

# Business Enterprises and the Environment

## Corporate Environmental Responsibility

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### 1. Introduction

The role of business enterprises in the international legal order and the concept of corporate social responsibility (CSR) have received renewed attention over the last decade.<sup>1</sup> CSR has been discussed within the framework of international organizations and forums – such as the Organization of Economic Co-operation and Development (OECD),<sup>2</sup> the International Labor Organization (ILO),<sup>3</sup> the World Bank,<sup>4</sup> the United Nations (UN),<sup>5</sup> the European Union (EU)<sup>6</sup> and the G8<sup>7</sup> – as well as within national states.

Despite several recent (yet fragmented) developments to incorporate CSR in binding rules,<sup>8</sup> it mainly remains within the voluntary realm, addressed by a wide range of self-regulation and soft law. These initiatives are very different in scope, however, and therefore do not provide a clear picture. Some initiatives are general in nature and extend across all relevant aspects, whilst others are limited to specific regions, industry sectors, or specific themes. Some initiatives provide practical guidance, whilst others merely provide for minimum business standards. Although many business enterprises either volunteer to adhere to soft law codes of conducts and/or to have put their own (self-regulatory) codes in place,<sup>9</sup> it is the multiplicity of all these initiatives that

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1. For initiatives undertaken in the 1970s, 1980s and 1990s, see, e.g., Joseph 2000, pp. 83-85; Muchlinski 2010, para. 16.

2. The OECD has dealt with CSR since the early 1970s and has facilitated, among other things, the drafting, updating and implementation of the Guidelines for Multinational Enterprises of the Organization of Economic Co-operation and Development (OECD Guidelines); Recommendations for Responsible Business Conduct in a Global Context, Adopted by the 42 adhering governments at the OECD's 50th Anniversary Ministerial Meeting of 25 May 2011, as annex to the OECD Declaration on Decisions on International Investment and Multinational Enterprises. Retrieved from <www.oecd.org>.

3. The ILO has dealt with CSR since the late 1970s and has facilitated, among other things, the drafting and updating of the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (Tripartite Declaration), adopted by the Governing Body of the International Labour Office at its 204th Session (Geneva, November 1977), as amended at its 279th (November 2000) and 295th Session (March 2006). Retrieved from <www.ilo.org>.

4. The World Bank Group has dealt with CSR, among other ways, through the International Finance Corporate (IFC), which uses the Performance Standards on Social and Environmental Sustainability (IFC Performance Standards), 1 January 2012 (updated version). Retrieved from <www.ifc.org>.

5. Within the United Nations framework, the human rights commission and the United Nations Commission on Transnational Corporations – United Nations Conference on Trade and Development (1970s till the early 1990s) dealt with CSR-related issues. In 2000, the United Nations Global Compact (UN Global Compact) was established by the United Nations and the business community to provide a “policy framework for organizing and developing corporate sustainability strategies while offering a platform – based on universal principles – to encourage innovative initiatives and partnerships with civil society, governments and other stakeholders”. Its establishment was instigated by then UN Secretary-General Kofi Annan at the World Economic Forum in Davos on 31 January 1999 (SG/SM/6881 of 1 February 1999). Over 8,700 corporations and other stakeholders from over 130 countries have adhered to it. See <www.unglobalcompact.org>. See also Business & Human Rights Initiative, *How to Do Business With Respect for Human Rights: A Guidance Tool for Companies*, The Hague, Global Compact Network Netherlands, 2010.

6. The EU has dealt with CSR at various levels since 2001. On 25 October 2011, the European Commission sent its most recent ‘Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A renewed strategy 2011-14 for Corporate Social Responsibility, COM(2011) 681 final’. See also the non-governmental European Alliance for CSR and CSR Europe at <www.csreurope.org>.

7. See, e.g., G8 Summit 2007 Heiligendamm, ‘Growth and responsibility in the world economy; Summit Declaration’ (7 June 2007), paras. 9, 24-26, 84-85, 96.

8. See, e.g., the South African ‘Johannesburg Stock Exchange Requirements’ that stipulates that for a company to become listed it should fulfill certain requirements; the 2008 Danish Financial Statements Act (Accounting for CSR in large businesses); the United States’ Dodd-Frank Wall Street Reform and Consumer Protection Act; the Proposal for a directive of the European Parliament and of the Council amending Council Directives 78/660/EEC and 83/349/EEC as regards disclosure of nonfinancial and diversity information by certain large companies and groups, COM(2013) 207 final, 16 April 2013; and European Regulation No. 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market, in force as of 3 March 2013.

9. Already a few years ago, it was estimated that over 2,000 non-legally binding, self-regulatory codes exist. See Van Leuven 2004, p. 9.

impedes a common understanding or standard of the responsibilities of business enterprises.

In 2005, the UN Human Rights Commission, which is the predecessor of the current Human Rights Council, requested the UN Secretary-General “to appoint a special representative on the issue of human rights and transnational corporations and other business enterprises”. His mandate was, among other things, “[t]o identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights”.<sup>10</sup>

Following his appointment as special representative on 25 July 2005, Ruggie presented a “conceptual and policy framework to anchor the business and human rights debate, and to help guide all relevant actors” on 7 April 2008.<sup>11</sup> This Framework for Business and Human Rights (‘Framework’) consists of three pillars: (1) the duty of states to protect human rights; (2) the responsibility of business enterprises to respect human rights; and (3) access to remedies for those affected by human rights violations. The Human Rights Council welcomed this Framework and extended the Special Representative’s mandate to operationalize it.<sup>12</sup> Ruggie subsequently presented his Guiding Principles on Business and Human Rights (‘Guiding Principles’),<sup>13</sup> which were welcomed and endorsed by the Human Rights Council.<sup>14</sup>

The adoption of the 2008 Framework and 2011 Guiding Principles has boosted a common and coherent understanding of the relationship between business enterprises and human rights. In fact, despite some fierce criti-

cism,<sup>15</sup> the Framework and Guiding Principles appear to be the dominant paradigm for discussing CSR.<sup>16</sup>

As the mandate of Ruggie specifically focused on business and human rights, any concerns in relation to the protection of the environment had to be translated into relevant human rights obligations:

Nearly a third of [the investigated human rights cases] alleged environmental harms that had corresponding impacts on human rights. Environmental concerns were raised in relation to all sectors. In these cases, various forms of pollution, contamination, and degradation translated into alleged impacts on a number of rights, including on the right to health, the right to life, rights to adequate food and housing, minority rights to culture, and the right to benefit from scientific progress. A number of environmental issues also prompted allegations that a firm had either impeded access to clean water or polluted a clean water supply, an issue raised in 20 per cent of cases.<sup>17</sup>

For several reasons, however,<sup>18</sup> these human rights fall short in establishing an all-encompassing basis with regard to environmental issues. Shale gas extraction, tar sand mining, large-scale soy production in tropical rainforest areas, mining of heavy and precious metals, and (industrial) deep-sea bottom trawling are but a few examples of projects (likely to) causing significant environmental impacts, which may or may not infringe on a human right. After all, sometimes the extent or scope of the alleged environmental harm is not sufficiently serious to infringe on a human right.<sup>19</sup> At other times, physical distance, time sequence and/or causation questions make it difficult to establish a breach of a human right.<sup>20</sup> Furthermore, human rights are not specifically designed to provide general protection of the intrinsic value of the environment and thus lack the opportunity for ecocentric public interest litigation (*actio popularis*).

In view of the above, the Framework and the Guiding Principles are not intended to protect the human envi-

10. E/CN.4/2005/69 of 20 April 2005; Resolution of the Commission on Human Rights and transnational corporations and other business enterprises, para. 1.

11. A/HRC/8/5, 7 April 2008; Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie; Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development; Protect, Respect and Remedy: a Framework for Business and Human Rights, p. 1.

12. A/HRC/RES/8/7 of 18 June 2008; Mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises.

13. A/HRC/17/31, 21 March 2011; Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie; Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework.

