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SUSTAINABILITY, LIMITATIONS OF LAW, AND THE CHANGING RELATIONSHIP BETWEEN COMPANIES AND NGOs

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An important aspect of the discussion on sustainable development relates to the transboundary effects of multinational companies and transboundary production chains. Issues that will receive attention here include: the prevention of adverse environmental impact, safeguarding human rights and ensuring adequate working conditions for employees. Finding effective instruments to address these sustainability issues is a complex task. The problems are often interrelated, and many states, companies and other stakeholders may be involved.

Relationships between governments, companies and NGOs are changing in the context of the promotion of sustainable development. With regard to various sustainability issues, governments seem to 'lose their grip' and the relationship between companies and NGOs appear to become more and more important. This is illustrated by the increase in collaboration projects—lately referred to as 'partnerships'—between companies and NGOs in the challenge to find solutions for the various sustainability issues.

This is a conceptual chapter addressing the role of company–NGO collaboration in relation to the role of national and international law in finding solutions for complex and transboundary sustainability issues. We seek to integrate a theoretical perspective with practice and focus on European and North American multinational companies. NGOs in the context of this chapter can be local, regional or worldwide organisations dealing with the various sustainability issues, such as human rights, environmental protection and labour conditions.[1] In section 19.1, a general outline is presented of the changing relationships between government, companies and NGOs in addressing vari-

1 In this contribution, we specifically deal with NGOs. In the literature, the category of NGOs is regarded as an important category of civil society (Kaldor 2003).

ous policy issues. In section 19.2, the role of traditional national and international law in addressing transboundary sustainability issues is discussed. The potential asset of company–NGO collaboration in relation to the different links in the 'regulatory chain' is discussed in section 19.3. In the light of these discussions of company–NGO collaboration, the authors return to the role of national and international legislation in section 19.4: can the government sit back and relax, or does it still have a role to play? In section 19.5 our main conclusions are presented.

19.1 Changing relations in the 'governance triangle'

In discussions on promoting sustainable development, the government, companies and NGOs (as representatives of the broader public) are often placed in a 'governance triangle'. At the national level as well as at the regional and global levels, the relations between these three 'sectors of society' are continuously changing. Although practice is much more complex, in various states in the Western hemisphere 'dialogue' becomes more common than **command-and-control**, and particularly in recent years various dialogues have resulted in concrete collaboration initiatives.

Under the well-known 'command-and-control' approach attention was focused on the relation between government and companies, and norm-setting was primarily to be found in legislation. NGOs tried to influence the substance of legislation, primarily through their relationship with government. Relationships between NGOs and companies were generally characterised by 'confrontation' and 'keeping them at a distance'. Although under this 'command-and-control' model there was some dialogue, collaboration initiatives were not common.

Since the 1980s, the 'command-and-control' model has often been criticised in the field of environmental policy as well as in other policy areas (Harrison 2003<1999 in refs>: 2):

> In recent years, governments throughout the world have expressed increasing dissatisfaction with so-called 'command-and-control' environmental regulation, which is widely criticized as economically inefficient, adversarial, and administratively cumbersome.

Generally speaking, this dissatisfaction particularly changed the relationship between government and business: the *own responsibility* of businesses has become one of the central issues in policy-making in many states, especially in Europe and North America, and more often norm-setting is the result of intensive dialogues. Furthermore, the types of 'instruments' to regulate companies' activities are becoming more diverse. Instruments, such as voluntary agreements, certification systems and various types of financial instruments, have become more important to support the effectiveness of existing legislation, or even to replace legislation. This process can be observed in various states (De Waard 2000), but also at the European and international levels. For example, within the EU the recent governance debate clearly indicates that the 'command-and-control' approach is no longer considered to be the most promising path. Also in various EU policy fields, the changing view on the role of legislation as a gover-

nance instrument is clearly visible (European Commission 2001 <I or II?>). For example, in the field of environmental protection within the EU, for many years the institutions have been focused on adopting legislation; however, since the mid-1990s other policy instruments, such as voluntary agreements, certification and emissions trading have also received earnest attention.

