechanism (Decision 25/COP.1, 10 October 1997).

⁴¹ UNCCD, Memorandum of Understanding between the Conference of the Parties to the United Nations Convention to Combat Desertification and the International Fund for Agricultural Development regarding the Modalities and Administrative Operations of the Global Mechanism (Decision 10/COP.3, 26 November 1999).

⁴² See CBD, n. 14 above, Article 15.

⁴³ A number of regional- and national-level access and benefit-sharing (ABS) regimes are currently in place, almost all of them in developing countries or regions of the world. In 2002, the CBD agreed a set of guidelines for establishing domestic ABS regimes

rights and the ethics of patenting genetic resources, represent a thorny question that has not yet been satisfactorily resolved.⁴⁴

The listing of frequently traded endangered species under CITES can present barriers to smaller businesses and industries. Banning or otherwise limiting international trade in certain species requires a thorough socio-economic analysis of the impact this may have on the livelihoods of local communities. There have been cases where the listing of a particular species without adequate information on the level of the real threat posed to it by international trade has been detrimental.⁴⁵ In this regard, there are real challenges associated with the enforcement of CITES, and some would argue that the criminalization of international trade has not proved effective in eradicating some of the most significant pressures on the world's most endangered species.⁴⁶

Another area where the encouragement of business involvement may have limited effect concerns the UNCCD. Although the convention seeks to foster private sector investment, it has been difficult to attract business interest in investment in high-risk areas characterized by fragile ecosystems, climate variability, and limited physical and socio-economic infrastructure.⁴⁷ Even if the UNCCD contains some positive provisions with a private sector angle – for example

(Bonn Guidelines). The WSSD's 2002 Plan of Implementation calls for action to negotiate, within the framework of the CBD, an international ABS regime. This process is currently going on under the auspices of the CBD's Ad-hoc Working Group on Access and Benefit Sharing. See CBD, Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization (Decision VI/24, 19 April 2002); Plan of Implementation of the World Summit on Sustainable Development, Johannesburg, South Africa, 26 August–4 September 2002 (A/CONF/199/20, 4 September 2002), Annex II, para. 44(o) (JPOI); and, for information on the Working Group on ABS, see the website available at <<http://www.cbd.int/convention/wgabs.shtml>>.

⁴⁴ Intellectual property rights are patents, copyrights or other means of protecting an innovator's exclusive ability to control the use of their innovation for a specific period of time. Patenting is one way to protect the region's natural resources from other countries' cultivation of their own plants or developing synthetic substitute'; see A. Stephens, *Private Sector Involvement in Implementing Multilateral Environmental Agreements (MEAs): A Closer Look at the Natural Products Industry*, OECD Workshop, Helsinki, 16–17 June 2005 (OECD, June 2005).

⁴⁵ 'The mere proposal to list Devil's Claw – a perennial vine that grows in deep Kalahari sands – had negative consequences in the international market, and by implication for the livelihood of the extremely poor people who rely on wild harvesting for an income. The CITES proposal caused an immediate dip in market demand'. See *ibid.*

⁴⁶ *Ibid.*

⁴⁷ 'Developed countries or countries with economies in transition are able to attract much higher amounts of private investment for desertification-related projects'; see Working Party on Global and Structural Policies, *Multilateral Environmental Agreements and Private Investment: Business Contribution to Addressing Global Environmental Problems* (OECD, 19 April 2005), at 25.

references to capacity building, education and technology transfer – land degradation has not been a priority issue for donor governments, muting whatever signals the Convention process may be sending to the private sector.⁴⁸ Developing countries may have the political will to tackle the issue, but they often lack the technical resources, money and capacity for sustainable, long-term activities.⁴⁹ The real challenge is to develop some momentum in the Convention process itself as a pre-requisite for making the case for responsible businesses to get more deeply engaged in its implementation.