14. A/HRC/RES/17/4 of 16 June 2011; Human rights and transnational corporations and other business enterprises, para. 1.

15. See, e.g., Simons 2012, and the Joint Civil Society Statement on the draft Guiding Principles on Business and Human Rights, January 2011, supported by Amnesty International, CIDSE, International Network for Economic, Social and Cultural Rights, International Federation for Human Rights, Human Rights Watch, International Commission of Jurists, and Rights and Accountability in Development, at <www.business-humanrights.org>. Their criticism includes that the (then) draft guiding principles do not provide “sufficient guidance to close the governance gaps identified by the SRSG as the root cause of the business and human rights predicament today”.

16. See, e.g., the references Backer (2010), retrieved from <law.scu.edu>, pp. 4-5. According to the final statement of the Oslo Conference on Corporate Social Responsibility, Norway, 13-14 November 2012 “the UN Guiding Principles on Business and Human Rights represent a watershed that opens the way to more coherent approaches to CSR”, retrieved from <www.regjeringen.no/upload/UD/Vedlegg/csr/csrkonf\_slutt121114.pdf>.

17. A/HRC/8/5/Add.2, 23 May 2008, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Addendum: Corporations and human rights: a survey of the scope and patterns of alleged corporate-related human rights abuse, para. 27.

18. See more extensively, Jesse 2013.

19. See, e.g., *Kyrtatos v. Greece*, ECHR (22 May 2003), Application No. 41666/98, Reps. 2003-VI.

20. Annual Report of the UN Human Rights Council, A/HRC/10/61, 15 January 2009, para. 70.

ronment or the intrinsic value of the environment.<sup>21</sup> But their systematic approach and structure do provide a model to address state duties and business responsibilities to care for the environment. This article is intended to complement the Framework and Guiding Principles on business and human rights with principles in the field of business and the environment. It is submitted that states have a customary duty to care for the environment (Section 2); it is submitted that business enterprises have a responsibility to care for the environment (Section 3); and it is submitted that stakeholders must have access to remedies in relation to breaches of these duties and responsibilities (Section 4).<sup>22</sup>

## 2. The Duty of States to Care for the Environment

International concern for the environment is of relatively recent origin. One of the first expressions of this concern is the 1972 Stockholm Declaration, which was adopted after the first UN Conference on the Human Environment. The Declaration was intended “to inspire and guide the peoples of the world in the preservation and enhancement of the human environment” and provided among other things in Principle 2:

The natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.

Principle 2 of the Stockholm Declaration was followed by similar UN declarations in 1982 (World Charter for Nature), in 1992 (Rio Declaration), in 2002 (Johannesburg Declaration) and in 2012 (Rio+20 Declaration). Although these declarations do not entail binding obligations for states, they do highlight the development of a relatively new area of public international law, namely, international environmental law.

International environmental law is founded on a number of general principles, such as the principles of preven-

tion and the precautionary principle,<sup>23</sup> the principle of good neighborliness<sup>24</sup> and/or the principle or maxim *sic utere tuo ut alienum non laedas*.<sup>25</sup> These principles arguably qualify as general principles of law in the meaning of Article 38(1)(c) of the Statute of the International Court of Justice and therefore as an autonomous source of public international law.<sup>26</sup> The principles of international environmental law are reflected in an increasing number of specific rules, such as rules on protecting the marine environment, international watercourses, the atmosphere, the climate, endangered species and biodiversity.

Most rules are laid down in international treaties, which only create rights and obligations for those states that have become parties to these treaties. Some rules, however, have been recognized as rules of customary international law, which are binding on all states. One of these rules is the prohibition to cause transboundary pollution. This rule was first recognized in the 1930s,<sup>27</sup> and is now generally accepted as a rule of public international law. According to the International Court of Justice,

[t]he existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.<sup>28</sup>

The required standard of behaviour to prevent a breach of this obligation is due diligence, which requires states to

undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource. Moreover, due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning

21. According to the Iron Rhine case, the term ‘environment’ must be interpreted to include air, water, land, flora, fauna, natural ecosystems and sites, human health and safety, climate; see Iron Rhine (Ijzeren Rijn) Railway arbitration (*Belgium v. The Netherlands*), Arbitral Tribunal, 24 May 2005, para. 58 at <www.pca-cpa.org>. Environmental impact assessment regimes at the international level (and following national levels) have even broadened this scope, to also explicitly include biodiversity and cultural heritage, Jesse 2008, pp. 70-73, 186-201.

22. The focus in this article lies on (the prevention of) significant environmental pollution, harm and other degradations, including due to cumulative impacts. After all, whereas attempts should be made to avoid human rights violations at all times, environmental impacts in general are unavoidable.

23. See Separate Opinion of Judge Cañado Trindade in relation to the Case Concerning *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of the ICJ of 20 April 2010 (*Pulp Mills Case*), paras. 52-96.

24. Nelissen 2002, pp. 11-12. The principle of good neighborliness has also been recognized in the United Nations Charter (Preamble and Art. 74), 39 *AJIL* 1945, Supplement: Official Documents, p. 190.

25. See the discussion of the meaning of the general principles relevant to international environmental law in Nollkaemper 1993, pp. 28-30.

26. Separate Opinion of Judge Cañado Trindade, *Pulp Mills Case*, paras. 28, 26, 29-47. Similarly Koppe 2013, pp. 61-68. The article submits that the principle of ambituity (derived from the Latin word *ambitus* which means environment) qualifies as a fundamental principle of the law of armed conflict – complementing the principle of humanity – and as such as a general principle of law. It is arguable that the principle of ambituity similarly underlies international environmental law.

27. Trail Smelter Arbitration (*US v. Canada*); 16 April 1938, 11 March 1941, in Lauterpacht 1942, p. 317.

28. ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, 1996 ICJ Reps. (Nuclear Weapons Advisory Opinion), para. 29; ICJ, *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment of 25 September 1997, 1997 ICJ Reps. (*Gabčíkovo-Nagymaros Case*), para. 53.

works liable to affect the régime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works. [...] The Court also considers that an environmental impact assessment must be conducted prior to the implementation of a project. Moreover, once operations have started and, where necessary, throughout the life of the project, continuous monitoring of its effects on the environment shall be undertaken.<sup>29</sup>

The object and purpose of this standard of conduct is to prevent transboundary harm, whether it is harm to the environment of another state or of areas beyond national jurisdiction. After all, it is better to prevent than to cure, in particular since it may be difficult – if not impossible – to cure environmental damage and “compensation in case of [environmental] harm often cannot restore the situation prevailing prior to the event or accident”.<sup>30</sup> The International Court of Justice ruled in the *Pulp Mills Case* as follows:

The Court points out that the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory. [...] A State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State.<sup>31</sup>

Prevention of transboundary harm, whether the norm qualifies as a customary rule or as a general principle,<sup>32</sup> has been further elaborated by the International Law Commission (ILC) in its 2001 Draft Articles on Transboundary Pollution. These Draft Articles, which have been recognized and commended by the General Assembly of the UN,<sup>33</sup> provide, in short, that the state of origin must take all appropriate measures to prevent significant transboundary harm or minimize the risk thereof (Article 3). For that purpose, states must cooperate in good faith, seek assistance, if necessary, of international organizations (Article 4) and take legislative and administrative measures to implement these articles (Article 5). Each state shall make sure that private parties do not carry out hazardous activities in their jurisdictions without the state’s prior authorization. Such authorization procedure requires a proper environmen-

tal impact assessment as well as notification of the states involved, informing them about the outcomes, and consultation with them, with a view to achieve acceptable solutions in order to prevent harm or minimize the risk thereof (Articles 6-9).<sup>34</sup> As such, these provisions are intended to operationalize the above-mentioned principle or customary rule of prevention (*Pulp Mills Case*), the duty of vigilance (*Pulp Mills Case*), or rather, as stated above, the general obligation of states to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control (Nuclear Weapons Advisory Opinion).<sup>35</sup>

These norms – the principle or customary rule of prevention, the duty of vigilance, and the general obligation to ensure respect for the environment of other states or areas beyond national control – appear to be related to the general obligation of states “not to allow knowingly its territory to be used for acts contrary to the rights of other states”, which was recognized by the International Court of Justice in the 1949 Corfu Channel Case.<sup>36</sup> This obligation is intended to protect the interests of a particular state, including the interests of its citizens and their property and arguably follows from a general duty of care of states towards other states, similar to the general duties of care recognized in the theory of tort liability.<sup>37</sup> In view of this close relationship, it is arguable that the above-mentioned norms can be reduced to one single norm: a general duty of care towards other states, more specifically a general duty of care for the environment in other states and for the environment in areas beyond national jurisdiction. As such, this obligation is intended to protect the interests of all states, or rather all mankind.<sup>38</sup> After all, “the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn.”<sup>39</sup>

It is further submitted that this duty of care is not limited to the environment in other states and to the environment in areas beyond national jurisdiction, but also extends to the environment – both the human environment and the environment as such – within states’ own jurisdiction. Although states indeed have “the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies” (Principle 21 Stockholm Declaration, first sentence and Principle 2 Rio Declaration, first sentence), it is arguable

29. ICJ, *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 April 2010 (*Pulp Mills Case*), paras. 204-205. See also Principle 17 of the Rio Declaration.