This process of developing more efficient and more effective instruments based on the acknowledgement of the responsibility of business primarily changed the relationship between government and business. Generally speaking, in the 1990s the role of most NGOs was still limited to 'influencing the decision-makers' by confrontation or dialogue. This may be illustrated by the fact that, in the Netherlands up until the year 2000, more than 30 environmental covenants had been concluded between the Dutch Central Government and business; however, only once was an environmental NGO a 'contracting party' to such an agreement<confirm>.[2]

More recently, and partly parallel to the process described above, the types of relationships between governments and NGOs, and those between companies and NGOs are also becoming more intensive. Confrontational actions by NGOs, for instance legal actions, demonstrations, or accusations in the press, have certainly not disappeared, but they are more often involved in dialogues and collaboration initiatives. In the field of sustainable business, **partnership** appears to be the new magic word.

The term 'partnership' has been defined as 'a commitment by a corporation or a group of corporations to work with an organisation from a different economic sector (public or nonprofit)' (Googins and Rochlin 2000: 130, quoting Waddock). Googins and Rochlin have suggested that partnerships 'are, in fact, at very early stages of development, loosely arranged, largely unexamined, and exist only in very crude forms at the present' (2000: 131). Nevertheless, these authors also stress that 'cross-sector partnerships are essential mechanisms by which corporations and communities can maximize their goals' and that 'the challenge will be to move beyond the rhetoric of partnership and achieve a clear understanding of the potential of partnerships to be a vehicle of productive social change' (2000: 128, 143).

This development of changing relations between the government, companies and NGOs cannot be explained easily; most likely many factors influence this process. For instance, incidents concerning, for example, the offshore platform 'Brent Spar', oil pollution in Nigeria, and life-threatening labour conditions at the ship-dismantling sites in India increased the awareness of companies that NGOs may have a substantial influence on business reputation. Without doubt, these incidents have pushed the issue of stakeholder dialogue high on the agenda of the worldwide debate on sustainability and Corporate Social Responsibility (CSR) (Svendsen 2003). However, in this CSR debate many authors and institutions have stressed that the importance of good relationships with stakeholders, including NGOs, goes far beyond the issue of reputation management. Sustainable development includes many extremely complex challenges and it is generally recognised that governments, companies and members of civil society heavily depend on each other in finding solutions. This is possibly the most important reason

2 In 1992–93, WWF-the Netherlands and IUCN were actively involved in the negotiations of a voluntary agreement on the import of sustainable tropical timber in the Netherlands. In June 1993, Dutch timber companies, various Dutch ministries, and WWF and IUCN became contracting parties to this agreement.

why 'partnership' is considered to be a promising CSR instrument: Wilson and Charlton state that, 'it has been suggested that a partnership should seek to achieve an objective that no single organisation could achieve alone—an idea described by Huxham (1993) as "collaborative advantage" ' (Googins and Rochlin 2000: 131, quoting Wilson and Charlton).

This collaborative advantage may be of particular importance in relation to complex transboundary sustainability issues, such as the comprehensive protection of transboundary ecosystems and the improvement of transboundary food and production chains (Wijffels 2003). Limitations of national and international law to address these complex issues may enhance the changes in relationships and may in particular constitute an additional argument for companies and NGOs to intensify their relations, or even to start partnerships.

19.2 Limitations of traditional national and international law

19.2.1 National law

Transboundary sustainability issues are generally regarded as 'difficult to regulate' under national law. One of the difficulties relates to the issue of jurisdiction. Although, in the literature, many different definitions of the term 'jurisdiction' can be found (Malanczuk 1997: 109), most authors refer to this term when they speak about 'the lawful power to make and enforce rules' (Oxman 1987: 55). In international law, several principles have been developed which are used to determine whether a state has legislative jurisdiction ('powers to legislate in respect of the persons, property, or events in question', Malanczuk 1997: 109). The most important principles include: the territoriality principle, the principle of nationality, the protective principle, the universality principle and the passive nationality principle (Brownlie 1998; Molenaar 1998; Schachter 1991).

In the field of CSR, the limitations of state governments and national law are often linked with the sovereign territory of a state (Browne 2001):

> [The] partial process of globalisation has had a number of effects. It is weakening the traditional national structures of policy-making and limiting the power of national governments to control events in their own territory. The sense of authority over a particular geographic space has been diminished and in some cases lost. The word sovereignty has acquired an antique ring.