THE INTERSECTION BETWEEN MEAs AND GLOBAL TRADE RULES

Many existing MEAs contain provisions that affect free trade, both directly and indirectly. By and large, trade obligations laid down by MEAs can be classified into four categories: trade bans, export and/or import licensing, notification requirements, and packaging and labelling requirements.⁵⁰ Conflicts between MEAs and the World Trade Organization (WTO) can arise when trade rules prescribed in MEAs contravene one of the measures contained in the WTO agreements, such as rules in the General Agreement on Tariffs and Trade (GATT)⁵¹ or other WTO agreements that restrict the WTO legality of bans or quotas. Certain WTO agreements impose strict parameters on the design and application of technical requirements such as labelling provisions (e.g. WTO Agreement on Technical Barriers to Trade (TBT)).⁵² Other WTO rules require trade measures to be backed up by a risk assessment (e.g. WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS)).⁵³ The WTO rules also prohibit discrimination between the same (or 'like') products on the basis of their country of origin (e.g. the most-favoured nation principle under Article III of GATT).⁵⁴

CITES requires parties to penalize the trade in or possession of regulated specimens. The Montreal Protocol

⁴⁸ C. Bai *et al.*, 'Summary of the Seventh Conference of the Parties to the Convention to Combat Desertification: 17–28 October 2005', 4:186 *Earth Negotiations Bulletin* (31 October 2005), available at <<http://www.iisd.ca/vol04/enb04186e.html>>.

⁴⁹ L.C. Stringer, *The UN Convention to Combat Desertification* (SciDevNet Policy Briefs, October 2006).

⁵⁰ A.L. Stoler, *The Doha Round Negotiations on the MEA–WTO Interface: Shared Perceptions or Ulterior Motives?*, International Bar Association Conference (Auckland, New Zealand, 26 October 2004).

⁵¹ General Agreement on Tariffs and Trade (Marrakesh, 15 April 1994).

⁵² Agreement on Technical Barriers to Trade (Marrakesh, 15 April 1994).

⁵³ Agreement on the Application of Sanitary or Phytosanitary Measures (Marrakesh, 15 April 1994).

⁵⁴ A. Palmer and R. Tarasofsky, *The Doha Round and Beyond: Towards a Lasting Relationship between the WTO and the International Environmental Regime* (FIELD and Chatham House, April 2007).

has imposed strict rules on both parties and non-parties, limiting trade either in ozone-depleting substances or in products (refrigerators, aerosol, products and air conditioners) that contain these substances. The Biosafety Protocol⁵⁵ has the potential for significantly limiting the free trade of genetically modified products. Based on a precautionary approach, the Protocol allows parties to ban the import of certain genetically modified products where they believe there is a threat of serious or irreversible damage. The Basel Convention, which came into existence as a response to misrepresented and fraudulent export of hazardous wastes to developing countries, can affect the principles of free trade through trade bans and restrictions. The trade bans proposed under this Convention could be considered a violation of the 'most favoured nation' status accorded to all members of the WTO.⁵⁶ In addition, the Basel Convention does not regulate through tariffs alone but seeks to determine the manner of production, another possible violation of the principles established under the WTO. Also, domestic allocation of Kyoto emissions allowances could conflict with the WTO Subsidies Agreement, which prohibits governments from providing direct assistance to their own industries in order to improve domestic competitive positions when it constitutes the provision of a subsidy to the receiving industries.⁵⁷

WTO agreements do provide exceptions to the rules prohibiting restrictions on free trade. Members are permitted to take measures to protect human, animal or plant life or health (GATT, Article XX(b)) and measures may be designed to conserve exhaustible natural resources (GATT, Article XX(g)), provided 'such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade' (chapeau to GATT, Article XX). While there is scope for MEA trade measures under WTO rules, it is limited.⁵⁸

Limitations notwithstanding, it is interesting to note that MEAs do not provide reciprocal guidelines. Within the MEA process, Agenda 21 – drafted at the 1992 United Nations Conference on Environment and