30. International Law Commission, *Draft Articles on Prevention of Transboundary Harm From Hazardous Activities, With Commentaries*, 2001, Report of the International Law Commission on the work of its 53rd session (A/56/10), General commentary, para. 2.

31. *Pulp Mills Case*, para. 101. See also Principle 2 of the 1992 Rio Declaration.

32. It appears to be ‘conceptually flawed’ to confuse general principles with norms of customary international law. See Separate Opinion of Judge Cançado Trindade, *Pulp Mills Case*, para. 17.

33. See A/RES/62/68 of 6 December 2007 and A/RES/65/28 of 6 December 2010.

34. See also Principle 19 of the Rio Declaration.

35. As will be explained below, in Section 3, the responsibility of business enterprises to care for the environment is or should be operationalized in a similar way.

36. ICJ, *Corfu Channel Case*, Judgment of 9 April 1949, 1949 ICJ Reps. (*Corfu Channel Case*), p. 22.

37. See Fitzmaurice 2002, pp. 132, 137-139. Fitzmaurice relies, among other things, on the dissenting opinion of Judge Azevedo in this regard (Dissenting Opinion Judge Azevedo, pp. 84-85).

38. *Gabčíkovo-Nagymaros Case*, para. 53, where the Court quotes the International Law Commission.

39. Nuclear Weapons Advisory Opinion, para. 29.

that such exploitation must be carried out with due regard for the environment.<sup>40</sup>

The *opinio iuris* required for the existence of such duty of care is clearly evidenced by the 1982 World Charter for Nature, which was adopted by the General Assembly of the UN.<sup>41</sup> The World Charter “proclaims [...] principles of conservation by which all human conduct affecting nature is to be guided and judged”. The first four general principles provide as follows:

1. Nature shall be respected and its essential processes shall not be impaired.
2. The genetic viability on the earth shall not be compromised; the population levels of all life forms, wild and domesticated, must be at least sufficient for their survival, and to this end necessary habitats shall be safeguarded.
3. All areas of the earth, both land and sea, shall be subject to these principles of conservation; special protection shall be given to unique areas, to representative samples of all the different types of ecosystems and to the habitats of rare or endangered species.
4. Ecosystems and organisms, as well as the land, marine and atmospheric resources that are utilized by man, shall be managed to achieve and maintain optimum sustainable productivity, but not in such a way as to endanger the integrity of those other ecosystems or species with which they coexist.

Apart from the conclusion of an increasing number of treaties, which require states to take measures to protect the environment within their national jurisdictions, the existence of such general duty of care for the environment within national jurisdictions is further evidenced in state practice. Such practice includes the prevalence of environmental protection legislation in national states as well as environmental protection legislation adopted within the framework of international organizations, such as the European Union. There is even an increasing number of states that incorporate environmental protection into human rights law by including specific environmental rights in their national constitutions.<sup>42</sup>

40. Commenting on Principle 21 Stockholm Declaration, Sohn stated, “An over-broad interpretation of this sovereign right would be inconsistent with the rest of the Declaration which emphasizes the fact that no part of the global environment can be separated from the rest and that it has to be preserved and improved for the benefit of all the people of both the present and future generations. No state can claim an absolute right to ruin its environment in order to obtain some transient benefits. It should think not only of the effect on other peoples but also about the future of its own people. It should not ruin the soil of its country in order to get a few extra crops or to sell more wood or pulp. Destruction and depletion of irreplaceable resources are clearly condemned by the Declaration, even when there is no effect abroad, and a state cannot engage in such activities behind the shield of misconceived sovereignty” (Sohn 1973, p. 492).
41. A/Res/37/7, adopted on 28 October 1982; World Charter for Nature. On the normative value of General Assembly resolutions and their importance for the formation of customary international law, see the Nuclear Weapons Advisory Opinion, para. 70.
42. See Shelton 2010, pp. 89-120.

Similarly, a number of international human rights treaties and documents recognize environmental rights.<sup>43</sup>

Further, the existence of a duty of care for the environment as such arguably follows from the recognition of such duty of care within the law of armed conflict.<sup>44</sup> When it is generally accepted that states have an obligation under customary international law to protect the intrinsic value of the environment in times of armed conflict, which qualifies as an exceptional situation and which triggers the applicability of a specific set of rules, then such duty of care would *a fortiori* apply in times of peace.

Indeed such duty would also be instrumental to achieve sustainable development, which was first recognized in the 1987 report ‘Our Common Future’ of the Brundtland Commission. The Brundtland Commission described sustainable development as “development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs”.<sup>45</sup> Sustainable development not only urges that economic development, the protection of the environment and the protection of human rights be treated in an integrated and interdependent manner,<sup>46</sup> but also presupposes equitable sharing between the ‘Northern’ developed countries and the ‘Southern’ developing countries.<sup>47</sup> Sustainable development received widespread recognition in the 1992 UN Conference on Envi-

43. See Arts. 12(1) and (2)(b) of the 1966 International Covenant on Social and Economic Rights; Art. 24 of the 1981 African Charter of Human and Peoples’ Rights; Art. 11 of the 1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights; and the Vienna Declaration on Human Rights (A/CONF.157/23 of 12 July 1993), para. 11. There is also an increasing recognition of the importance of a clean and safe environment within the framework of classic human rights, such as the right to life (see, e.g., European Court of Human Rights, 30 November 2004, *Öneryildiz v. Turkey*, Application No. 48939/99), the right to health, the right to property and the right to respect for private and family life (see, e.g., European Court of Human Rights, 10 January 2012, *Di Sarno and other v. Italy*, Application No. 30765/08).
44. In 2005, the International Committee for the Red Cross (ICRC) concluded that pursuant to customary international humanitarian law “[m]ethods and means of warfare must be employed with due regard to the protection and preservation of the natural environment. In the conduct of military operations, all feasible precautions must be taken to avoid, and in any even to minimize, incidental damage to the environment. Lack of scientific certainty as to the effects on the environment of certain military operations does not absolve a party to the conflict from taking such precautions” (Rule 44). This rule applies within the framework of international armed conflict and arguably within the framework of non-international armed conflict (see Henckaerts & Doswald-Beck 2005). As such, this obligation embodies a general duty of care for the environment in times of armed conflict. After all, due regard is merely the standard of conduct which must be observed, similar to the general standard of due diligence for the above-stated customary duty of care for other states. See, generally, on the customary duty of care for the environment Koppe 2008, pp. 248-256.
45. World Commission on Environment and Development, *Our Common Future*, Oxford, 1987, p. 43. The mandate of this Commission was granted by the General Assembly of the United Nations, see A/RES/38/161 of 19 December 1983, para. 8, subparas. a, b.
46. Sands 1995, p. 53.
47. The so-called intra-generational equity.

ronment and Development (UNCED) in Rio de Janeiro<sup>48</sup> and has meanwhile been generally recognized in public international law.