Although this general notion appears to be correct, stakeholders involved in the CSR discussion seem to conclude, too often and too easily, that no options exist in national law for regulating transboundary sustainability issues. For example, other principles—in particular the nationality principle—may provide interesting options and it should be noted that the principles are not absolute. Their exact meaning and the use of the different principles depend on the legal system and some principles are subject to continuous development. In particular the territoriality principle has been broadened over

the years (Orrego Vicuña 1988: 85). Furthermore, it is not clear whether 'the position is that the state is free to act unless it can be shown that a restrictive rule of treaty or customary law applies to it', or that a 'state is entitled to exercise its jurisdiction only in pursuance of a principle or rule of international law conferring that right' (Schachter 1991: 251; Molenaar 1998: 80); the *Lotus* case has been an important basis for the former opinion (Schachter 1991: 251). It has been stated that '[w]hatever the underlying conceptual approach, a state must be able to identify a sufficient nexus between itself and the object of its assertion of jurisdiction' (Oxman 1987: 55-56). This general requirement of a sufficient link is also emphasised by other scholars: 'It is well recognized in international law that a state cannot exercise legislative or enforcement jurisdiction unless there exists some linkage between the state and the event it acts upon' (Wolfrum 1986). Based on these thoughts, the options to regulate certain transboundary sustainability issues may be more comprehensive than is generally assumed.

Nonetheless, the possibilities for a national government to subject multinationals and international production chains to domestic legislation are not fully clear and may easily conflict with trade law and competition law as adopted within either the EU (Jans 2000: 263) or the WTO (Birnie and Boyle 2002: 707). Also the issue of supervision and enforcement raises important questions on the value of developing national law to address transboundary sustainability issues. Furthermore, even if the legal options to regulate transboundary sustainability issues through national law were fully clear and instruments existed for adequate supervision and enforcement, the question is whether the responsible national authorities have the political will to use these opportunities. Governments, at least in the Western hemisphere, are less willing to address social and environmental problems as a consequence of a growing call for deregulation (less detailed, simpler and more effective legislation) in many countries (European Commission 2001a; Mank 1990<1998 in refs>: 4). This is reflected by the following quotation from a recent keynote speech on CSR by the then Dutch State Secretary for Development Co-operation (Van Ardenne-Van der Hoeven 2003):

> Many societal organizations feel that the WTO and Western governments should enact binding laws and regulations. I would like to express my confidence in the strength of society. On the basis of this confidence, the government refuses to opt for the enactment of binding regulations.

19.2.2 International law

Particularly in view of the limitations of national law, international law at first glance seems to be the most suitable way to address global or transboundary sustainability issues. Certain limitations of national law may be addressed at the international level. For example, through amendments to international and European trade legislation, the national legislator may obtain more options for regulating particular issues in relation to products. International law may also constitute the legal basis or a stimulus for national governments to adopt domestic legislation that regulates activities that are conducted in other states or in areas beyond state jurisdiction. The Environmental Pro-

tocol to the Antarctic Treaty of 1991[3] is one of the examples. However, international law also has its weaknesses.

In the first place, international treaties are concluded between state governments, so some of the problems with state law mentioned above occur here as well. NGOs and transnational corporations do play a role in the process leading to an international agreement, but their formal position is not strong. NGOs may affect the outcome of international environmental law-making by using their political influence at conventions (Arts 1998: 304). A hybrid NGO like IUCN even does preparatory work at international conventions, such as drafting proposals (Birnie and Boyle 2002: 68).[4] Formally, however, only states can adopt binding international law. Recently, Ellen Hey showed that traditional international law is not well suited to address issues of concern to the international community as a whole which directly involve individuals, and groups: such as NGOs, indigenous peoples, or transnational corporations (Hey 2003: 5):

> Given the inter-state nature of the traditional international legal system and its focus on the shared interests of states, efforts to develop legal relationships involving entities other than states and that seek to address community interests entail the introduction of systemic change into the existing international legal system. In other words, the inter-state nature of the current international legal system entails that that system is ill-equipped to translate social relationships that are arising as a result of globalization into legal relationships.