Development in Rio de Janeiro – states that trade and environmental policy should share common objectives (promoting sustainable development through trade liberalization, making trade and environment mutually supportive and discouraging unilateral action in favour of multilateral efforts), but goes no further in offering a practical solution to the controversies between trade and environment.⁵⁹ Ten years later, the relationship between trade and the environment provided for heated debate during the drafting of the Johannesburg Plan of Implementation at the World Summit on Sustainable Development (WSSD).⁶⁰ At the end of the day, the WSSD supported the argument that the relationship between the WTO and MEAs should be non-hierarchical and mutually supportive.⁶¹ Ironically, the search for resolution of potential conflicts between MEAs and international trade rules is currently being played out in the trade arena, putting the environmental agenda, with possibly the most to lose, at a great disadvantage. Time will tell if the even-handed approach taken at the WSSD has any influence on the outcome of this debate.

While the current round of WTO negotiations has recognized the need to discuss the relationship between MEAs and international trade rules,⁶² these discussions do not have a high priority in the context of the WTO agenda.⁶³ By virtue of its intrinsic role in development and fostering of global trading relations, the private sector has a significant role to play in addressing the trade and environment debate.⁶⁴ But to date, WTO members have given only limited consideration to the relevance of responsible business behaviour in this debate.

TOWARDS FUTURE STRATEGIES TO IMPROVE THE RESPONSIBILITY OF BUSINESS

There have been a number of CSR-related discussions in the global policy arena that have had real potential to inform future strategies for harnessing responsible

⁵⁵ The Cartagena or Biosafety Protocol was agreed on the basis of CBD, Article 19.3, which provides for parties to consider the need for and modalities of a protocol on the safe transfer, handling and use of living modified organisms (LMOs) that may have an adverse effect on biodiversity. See CBD, n. 14 above.

⁵⁶ See P. Srinivasan, *The Basel Convention of 1989 – A Developing Country's Perspective*, Working Paper (Liberty Institute, Delhi, 24 September 2001), at 2.

⁵⁷ C. Carlarne, 'The Kyoto Protocol and the WTO: Reconciling Tensions Between Free Trade and Environmental Objectives', 17:1 *Journal of International Environmental Law & Policy* (2005–2006), 45.

⁵⁸ See A. Palmer and R. Tarasofsky, n. 54 above.

⁵⁹ E.-U. Petersmann, 'International Trade Law and International Environmental Law', 27:43 *World Trade Journal* (1993), 43.

⁶⁰ F.X. Perrez, 'The World Summit on Sustainable Development: Environment, Precaution and Trade – A Potential for Success and/or Failure', 12:1 *RECIEL* (2003), 12, at 18–21.

⁶¹ *Ibid.* See also JPOI, n. 43 above, paras 97 and 98.

⁶² In Doha Ministerial Declaration, para 31(i), WTO members have agreed to negotiate the relationship between existing WTO rules and specific trade obligations set out in MEAs. See Doha Ministerial Declaration, WTO Fourth Ministerial Conference (Doha, 14 November 2001).

⁶³ See A. Palmer and R. Tarasofsky, n. 54 above.

⁶⁴ R. McCormick, 'A Qualitative Analysis of the WTO's Role on Trade and Environment Issues', 6:1 *Global Environmental Politics* (February 2006), 118.

business to the pursuit of MEAs. Here we will discuss three of the more recent ones.⁶⁵

First, there is ongoing discussion (without any formal institutional *locus*) on whether, and if so how, to identify minimum global business standards in the environmental sphere. Because international environmental policy has no direct equivalent of the Universal Declaration of Human Rights⁶⁶ or the International Labour Organization (ILO) Declaration⁶⁷ on core labour standards, it is hard to identify globally applicable minimum environmental standards. It has been suggested that the global framework provided by MEAs might offer a route to this end, but it is difficult to identify very specific sources of business guidance in most. This remains a challenge for the international environmental policy community generally.⁶⁸