Still, due to its general, comprehensive and utopian nature, sustainable development is less suitable to be used as a measure for legal decisions.<sup>49</sup> It should therefore be qualified as an ideal (rather than a principle).<sup>50</sup> As (the ideal of) sustainable development has been explicitly laid down in many international, European and national legally binding and non-binding documents, it strongly influences existing and new principles of environmental law, and, through these principles, also more concrete regulatory rules and policies.<sup>51</sup> Thus, “principles [of environmental law] form a necessary link between directly applicable and enforceable environmental legal rules and the underlying ideal.”<sup>52</sup>

When the General Assembly adopted the World Charter for Nature, it was convinced that man had to be “guided by a moral code of action” and was

firmly convinced of the need for appropriate measures, at the national and international, individual and collective, and private and public levels, to protect nature and promote international co-operation in this field.<sup>53</sup>

The subsequent section will discuss how business enterprises have implemented and should implement this responsibility for the environment in practice.

### 3. The Responsibility of Business Enterprises to Care for the Environment

While customary international law arguably obliges states to observe a general duty of care for the environment, both within and outside their jurisdiction, no such rule appears to exist for business enterprises. After

48. See, e.g., Principle 1 of the Rio Declaration, which provides that “[h]uman beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.” It has been argued that all documents signed at the Rio Conference aim at sustainable development (Verschuuren 2003, pp. 22-23). For earlier recognition, see Schrijver 2008, Chapter II.

49. The concept of sustainable development has been relied upon in some cases, however. See, e.g., the so-called Shrimps-Turtles Case in which the WTO Appellate Body considered that sustainable development “has been generally accepted as integrating economic and social development and environmental protection”. WTO Appellate Body, United States Import Prohibition of Shrimp and Turtle Products, 12 October 1998, Doc. WT/DS58/AB/R, paras. 153 and 129.

50. See Verschuuren 2003, pp. 37, 49. He defines an ideal as “a value that is explicit, implicit or latent in the law, or the public and moral culture of a society or group that usually cannot be fully realized, and that partly transcend contingent, historical formulations, and implementations in terms of rules and principles and policies”.

51. Verschuuren 2003, p. 43.

52. *Ibid.*

53. A/Res/37/7, adopted on 28 October 1982; World Charter for Nature, Preamble.

all, public international law primarily binds states; hence international rights and obligations of non-state actors, such as business enterprises, are limited.

It is arguable, however, that business enterprises do have responsibilities to care for the environment. Already in 2002, it was provided in the Plan of Implementation of the UN World Summit on Sustainable Development that one of the actions with regard to sustainable development is to “[e]nhance corporate environmental and social responsibility and accountability” through, *inter alia*, “voluntary initiatives, including environmental management systems, codes of conduct, certification and public reporting on environmental and social issues”, and also to “[e]ncourage dialogue between enterprises and the communities in which they operate and other stakeholders”.<sup>54</sup>

Whilst the 2008 Framework and the 2011 Guidelines provide a framework for the social responsibilities of business enterprises, the responsibilities of business enterprises for the environment have been neglected. It is therefore submitted that the current CSR framework must be complemented by corporate environmental responsibility. As such, CSR would aim to or would even be instrumental to achieve sustainable development by balancing economic development with social and environmental needs.<sup>55</sup>

Since a corporate environmental responsibility framework would be a manifestation of the environmental pillar of sustainable development, it is arguably based on the same principles of international environmental law such as the principles laid down in the 1992 Rio Declaration, most notably, the principle of prevention, the precautionary principle, the polluter pays principle, the principle of integration, and the principles of transparency, stakeholder participation and access to justice.

This link was recognized in the 2002 Plan of Implementation, stating that in order for globalization to be fully inclusive and equitable, urgent actions are required to, *inter alia*, “actively promote corporate responsibility and accountability, based on the Rio Principles”.<sup>56</sup> This link is further evidenced by a number of environment relevant CSR initiatives, such as the OECD Guidelines for Multinational Enterprises: “The text of the Environ-

54. United Nations World Summit on Sustainable Development, Plan of Implementation, 4 September 2002, para. 18 (in relation to para. 2). Similarly, ISO 26000, Guidance on Social Responsibility, 2010, p. 1: “This International Standard is intended to assist organizations in contributing to sustainable development.” Earlier recognition can be found in Chapter 30 of the 1992 UN action plan ‘Agenda 21’.

55. See more extensively, Jesse 2013, pp. 30-66. Similarly, the website of Canada’s industries department (‘Industry Canada’) <[www.ic.gc.ca/eic/site/csr-rse.nsf/eng/Home](http://www.ic.gc.ca/eic/site/csr-rse.nsf/eng/Home)>, which states: “[w]hile CSR does not have a universal definition, many see it as the private sector’s way of integrating the economic, social, and environmental imperatives of their activities. As such, CSR closely resembles the business pursuit of sustainable development and the triple bottom line.” The triple bottom line is a tool for public and private sector initiatives alike to measure the degree of sustainable performance on three dimensions: people, planet and profit. Whilst the Framework and Guiding Principles are concerned with the people dimension, the corporate environmental responsibility proposed in this article is concerned with the planet dimension.

56. 2002 Plan of Implementation, p. 45.

ment Chapter broadly reflects the principles and objectives contained in the Rio Declaration on Environment and Development.”<sup>57</sup>

One of these CSR initiatives also provides insights into the link between CSR and principles of law on a higher level of abstraction:

Although customary international law, generally accepted principles of international law and intergovernmental agreements are directed primarily at states, they express goals and principles to which all organizations can aspire.<sup>58</sup>

This is evident from the same initiative, the 2010 Guidance on Social Responsibility, ISO 26000:

In addition to complying with law and regulations, an organization should assume responsibility for the environmental impacts caused by its activities in rural or urban areas and the broader environment. In recognition of ecological limits, it should act to improve its own performance, as well as the performance of others within its sphere of influence.<sup>59</sup>

Such a responsibility is furthermore incorporated in the UN Global Compact. In the commentary to its Principle 8, which reads “business enterprises should undertake initiatives to promote greater environmental responsibility,” reference is made to another Rio Principle:

The relevant principle in the Rio Declaration says we have the responsibility to ensure that activities on our own yard should not cause harm to the environment of our neighbours. Society also expects business to be good neighbours. Business gains its legitimacy through meeting the needs of society, and increasingly society is expressing a clear need for more environmentally sustainable practices.<sup>60</sup>

Corporate environmental responsibility, and the principles of international environmental law which it

implies,<sup>61</sup> means that business enterprises should prevent and, in the event not possible, mitigate and compensate, and, on occasion, repair environmental damage. This responsibility exists irrespective of national environmental law, especially in countries where environmental standards and their enforcement tend to be low.<sup>62</sup> The responsibility also extends across all components of the environment, and it extends across all business enterprises, regardless of their size, sector, operational context, ownership and structure.<sup>63</sup> As the OECD Guidelines put it,

[t]he Guidelines are not aimed at introducing differences of treatment between multinational and domestic enterprises; they reflect good practice for all. Accordingly, multinational and domestic enterprises are subject to the same expectations in respect of their conduct wherever the Guidelines are relevant to both.<sup>64</sup>

As small- and medium-sized enterprises may not have the same capacities as larger enterprises, the OECD Guidelines acknowledge that adhering governments may have to encourage these enterprises to observe the guidelines’ recommendations to the fullest extent possible.<sup>65</sup>

Still, also small- and medium-sized enterprises may cause significant environmental impacts, which require corresponding measures regardless of their size.

Similar to the obligation of states to prevent environmental harm and similar to the responsibility for business enterprises to respect human rights as recognized in the above-mentioned 2008 Framework and 2011 Guidelines, it is submitted that business enterprises must show due diligence in order to meet their responsibility to care for the environment or their corporate environmental responsibility. As such, business enterprises will be informed about the potentially significant environmental impacts of their intended and ongoing projects. Therefore, such process should be initiated as early as possible, not only on a general level by having in place a policy to meet their corporate environmental

57. Organization for Economic Co-operation and Development (OECD), *Guidelines for Multinational Enterprises, Recommendations for Responsible Business Conduct in a Global Context, 2011*, Paris, OECD Publishing, 2011, commentary on the environmental guidelines, p. 44, para. 60, at <oeed.org>. Similarly, e.g., the preamble of the 2000 United Nations Global Compact, at <unglobalcompact.org>; and the 2010 ISO standard, ISO 26000, p. 5, paras. 41-42. Unfortunately, this ISO standard is not freely accessible on ISO’s website <iso.org>.