Another limitation of international law is the fact that, in today's world, it is becoming increasingly difficult to get the international community to agree to specific legally binding rules, given the political, cultural, religious and developmental diversity of contemporary international society. Treaties—although a more useful medium than national legislation to address global sustainability issues—either do not enter into force, or apply to only a limited number of states. In particular in relation to transboundary sustainability issues, this is a severe handicap that may seriously limit the effectiveness of the international agreement concerned. For instance, even a relatively successful international law programme such as the 1985 Vienna Convention for the Protection of the Ozone Layer experiences difficulties such as a reluctance among developing countries, especially the world's largest producers of CFCs, China and India, to agree to reducing ozone-depleting chemicals, as well as the reluctance by some developed countries, especially the US, to finance protective measures in developing countries or to transfer Western technologies to these countries.

Also, transboundary sustainability issues may be difficult to address through international agreements if not all states involved decide to become contracting parties. For example, it will be difficult to limit the adverse effects for the environment and people caused by multinationals if not all the states that host the individual plants of a multinational corporation, or the states where the actual problems occur, are willing to join

3 The Protocol entered into force on 14 January 1998 and establishes a comprehensive system of obligations and prohibitions, addressing most types of activities in the region south of 60 degrees South latitude. For a detailed discussion, see Bastmeijer 2003.

4 The IUCN (World Conservation Union) has a hybrid character because it is a federative membership organisation with not only 758 NGO members, but also with state and government agency memberships.

(Birnie and Boyle 2002: 24-25). Another example is provided by the Antarctic Treaty System: the 30 contracting parties to the Protocol on Environmental Protection to the Antarctic Treaty 'commit themselves to the comprehensive protection of the Antarctic environment' (see Article 2<are there biblio details for the Treaty?>), but legally they have no instruments to prevent governments of other states from initiating, for instance, mining activities in Antarctica (Bastmeijer 2003).

Implementation, as well as monitoring and enforcement, is another weakness of traditional international environmental law. Implementation and enforcement must be carried out by national authorities (Bush 1991: 34):

> Many, if not most treaties, do not specify how the parties to it are to give effect to it under their domestic administrative procedures and legal system. It is the end result that matters: that each party ensures that a breach does not occur within its area of responsibility.

Usually, the implementation and enforcement efforts of the parties are subject to review by intergovernmental commissions and meetings of treaty parties. These international institutional arrangements, however, are often found to be disappointingly inadequate: they are no more than the expression of their members' willingness or unwillingness to act (Birnie and Boyle 2002: 181). Only recently, things seem to be changing somewhat for the better with the adoption of a strict enforcement mechanism under the Kyoto Protocol.[5]

Finally, international law traditionally has limited possibilities to address disputes concerning the implementation of treaties. In regular international law, there are usually either special tribunals, such as the International Tribunal for the Law of the Sea (ITLOS) or the International Court of Justice that can be addressed. However, these institutions are only competent to resolve disputes between states in so far as the states concerned explicitly accepted the jurisdiction of the institutions. Other interested parties, such as NGOs or business corporations, let alone interested citizens, cannot address these institutions. The establishment of an international environmental court, although proposed by many (Hey 2000), still seems to be a distant illusion.

The limitations of international law discussed above are not absolute. In recent years, many initiatives have been taken to find solutions and to improve the effectiveness of international environmental agreements. For example, David Freestone mentions various instruments that are applied to improve the implementation process at the domestic level, such as capacity building, financial support and the use of other non-binding instruments (Freestone 1999). However, at the same time it should be noted that the recognition of the complexity of sustainability issues has grown: attention is more and more focused on the protection of entire ecosystems and improving the sustainability of complete production chains (Wijffels 2003). Although there are examples of international environmental agreements that are based on these more comprehensive approaches (Redgwell 1999),[6] it is clear that the difficulties discussed above may constitute serious blockades against establishing effective international environmental agreements on these issues.

5 Decided upon during COP7, Marakesh, November 2001; see unfccc.int.

6 For example, Redgwell states that the 1980 Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR) is 'a path-breaking example of the ecosystem approach to resource

19.3 Company–NGO collaboration

From a governance perspective, the above limitations of traditional national and international law make the emergence of multistakeholder approaches all the more interesting. Multistakeholder approaches can be seen as an alternative way to steer multinational corporations towards a more sustainable way of doing business. Multinationals can be 'self-disciplined' through collaborate approaches, either in international business organisations or in bilateral or multilateral initiatives involving NGOs. The latter type of self-regulation has the advantage that NGOs offer a countervailing power to mighty transnational business corporations. In the (sharp) words of Falk: 'There is nothing in the history of business operations to suggest that the long-term public good can be safely entrusted to those whose priority is short-term profits' (Falk 1996: 17).