Second, there is a rapidly evolving 'sub-theme' within the CSR agenda which addresses the business/development interface, and the contribution of business to poverty reduction, sustainable livelihoods and the involvement of the Millennium Development Goals (MDGs).⁶⁹ The United Nations Development Programme High Level Commission on the Private Sector and Development highlighted development – if not environment – links between the private sector and efforts to achieve the MDGs.⁷⁰ The Commission focused on both means for

least developed countries to attract foreign investment and ways in which domestic capital can be mobilized.⁷¹ There is also potential to harness current business enthusiasm for the MDGs by stressing the relevance of MEAs to MDG-7 on environmental sustainability.⁷² The key is to make the most of business competences in delivering internationally agreed development targets.

Finally, the International Organization for Standardization (ISO) has established an international working group, which is developing an international guidance standard on 'organizational social responsibility', which, if adopted, will become ISO 26000. This potentially highly significant ISO process is scheduled for completion in 2008. It offers a space to ensure that the goals of MEAs – and the authoritative normative guidance that they offer – are plugged into a standard that will set guidance on 'social responsibility' expectations of different kinds of organizations, not limited to businesses.⁷³ The ISO 26000 guidance standard will not take a management system standard approach, nor include a certification standard for assessing the conformity of a particular product or service to socially responsible principles.⁷⁴

ISO 26000 is intended to assist organizations in addressing their social responsibilities, to provide practical guidance needed to operationalize social responsibility, to assist organizations in identifying and engaging with stakeholders, and finally to enhance

⁶⁵ In addition to the examples discussed here, the OECD Guidelines on Multinational Enterprises is an earlier initiative that considered the ethical role of business in a number of major areas including the environment. The OECD Guidelines, revised in 2000, are recommendations on responsible business conduct addressed by governments to multinational enterprises operating in or from the 33 OECD member countries. In addition to requiring the compliance of business with international human rights norms, the UN Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights (2003) requires relevant business entities 'to carry out their activities . . . in accordance with relevant international agreements, principles, objectives, responsibilities and standards with regard to the environment . . .' (para. 14). See Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights (E.CN.4.Sub.2.2003.12.Rev.2.En, 26 August 2003) and OECD Guidelines on Multinational Enterprises (OECD, 2000).

⁶⁶ Universal Declaration of Human Rights (General Assembly Res. 217A, 10 December 1948).

⁶⁷ International Labour Organization Declaration on Fundamental Principles and Rights at Work (Geneva, 18 June 1998).

⁶⁸ For an analysis of the issues, see, generally, H. Ward *et al.*, *Defining Global Business Principles: Options and Challenges*, IIED Discussion Paper with Insight Investment (IIED, November 2004), available at <http://www.iied.org/SM/CR/documents/global_business_principles.pdf>.

⁶⁹ See, for example, The Prince of Wales International Business Leaders Forum in collaboration with the United Nations Development Programme, *Business and the Millennium Development Goals: A Framework for Action* (UNDP, 2003), available at <<http://www.iblff.org/docs/MDG32pp.pdf>>.

⁷⁰ UN Commission on the Private Sector and Development, *Unleashing Entrepreneurship: Making Business Work for the Poor*, Report to the Secretary-General of the United Nations (UNDP, 1 March 2004), available at <<http://www.undp.org/cpsd/documents/report/english/fullreport.pdf>>.

⁷¹ *Ibid.*

⁷² See UN General Assembly Millennium Declaration (General Assembly Res. 55/2, 18 September 2000). The MDGs are listed on the UN Millennium Development Goals website available at <<http://www.un.org/millenniumgoals/index.html>>. MDG-7 is the 'environmental' goal, which aims, *inter alia*, to integrate the principles of sustainable development into country policies and programmes and reverse loss of environmental resources.