58. ISO 26000, para. 2.11, n. 2. In para. 2.12 an organization is defined as an “entity or group of people and facilities with an arrangement of responsibilities, authorities and relationships and identifiable objectives”.

59. ISO 26000, para. 6.5.2.1.

60. UN Global Compact, Principle 8, referring to Rio Principle 4. Similarly, but less literally, OECD 2011, p. 44, para. 61; p. 45, para. 67.

61. This is evidenced, either literally or in spirit, by the three CSR initiatives involved in this article. See for the principle of prevention: UN Global Compact, Principle 9, Principle 8; OECD 2011, p. 42; ISO 26000, paras. 6.5.2.1, 6.5.3-6.5.6; the precautionary principle: UN Global Compact, Principle 7; OECD 2011, p. 43, para. 4; ISO 26000, para. 6.5.2.1; the polluter pays principle: UN Global Compact, Principle 7 (reference to cost-effectiveness); OECD 2001, p. 44, para. 62 (reference to cost-effectiveness); ISO 26000, para. 6.5.2.1; the principle of integration: UN Global Compact, Principle 8; OECD 2011, p. 44, para. 61; ISO 26000, para. 6.5.1.1; the principle of disclosure and information sharing: UN Global Compact, Principles 7 and 8; OECD 2011, p. 42, para. 2; ISO 26000, paras. 3.3.1, 4.4, 6.8; principle of public involvement: UN Global Compact, Principles 7 and 8; OECD 2011, p. 42, para. 2; ISO 26000, paras. 3.3.3, 5.3.2, 5.3.3. For the principle of access to justice, see Section 4.

62. See ISO 26000, Principle 4.6 (regarding the rule of law) and para 6.5.2.1 (on environmental responsibility); OECD 2011, p. 42.

63. See Guiding Principles, General Principles, p. 6.

64. OECD 2011, p. 18, para. 5.

65. *Ibid.*, para. 6. Similarly ISO 26000, pp. 8-9, box 3.

responsibility,<sup>66</sup> but also in the development of a new activity or a change or extension thereof. As the OECD Guidelines put it, “[e]nterprises should act as soon as possible, and in a proactive way, to avoid, for instance, serious or irreversible environmental damages resulting from their activities.”<sup>67</sup>

Another important consequence of implementing an environmental due diligence process is to facilitate stakeholder dialogue and prevent conflicts. It could thus help business enterprises to assess the risk of legal claims if conflicts nevertheless arise. On the basis of their environmental due diligence performance, business enterprises could show they took every reasonable step to avoid the alleged significant environmental impacts.<sup>68</sup> One important step is to “adopt voluntary charters, codes of conduct or practice internally as well as through sectoral and international initiatives to confirm acceptable behaviour and performance”,<sup>69</sup> such as relevant sector and/or theme-focused initiatives, *e.g.* the Electronic Industry Citizenship Coalition (EICC), Extractive Industries Transparency Initiative (EITI), Carbon Disclosure Projects’ Supply Chain Initiative, the Sustainable Packaging Coalition (SPC), the CEO Water Mandate, the Business and Biodiversity Offsets Programme, and the Global Reporting Initiative, as well as relevant multi-stakeholder initiatives, *e.g.* Forest Stewardship Council, Marine Stewardship Council, and relevant round tables, *e.g.* Round Table on Responsible Soy Association and Round Table on Sustainable Palm Oil. Such codes prescribe behaviour that is required of business enterprises to meet their due diligence standards. The commitment of business enterprises to such initiatives confirms their corporate environmental responsibility.

The environmental due diligence process should be ongoing as well.<sup>70</sup> Similar to the state duty to take new norms into consideration and give proper weight to new standards, “not only when States contemplate new activities but also when continuing with activities begun in the past”,<sup>71</sup> environmental due diligence requires

business enterprises to incorporate a responsibility in this respect.<sup>72</sup>

Similar to the rules as laid down in the 2001 Draft Articles on Transboundary Pollution, and as evidenced by the OECD Guidelines, the UN Global Compact and ISO 26000, it is submitted that the environmental due diligence process should include the following measures.<sup>73</sup>

The initial step in conducting environmental due diligence is to identify and assess the nature and size of the actual and potentially significant environmental impacts with which a business enterprise may be involved. The purpose is to understand the specific impacts on the various components of the environment, including people, given a specific context of operations.<sup>74</sup> Therefore, business enterprises should carry out an environmental impact assessment (EIA) prior to conducting a project, or change of extension thereof, that may cause or contribute to significant environmental impacts due to the nature or size of the possibly significant environmental impacts, combined with the location of the intended project.<sup>75</sup> The need to carry out an EIA is apparent from the UN Global Compact, which states that “[k]ey mechanisms or tools for the company to use [with respect to business environmental responsibility] would be [...] environmental impact assessment [...]”<sup>76</sup>

The OECD Guidelines rightly relate the preparation of an EIA to a project that is subject to a decision of a state authority.<sup>77</sup> As many states now have adopted a legal or regulatory EIA process, the link with a formal decision will normally be provided. Moreover, also the International Finance Corporation (IFC – the private sector arm of the World Bank Group) and the private banks oriented Equator-principles require carrying out their self-regulatory environmental and social assessment procedures to ensure environmentally and socially sound project financing.<sup>78</sup> Regardless of whether this is mandated by national law or self-regulatory guidelines, business enterprises should carry out an EIA in case of (potential) significant environmental impacts due to new projects or changes and extensions thereof, to meet the required standard of conducting environmental due diligence.

In treaties that provide for EIA, the objectives formulated for EIA imply that environmental pollution and other environmental harm and degradations should be prevented or mitigated as much as possible.<sup>79</sup> It is sub-

66. Based on the principle of integration. Indeed, from the three CSR initiatives it follows that corporations should have in place a vision, a policy and/or strategies, which focus on targets for, *inter alia*, improved environmental performance. See UN Global Compact, Principle 8 (on environmental responsibility); OECD 2011, p. 44, para. 61 (on prevention); and ISO 26000, para. 4.4 (on ethical behaviour).

67. OECD 2011, pp. 54-56, para. 69. See also, OECD 2011, p. 20, para. 10, p. 23, para. 14 (identification, prevention and mitigation of actual and potential adverse impacts), p. 42, para. 1 (environmental management system), p. 43, para. 3 (assess and address in decision-making the foreseeable environmental, health and safety-related impacts, and reference to early use environmental impact assessment), p. 45, para. 67 (*id.*), p. 43, para. 4 (precaution); ISO 26000, para. 6.5.2.1 (precautionary approach, environmental risk management), para. 6.5.2.2 (*e.g.*, environmental impact assessment); and UN Global Compact, Principle 7 (precautionary), Principle 9 (prevention) and Principle 8 (*e.g.*, on early use mechanisms such as environmental impact assessment).

68. See Guiding Principle 17.

69. UN Global Compact, Principle 8. See also, OECD 2011, p. 45, paras. 65, 66; and ISO 26000, para. 6.5.2.2.

70. *Ibid.* See also, ICJ, *Pulp Mills Case*, paras. 204-205.

71. *Gabčíkovo-Nagymaros Case*, para. 140.

72. See ISO 26000, para. 2.11, n. 2.

73. See, more extensively, Jesse 2013.

74. See Guiding Principles, Principle 18. For the aspects that fall under the term environment, see n. 21.

75. See UN Global Compact, Principle 8; OECD 2011, p. 42, para. 3; ISO 26000, para. 6.5.2.2.

76. UN Global Compact, Principle 8.

77. OECD 2011, p. 43, para. 3.

78. See the IFC Policy and Performance Standards on Environmental and Social Sustainability at <www.ifc.org> and the Equator-principles at <www.equator-principles.com>. On some drawbacks of the Equator-principles, see Van der Heijden & Jesse 2008, p. 47.

79. Jesse 2008, Chapter 5. The same applies to the Equator-principles and the IFC Policy and Performance Standards on Environmental and Social Sustainability.



mitted that this objection, and the substantive principles of international environmental law which it implies, should be one of the required standards to meet environmental due diligence.