From the perspective of transnational corporations, co-operative action can be used to legitimise their actions at a time when government approval alone is no longer considered to be sufficient for demonstrating adequate sustainable performance (Grolin 1998: 220). Also, NGOs can provide corporations with social, ecological, scientific and legal expertise, and they can help corporations build social networks with other stakeholders (Stafford *et al.* 2000: 123).

As shown above, since the 1990s multistakeholder approaches have begun to emerge in international sustainability policies. Transnational corporations and NGOs, with or without the involvement of governments, together are trying to find ways to tackle social and environmental problems. Many of these collaborative activities involve legal or semi-legal activities.

Let us now focus on one of the types of multistakeholder approaches, that is to say the partnerships already mentioned in section 19.1. In partnerships, multinationals and NGOs together (A) set new standards, and (B) implement them. They (C) monitor and enforce both existing international law and these new standards without government or state intervention. They sometimes even arrange for (D) arbitration or other ways of dispute settlement. Traditionally, all of these elements of the 'regulatory chain' have been considered to belong to the domain of national or international state authorities. Below we will elaborate on these four elements of the regulatory chain, using the perhaps best-known examples of business–NGO collaboration projects, the Marine Stewardship Council (MSC) and the Forest Stewardship Council (FSC), as illustrations.[7]

19.3.1 Norm-setting

Sustainability standards can be set within industry or business organisations alone (Roht-Arriaza 1995), and in business–NGO collaboration projects. As stated above, the latter is preferred because of its greater legitimacy. Important examples in the field of environmental policy of such norms are those that are the basis of the FSC and the MSC.

The FSC, founded in 1993 by environmental groups and the timber industry, is basically a certification system. Products from and traceable to certified forests are entitled

7 The MSC has its headquarters in London (see www.msc.org), and the FSC in Bonn (see www.fsc.org).

to carry the FSC logo. Companies seeking to use this logo must receive certification of a 'chain of custody' from primary production through to retail sale: every wood product, therefore, must always be traceable to a particular certified forest. The certification system is based on 'principles' and 'criteria' intended to clarify the application of these principles. These principles and criteria set norms on how to sustainably manage forests and forest operations (Meidinger 2000: 130). One of the principles, for instance, states that biological diversity is to be conserved, as well as its associated values, water resources, soils, and unique and fragile ecosystems and landscapes, and by so doing, maintain the ecological functions and the integrity of the forest (principle 6). This principle has been elaborated in several criteria. For instance, one criterion states that rare, threatened, and endangered species and their habitats (e.g. nesting and feeding areas) must be protected, that conservation zones and protection areas must be established, appropriate to the scale and intensity of forest management and the uniqueness of the affected resources, and that inappropriate hunting, fishing, trapping and collecting must be controlled. Establishing the FSC was a reaction to the failure of governments to reach agreements, for example, on the introduction of a government-run certification system, within the International Tropical Timber Organization (ITTO) (Meidinger 2000: 131). To date, there is no binding international law regarding the protection of tropical forests.[8] The FSC rapidly grew into an organisation with more than 500 members including, representatives of environmental and social groups, the timber trade and the forestry profession, indigenous people's organisations, community forestry groups and forest product certification organisations from around the world. Government organisations are denied membership.

The MSC, modelled on the FSC, was founded in 1997 by Unilever, one of the largest buyers of fish, and the WWF to ensure the long-term viability of the global fish populations. The system was to introduce incentives for all stakeholders to work toward the goal of sustainable fisheries (Constance and Bonanno 2000: 130). Again, principles and criteria constitute the basis for an accreditation and certification system (such as the, internationally endorsed, precautionary principle). The MSC now has links to more than 100 major seafood processors, traders and retailers from more than 20 countries around the world. The difference with the FSC, however, is that, in this case, a large body of binding international law exists, for instance the UN Convention on the Law of the Seas (UNCLOS). UNCLOS gives rules on fisheries and the protection of the living resources of the high seas, some of which have been worked out in the recent 'Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks'.[9]

8 Only 'soft law', such as the 'Authoritative Statement of Forest Principles', adopted during the 1992 UN Conference on Environment and Development in Rio de Janeiro. This document not only has a very weak legal status, but its meagre content also received much criticism (NGOs have called the statement a 'chain saw charter').