⁷³ According to the new work item proposal, the standard should ' . . . assist organizations in addressing their social responsibilities while respecting cultural, societal, environmental and legal differences and economic development conditions; provide practical guidance related to operationalizing social responsibility, identifying and engaging with stakeholders, and enhancing credibility of reports and claims made about social responsibility; emphasize performance results and improvement; increase confidence and satisfaction in organizations among their customers and other stakeholders; be consistent with and not in conflict with existing documents, international treaties and conventions and existing ISO standards; not be intended to reduce government's authority to address the social responsibility of organizations; promote common terminology in the social responsibility field; and broaden awareness of social responsibility'. See ISO, *Social Responsibility: About the Standard* (ISO, undated), available at <http://isotc.iso.org/livelink/livelink/fetch/2000/2122/830949/3934883/3935096/07_gen_info/aboutStd.html>.

⁷⁴ This is similar to the situation with respect to ISO 9000 and 14000 standards in the sense that quality management and environmental management standards are important for both commercial and non-commercial entities, and have not been written exclusively for use by business. See K. Webb, 'The ISO 26000 Social Responsibility Guidance Standard – Progress So Far', *Les cahiers de la Chaire-collection recherche* (September 2005), 8.

the credibility of reports and claims made about social responsibility.

Within the working group's debate, key issues to be clarified include the meaning of 'social responsibility', and guidance on strategies that public institutions or the private sector might wish to implement to operate in a socially responsible manner. Although ISO 26000 likely will not introduce a certification standard, governments or non-governmental bodies will be able to draw on it as a source of inspiration when developing domestic measures to promote or regulate trade in 'socially responsible' products (e.g. bans, labelling and certification requirements, government procurement requirements, State aid or government subsidies, preferential market access for goods from developing countries, tax relief, retailer or supply chain requirements, and corporate reporting and disclosure requirements or practices).

The ISO Social Responsibility Working Group⁷⁵ has included within the ongoing discussion the possible implications for ISO 26000 of harmonization rules in the WTO TBT Agreement. According to these provisions, international standards are to be used as a basis for certain technical regulations and standards, unless it would be ineffective or inappropriate (TBT, Article 2.4). Guides and recommendations issued by international standardization bodies are also to be used as a basis for assessing conformity with technical regulations or standards where those international instruments are relevant, effective and appropriate (TBT, Article 5.4).⁷⁶

While WTO members would not be legally required to use ISO 26000 as a basis for a domestic measure for socially responsible products to the exclusion of other more rigorous international instruments, the existence of ISO 26000, once adopted, could steer WTO members from using other international instruments as a basis for their measures. An ISO 26000 is likely to be perceived as a legitimate and authoritative source for domestic measures.

⁷⁵ See ISO, *ISO and Social Responsibility* (ISO, 2006), at 3, available at <<http://www.iso.ch/iso/en/CombinedQueryResult.CombinedQueryResult?queryString=iso+26000>>.

⁷⁶ A. Palmer, *The Relationship between the ISO Social Responsibility Standard and the WTO Agreement on Technical Barriers to Trade*, International Institute for Sustainable Development (IISD) Paper (IISD, 2007).

CONCLUDING REMARKS

Turning to CSR to frame an understanding of the business contribution to MEAs has some value. It can help governments to frame intergovernmentally agreed policy commitments to create an 'enabling environment' for responsible business behaviour. It can provide them with information that is useful in determining the limits of what businesses might 'voluntarily' be encouraged to do to support implementation of MEAs. And it can help to provide them with the business literacy that may be helpful in forming partnerships and alliances of various kinds to support governmental implementation of MEAs.

The role of MEAs in informing the development of minimum acceptable environmental norms of business behaviour should never be 'watered down' as a result of excessive attention to an agenda that is often framed as being about 'voluntary' market-driven action on the part of business. That is the risk of seeing CSR as a new pathway to MEA implementation. And if MEAs are to learn from CSR, their competitors and often stronger counterparts in the international architecture – intergovernmental trade and investment arrangements – also need to be equipped not only to be sensitive to CSR, but actively to support it.

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