Typically, information disclosure, the involvement of independent external environmental expertise and public involvement are crucial elements of the EIA process.<sup>80</sup> By means of consulting potentially affected stakeholders and representing environmental non-governmental organizations (NGOs) directly, business enterprises may be able to assess the environmental impacts more accurately as well as to make use of their knowledge of and concerns for the environment, and objections against the intended project.<sup>81</sup>

An increasing number of CSR initiatives even require business enterprises to carry out a life cycle assessment (LCA),<sup>82</sup> which extends over the product chain. ISO 26000 provides that

[t]he main objectives of a life cycle approach are to reduce the environmental impacts of products and services as well as to improve their socio-economic performance throughout their life cycle, that is, from extraction of raw materials and energy generation, through production and use, to end-of life disposal or recovery. An organization should focus on innovations, not only on compliance, and should commit to continuous improvements in its environmental performance.<sup>83</sup>

Such LCA appears to complement or extend the scope of an EIA and is similar to the responsibilities of business enterprises to ensure respect for human rights in their supply chains, as recognized in Guiding Principle 13.<sup>84</sup> Although, generally, LCA is not concerned with chain *liability*, the OECD Guidelines recognize “that multinational enterprises have certain responsibilities in other parts of the product life cycle”.<sup>85</sup> Showing the results of an EIA (and of LCA) would provide a measure of transparency and accountability to individuals and groups who may have been or will be

impacted, as well as to other relevant stakeholders, including investors. As the OECD Guidelines put it,

Information about the activities of enterprises and about their relationships with sub-contractors and their suppliers, and associated environmental impacts is an important vehicle for building confidence with the public. This vehicle is most effective when information is provided in a transparent manner and when it encourages active consultation with stakeholders such as employees, customers, suppliers, contractors, local communities and with the public-at-large so as to promote a climate of long-term trust and understanding on environmental issues of mutual interest. Reporting and communication are particularly appropriate where scarce or at risk environmental assets are at stake either in a regional, national or international context.<sup>86</sup>

To provide a means for communication and consultation, references are made to communication and reporting standards, such as the Global Reporting Initiative (GRI).<sup>87</sup> The GRI provides for sustainability reporting, comparable to financial reporting. A sustainability report gives information about economic, environmental, social and governance performance on the basis of a reporting cycle. Hence, sustainability performance is monitored on an ongoing basis.<sup>88</sup>

Monitoring should be integrated into relevant internal reporting processes, and the outcomes should be made public by means of reporting tools.<sup>89</sup> It is a means for business enterprises to find out if the environmental measures taken and the policies drafted have been implemented.<sup>90</sup> Monitoring could also reveal whether or not a business enterprise has responded effectively to the environmental impacts – both identified and unexpected by nature and size. It may furthermore stimulate improvements. Business enterprises should implement an environmental audit system,<sup>91</sup> such as provided by, e.g., ISO and the European Eco-Management and Audit

80. Jesse 2008, Chapter 6. Similarly, UN Global Compact, Principle 8; OECD 2011, p. 42, para. 2; ISO 26000, paras. 6.5.3.2, 6.5.4.2.

81. *Ibid.*

82. For instance, ISO provides for specific LCA codes; see, ISO 14040, Environmental management, Life cycle assessment, Principles and framework; ISO 14044, Environmental management, Life cycle assessment, Requirements and guidelines; ISO 14047, Environmental management, Life cycle impact assessment, Examples of application of ISO 14042; ISO 14048, Environmental management, Life cycle assessment, Data documentation format; ISO 14049, Environmental management, Life cycle assessment, Examples of application of ISO 14041 to goal and scope definition and inventory analysis. A state equivalent for LCA does not appear to exist.

83. ISO 26000, p. 43, para. 6.5.2.2. In Principle 8 of the UN Global Compact LCA is regarded as one of the key mechanisms or tools for a company to promote environmental responsibility (see also Principle 9). Similarly, OECD 2011, p. 41, para. 3, p. 45, para. 67.

84. Guiding Principle 13 provides: “[Business enterprises should] seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, or services by their business relationships, even if they have not contributed to those impacts.”

85. OECD 2011, p. 45, para. 67.

86. OECD 2011, p. 45, para. 65. Similarly OECD 2011, p. 20, para. 14 (general policies), p. 42, para. 2; ISO 26000, paras. 3.3.3, 4.3-4.5, 5; UN Global Compact, Principle 7.

87. UN Global Compact, Principle 8; OECD 2011, p. 45, para. 65. ISO 26000 does not refer to any existing reporting standard, but sets out similar standards for disclosure itself, see ISO 26000, para. 7.5.

88. See <[www.globalreporting.org](http://www.globalreporting.org)>.

89. OECD 2011, p. 42, para. 1, subpara. c; UN Global Compact, Principles 7 and 8; and ISO 26000, paras. 4.4, 6.5.1.2.

90. See Guiding Principles, Principle 20.

91. OECD 2011, p. 45, para. 64, UN Global Compact, Principle 8; and ISO 26000, paras. 6.5.1.1, 6.5.1.2.

Scheme (EMAS),<sup>92</sup> and/or an environmental management system.

An environmental management system aims to integrate the findings from the (environmental impact and possibly the life cycle) assessment and act upon them. Such a system typically includes the implementation of measures to prevent environmental impacts and to ensure the proper management of unavoidable environmental impacts. It also includes measures regarding transparency and unbiased dialogue with stakeholders regarding actual and potential environmental impacts and with respect to actual and proposed mitigation measures.<sup>93</sup>

Whether or not as part of an environmental management plan, business enterprises should also seek to improve corporate environmental performance by, *e.g.*, the adoption of environmentally sound technologies and practices,<sup>94</sup> including reducing CO<sub>2</sub> emissions.<sup>95</sup> This should be done at least at the corporate level and, where applicable, also for the supply chain.<sup>96</sup>

Furthermore, business enterprises should have in place contingency plans to prevent, mitigate and control significant environmental damage from accidents and emergencies, as well as for mechanisms for immediate reporting to the authorities concerned.<sup>97</sup>

As was mentioned above, the Guiding Principles for Business and Human Rights qualifies as the dominant paradigm within the framework of any discussion on CSR. They distinguish between foundational principles and operational principles. The former are the basis for the operational principles; the latter elaborate on the policies and processes business need to have in place to ensure that they respect human rights.<sup>98</sup> It is similarly possible to translate corporate environmental responsibility into four foundational and four operational principles. Inspired by the 2011 Guiding Principles, which these principles complement, it is submitted that they constitute the following:

### Foundational principles

- Business enterprises should prevent, and, if not possible, mitigate and compensate, significant environmental pollution, environmental harm and other environmental degradations.
- The responsibility of business enterprises to prevent, and, if not possible, mitigate and compensate, significant environmental pollution, harm and other degradations refers to internationally recognized principles of environmental law, *i.e.*, the principle of prevention, the precautionary principle, the polluter pays principle, the principle of integration, and the principles of disclosure and public involvement.
- Business enterprises should have in place a policy, vision and/or strategies to meet their corporate environmental responsibility.
- Business enterprises should have in place an environmental due diligence process to identify, prevent, mitigate, compensate and account for how they address the environmental impacts of their projects.

### Operational principles (environmental due diligence)

- Business enterprises should carry out an environmental impact assessment prior to conducting a project, or a change or extension thereof, which may cause or contribute to significant environmental impacts.
- Business enterprises should seek to carry out a life cycle assessment.
- Business enterprises should integrate the findings from the assessments and act upon them by having in place an environmental management system, including unbiased dialogue with stakeholders, an environmental improved performance plan and a contingency plan.
- Business enterprises should integrate monitoring into relevant internal reporting processes and make the outcomes public by means of reporting tools.

92. See, *e.g.*, ISO 14001, Environmental management systems, Requirements with guidance for use; ISO 14004, Environmental management systems, General guidelines on principles, systems and support techniques; ISO 14005, Environmental management systems, Guidelines for the phased implementation of an environmental management system, including the use of environmental performance evaluation and ISO 14006, Environmental management systems, Guidelines for incorporating ecodesign, and Regulation (EC) No. 1221/2009 of the European Parliament and of the Council of 25 November 2009 on the voluntary participation by organizations in a Community eco-management and audit scheme (EMAS), repealing Regulation (EC) No. 761/2001 and Commission Decisions 2001/681/EC and 2006/193/EC.

93. See in this respect, UN Global Compact, Principle 8; OECD 2011, p. 43, para. 1; and ISO 26000, paras. 6.5.3.2, 6.5.4.2, 6.5.5.2.1, 6.5.6.2.

94. OECD 2011, p. 43, para. 6; UN Global Compact, Principle 9; and ISO 26000, para. 6.5.2.2.

95. *Ibid.*

96. OECD 2011, p. 43, para. 6; UN Global Compact, Principle 8; and ISO 26000, paras. 6.5.2.1, 6.5.2.2, 6.6.6.

97. OECD 2011, p. 43, para. 5; ISO 26000, para. 6.5.2.1.

98. See, Office of the High Commissioner for Human Rights, *The Corporate Responsibility to Respect Human Rights, An Interpretative Guide*, Advance unedited version, November 2011, at <[www.ohchr.org/EN/Issues/Business/Pages/Tools.aspx](http://www.ohchr.org/EN/Issues/Business/Pages/Tools.aspx)>, p. 5.

## 4. The Responsibility to Provide for Access to Remedies

In view of the state duty of care for the environment – as established in Section 2 – and the corporate environmental responsibility – as established in Section 3 – it is arguable that stakeholders must have access to remedies in case of environmental damage. Although the third pillar of the above-mentioned Framework appears to be primarily aimed at states,<sup>99</sup> which “must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, [...] those affected have access to effective remedy”,<sup>100</sup> the

99. See Guiding Principles 25-28.

100. Guiding Principle 25.

third pillar also entails responsibilities for business enterprises. According to the Guiding Principles, business enterprises should not only provide for or cooperate in remediation through legitimate processes, but also establish or participate in effective grievance mechanisms<sup>101</sup> for individuals and communities who may be adversely impacted, in order to make it possible for grievances to be addressed early and/or restored directly.<sup>102</sup> As explained by the Special Representative, business enterprises may provide for such grievance mechanism within the company (internal or company-based)<sup>103</sup> or external, by means of third parties.<sup>104</sup>

The responsibility for states to provide access to remedies for those affected by environment damage appears to follow from the access to justice principle and the polluter pays principle, both of which are recognized in the Rio Declaration.<sup>105</sup> Since the responsibility of business enterprises is generally based on the principles of international environmental law, in particular the Rio Principles, it is arguable that the complementary responsibility for business enterprises to provide for remediation and effective grievance mechanisms similarly follows from these principles. Indeed, the general responsibility to provide for remediation in case of environmental pollution is recognized in ISO 26000,<sup>106</sup> which provides as follows:

In relation to all its activities an organization should [...] give highest priority to avoiding loss of natural

ecosystems, second to *restoring* ecosystems, and finally, if the former two actions are not possible or fully effective, to compensate for losses through actions that will lead to a net gain in ecosystem services over time.<sup>107</sup>

Further, in order to enhance credibility in relation to CSR in general, ISO 26000 suggests that business enterprises should “develop mechanisms for resolving conflicts or disagreements with stakeholders that are appropriate to the type of conflict or disagreement and useful for the affected stakeholders”.<sup>108</sup> Although the main focus of ISO 26000 is on the resolution of conflicts between business enterprises and individuals in the context of human rights (see in particular Section 6.3.6 of ISO 26000), conflicts between business enterprises and other stakeholders or groups of stakeholders may also materialize in the context of the protection of the environment. ISO 26000 suggests a number of formal and informal mechanisms, such as “forums in which stakeholders and the organization can present their points of view and look for solutions; formal complaints handling procedures; [and] mediation or arbitration procedures”.<sup>109</sup> Which mechanisms business enterprises choose for and how they are implemented will likely depend on the size of the enterprise, the sector the enterprise is working in and the impact of the enterprise on the environment. ISO 26000 also provides that business enterprises “should make detailed information on the procedures available for resolving conflicts and disagreements accessible to its stakeholders.”<sup>110</sup> Specific information on the relevant procedures, however, is only provided with regard to human rights and consumer issues and not to environmental issues.

Despite the inconclusive attention to environmental remediation and the limited attention to environment-related grievance mechanisms in the three CSR initiatives, currently a number of mechanisms can be identified, which are focused on the sustainability of business operations. These mechanisms often involve NGOs, such as UTZ Certified and the Rain Forest Alliance, which help business enterprises comply with their environmental and social/labour responsibilities by means of a certification scheme. UTZ Certified was established in 1999 by two business partners (a coffee grower and a coffee roaster) in order to improve the sustainability of the coffee industry by means of certification on the basis of codes of conduct.<sup>111</sup> Sustainability models for tea and cocoa were added in subsequent years. According to UTZ, one-third of all coffee is UTZ Certified, and global market leaders have committed to the program. The UTZ Certified codes of conduct are generally focused on sustainable harvesting and environmental aspects.

101. According to the interpretative guide to the Guidelines, the term grievance mechanism is used here as “a term of art to cover a whole range of mechanisms that address complaints and disputes involving enterprises and their stakeholders”. Office of the High Commissioner for Human Rights, 2011, para. 12.3. See also on the differences in terminology between complaints, grievances, and disputes: Corporate Social Responsibility Initiative, 2008, pp. 12-13.

102. Guiding Principles 15 (on remediation), 29 (on operational level grievance mechanisms) and 30 (on collaborative grievance mechanisms).

103. Company-based grievance mechanisms may involve the help of third parties and may include “hotlines for raising complaints, advisory services for complainants, or expert mediators”. A/HRC/8/5, para. 94.

104. Such grievance mechanisms have the advantage that they would appear to be more impartial, since the company will not have to act as defendant and judge at the same time. A/HRC/8/5, para. 95. Zandvliet & Anderson appear to be of the opinion that companies should provide for both an internal and an external grievance mechanism, which they refer to as a ‘recourse mechanism’. According to Zandvliet & Anderson, “[p]eople lodging a complaint need to have recourse if they are dissatisfied with the outcome of the investigation” (Zandvliet & Anderson 2009, p. 133).

105. Principle 10 of the Rio Declaration provides, *inter alia*, “[e]ffective access to judicial and administrative proceedings, including redress and remedy, shall be provided”. Principle 16 provides, “National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.”

106. The OECD Guidelines only refer in general terms to remediation in case of actual impacts on matters covered by the Guidelines, including environmental matters (see OECD 2011, Commentary on general principles, p. 23, para. 14), but they do not refer to remediation and/or restoration in the environmental chapter of the Guidelines. The OECD Guidelines furthermore do not provide for operational-level grievance mechanisms; in case of complaints, one is directed to the relevant National Contact Point. The UN Global Compact does not make any references to remediation or grievance mechanisms.

107. ISO 26000, para. 6.5.6.2 (emphasis added).

108. ISO 26000, para. 7.6.3.

109. *Ibid.*

110. *Ibid.*

111. Retrieved from <[www.utzcertified.org/](http://www.utzcertified.org/)>.

Compliance with these codes is checked on an annual basis through independent auditors. Additionally, UTZ Certified provides for a complaint mechanism,<sup>112</sup> which allows any person or organization to complain or express suspicions about producers, traders, roasters and others about alleged noncompliance with “the regulations and/or the spirit of the UTZ CERTIFIED program and requirements”. Complaints must be substantiated with documentary evidence, and UTZ Certified will deal with the complaint as it deems necessary depending on the nature of the complaint and in consultation with the complainant.<sup>113</sup>

The Rain Forest Alliance was established in 1986 after a major conference in New York City on the worldwide destruction of rain forests.<sup>114</sup> Currently, Rain Forest Alliance provides certification services to business enterprises that conduct their operations in a sustainable manner – in particular in the timber industry, agriculture, cattle ranching and tourism.<sup>115</sup> In order to be rewarded with one of Rain Forest Alliance’s certificates, companies need to meet both social (labour) and environmental standards.<sup>116</sup>

Rain Forest Alliance also focuses on sustainable agriculture, which may be of particular relevance for business enterprises producing and selling agricultural products. Its system of certification in this area is based on the environmental and social standards of the Sustainable Agriculture Network (SAN), which is a coalition of leading conservation groups (including Rain Forest Alliance) and which was founded in 1997.<sup>117</sup> The SAN Standards<sup>118</sup> are based on ten guiding principles,<sup>119</sup> two of which are specifically focused on the protection of ecosystem conservation and wildlife protection. With respect to sustainable forestry, Rain Forest Alliance’s certification is based on the standards of the Forest Stewardship Council, which was established in 1993 by a group of timber users, traders and environmental and human rights organizations in the United States.<sup>120</sup>

Grievances in relation to Rain Forest Alliance certification for sustainable agriculture may be lodged with Sustainable Farm Certification International, which is the Rain Forest Alliance/SAN’s certification body.<sup>121</sup> Complaints about a farm or an appeal against a certification decision may be lodged by a “person or organization” by means of a complaints/appeals form. Complaints and

appeals in relation to Rain Forest Alliance certification for sustainable forestry must be addressed to Smart-Wood, the Rain Forest Alliance’s forestry certification program since 1989,<sup>122</sup> and can be made by relevant stakeholders.

It appears, however, that these grievance mechanisms are not as formalized as some of the grievance mechanisms available in the textile industry in relation to labour standards. For example, the Fair Labor Association (FLA), which is an NGO committed to protecting workers’ rights and improving working conditions worldwide in the apparel and footwear industry, provides for a well-developed, accessible and transparent third-party complaints procedure with respect to companies that have committed to the FLA’s program. If the FLA finds that the company involved has breached FLA standards, the FLA will work with the company involved to develop an appropriate remediation plan, which plan will be made public on its website.<sup>123</sup>

Considering the above, it is recommended that the available grievance mechanisms in corporate environmental responsibility will be mapped in due time and advice will be provided on appropriate grievance mechanisms for business enterprises and stakeholders.<sup>124</sup>

## 5. Conclusion

On 30 March 2012, in an open letter to all government delegates, the UN High Commissioner for Human Rights, Pillay, appealed to all states to fully integrate key human rights considerations in the final Rio+20 outcome document. She urged Member States to

[c]ommit to ensuring full coherence between efforts to advance the green economy, on the one hand, and their solemn human rights obligations on the other. They should recognize that all policies and measures adopted to advance sustainable development must be firmly grounded in, and respectful of, all internationally agreed human rights and fundamental freedoms, including the right to development. To these ends, all actors, in both the public and private sectors,

112. UTZ Certified Complaint Handling Procedure, 2010.

113. UTZ Certified Complaint Handling Procedure, 2010 Section B.

114. At <[www.rainforest-alliance.org/about/history](http://www.rainforest-alliance.org/about/history)>.

115. At <[www.rainforest-alliance.org/about/](http://www.rainforest-alliance.org/about/)> and <[www.rainforest-alliance.org/about/approach](http://www.rainforest-alliance.org/about/approach)>.

116. Rain Forest Alliance’s certification system is based on the three pillars of sustainability, namely, environmental protection, social equity and economic viability. At <[www.rainforest-alliance.org/work/agriculture](http://www.rainforest-alliance.org/work/agriculture)>.

117. Retrieved from <[sanstandards.org](http://sanstandards.org)>. For a recent critical report on Rain Forest Alliance’s certification of Unilever tea, see Van der Wal 2011, retrieved from <[somo.nl](http://somo.nl)>.

118. SAN Sustainable Agriculture Standards, 2010, retrieved from <[sanstandards.org](http://sanstandards.org)>.

119. Sustainable Agriculture Network Principles, retrieved from <[sanstandards.org](http://sanstandards.org)>.

120. At <[www.fsc.org/history.html](http://www.fsc.org/history.html)>.

121. At <[www.sustainablefarmcert.com/index.cfm](http://www.sustainablefarmcert.com/index.cfm)>.

122. At <[www.rainforest-alliance.org/forestry/certification](http://www.rainforest-alliance.org/forestry/certification)>.

123. See <[www.fairlabor.org](http://www.fairlabor.org)>. Other examples of non-governmental and non-judicial grievance mechanisms (some of which are not sector specific and some of them included in ad hoc agreements between business enterprises and communities or business enterprises and trade unions) can be found in Koppe 2011. Report written upon the request of the World Legal Forum (WLF) and its partners in the Hague Utilities for Global Organizations program on corporate social responsibility (CSR) with a view to the establishment of a CSR Conflict Management Center in the city of The Hague, the Netherlands and made possible by the Netherlands Institute of Advance Studies (NIAS) in Wassenaar. The report is on file with the authors and with the WLF.

124. Organizations that could implement this recommendation include SHIFT, which is established in 2011 and intends to help putting the 2011 Guiding Principles into practice (see <[www.shiftproject.org](http://www.shiftproject.org)>), and ACCESS, which is a recently established facility in The Hague intended to facilitate dispute resolution in the area of CSR (see <<http://accessfacility.org>>).

should exercise due diligence, including through the use of human rights impact assessments.<sup>125</sup>

In the Rio+20 outcome document, Pillay's appeal was only partly implemented. Although the Rio+20 outcome document refers to the internationally agreed human rights and fundamental freedoms, it does not contain any references to the conduct of human rights due diligence, let alone environmental due diligence. Apart from a call to companies to integrate corporate sustainability reporting into their reporting cycle,<sup>126</sup> it only in general terms acknowledges the importance of CSR.<sup>127</sup> Similarly, the outcome document does not provide for any follow-up action regarding the responsibilities of business enterprises to care for the environment.<sup>128</sup>

As such Rio+20 is a missed opportunity to clarify the duties of states under public international law to care for the environment, as was discussed above in Section 2; a missed opportunity to clarify the responsibility of business enterprises to care for the environment, as discussed above in Section 3; and a missed opportunity to clarify the ensuing responsibility to provide access to remedies, as discussed in Section 4.

This article argues that corporate environmental responsibility is a necessary complement to CSR. As has been explained above, the 2008 Framework and the 2011 Guiding Principles – which currently qualify as the dominant paradigm in CSR discourse and the discussion on the scope of the duties of states and the responsibilities of business enterprises in the protection of human rights – are insufficient to provide the necessary protection of the environment and to advance the green economy.

In the absence of a UN Environmental Law Council (to complement the UN Human Rights Council), it is recommended that the newly established High-level Political Forum on Sustainable Development (which was established by the General Assembly on 9 July 2013 and which will replace the UN Commission on Sustainable

Development)<sup>129</sup> will develop a policy to integrate the greening of the economy (for example, by reference to UNEP's Green Economy Initiative), and as such corporate environmental responsibility, with the existing CSR framework.

Sustainable development requires that economic development, the protection of human rights and environmental protection are treated in an integrated and interdependent manner. Without a proper balancing, the ideal of sustainable development will never reach its full potential.

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125. See <www.ohchr.org/Documents/Issues/Development/OpenLetterHC.pdf>. In the preparation of Rio+20 various other actors emphasized the importance of addressing environmental CSR. See, e.g., A/RES/64/236 of 31 March 2010, paras. 13-14; European Commission, COM(2011) 363 final, 20 June 2011, paras. 3.3, 3.4, 4.4 and Council of Europe 15388/11, 11 October 2011, at 9, and J.-G. Strandenæes, *The Rio 2012 Conference – The Explanatory Roadmap to Rio+20*, 2012 at <www.unccd2012.org>. See also the so-called peoples sustainability treaty "Corporate Social Responsibility and Accountability Treaty", Dialogue on a Convention on Corporate Social Responsibility and Accountability, at <www.csradialogue2012.org>.
126. Rio+20 outcome document "The Future We Want", para. 47, at <www.unccd2012.org>.
127. *Ibid.*, paras. 13, 46, 69. The Rio+20 outcome document does also address the private sector in welcoming voluntarily commitments and partnerships, *ibid.*, para. 283 (commitments) and paras. 46, 71, 202, 207, 215, 217 (partnerships). The UNEP background document on green economy also only incidentally refers to CSR, see UNEP, 'Towards a Green Economy; Pathways for Sustainable Development and Poverty Eradication', 2011, <www.unep.org/greeneconomy>.
128. For the registered private sector commitments, see <http://business.un.org/en/browse/commitments>; for the registered partnerships, see <www.unccd2012.org/partnershipregistry.html>.
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