9 This Agreement entered into force on 11 December 2001. All UNCLOS documents are available at the UNCLOS secretariat website, www.un.org/Depts/los.

19.3.2 Implementation

Implementation of the norms that have been agreed upon seems to be less of a problem as far as multistakeholder approaches are concerned than the implementation of traditional international law. Taking the FSC as an example, the organisation evaluates, using fixed procedures and standards, which certification bodies are able to provide certification. In this accreditation process, it is decided which organisations are allowed to carry out the certification scheme and evaluate forests. The (regular) certification organisations, therefore, implement the FSC scheme. At the same time, the NGO members of the FSC are actively trying to build demand for FSC products (by advertising, by establishing groups of retailers and product dealers committed to FSC products, and by persuading retailers to carry FSC products).

Multistakeholder agreements can also stimulate the implementation of traditional international environmental law. For instance, one of the principles of MSC states that fisheries management systems should respect local, national and international laws and standards.

19.3.3 Monitoring and enforcement

As stated above, the monitoring and enforcement of international environmental law is usually regarded as problematic, to put it mildly. Because of the inherent weakness of the public enforcement, NGOs traditionally played an important role in monitoring and enforcing international law, either in collaboration with governments through special monitoring organisations such as TRAFFIC, initiated by the WWF and IUCN to monitor the Convention on International Trade in Endangered Species (Braithwate and Drahos 2000: 574), or by exposing illegal conduct or even confiscating illegal fishing gear on the high seas (Greenpeace 2000). The European Commission has recognised this role of NGOs and is looking for methods to further facilitate its development <check>. In its 6th Environmental Action Programme, the Commission states that 'NGOs have an important role to play ... in monitoring the implementation of legislation' (European Commission 2001b: 62).

Monitoring and enforcing multistakeholder agreements like the FSC and the MSC is a logical part of the certification process. Not only is the work of the certifier peer reviewed before a certificate is actually issued, but the certificate is also subject to the minimum requirement of annual monitoring by the certifiers. Certifiers have the right to conduct irregularly timed, short-notice inspections. This is stated in contractual agreements between the certification body and the recipient company. In the case of noncompliance, additional conditions can be included in these agreements or the certificate can be withdrawn.[10]

Also with regard to other transboundary sustainability issues, supervision and enforcement may constitute an important element of NGO–company collaboration. For example, multinationals may collaborate with labour unions, environmental NGOs, or other NGOs in developing countries to check whether the various actors in the supply chain respect the company's sustainability policy. Recently, various 'incidents' in the

10 See, for instance, the MSC Certification Methodology, available at the MSC website, www.msc.org/Docs/CertmethIss3.doc<not found>.

media illustrate the desirability of such types of collaboration. For example, in its report 'Labour Conditions of IKEA's Supply Chain', the Dutch foundation SOMO concluded that various suppliers in India, Bulgaria and Vietnam 'violated' IKEA's code of conduct, 'IKEA Way of Purchasing Home Furnishing Products' (SOMO 2003). According to a press release of 24 September 2003, the Dutch labour union FNV—which had requested SOMO to conduct the research—argued that local and international labour unions should be involved in the process of implementing and monitoring codes of conduct.[11]

19.3.4 Dispute resolution

Resolving disputes concerning the implementation of norms set in multistakeholder approaches has long been neglected. Several of the NGO–multinational corporation arrangements did provide for objection procedures, but a full dispute resolution arrangement usually is missing. However, things are changing rapidly. For instance, the FSC now has a newly established Dispute Resolution Committee and an 'Interim Dispute Resolution Protocol'.[12]

19.4 The changing role of national and international law

From a legal point of view, the growing importance of multistakeholder approaches sheds a new light on the role of traditional law. This leads to a series of interesting questions that have to be dealt with in the near future, such as: what role, then, remains for government regulation? In our view, the changing relationships do not so much reduce the role of legislation, as change this role.

First of all, if the government is convinced of the value of a more intensive relationship and collaboration between companies and NGOs, legislation may be used to support this development. For example, legislation may provide for obligations to increase transparency and to improve access to information. As Halina Ward states:

> Mandatory legislation on various aspects of business transparency is emerging around the world. It can form part of company law, environmental regulation, or tailored legislation for institutional investors or on social and environmental reporting (Ward 2003: iii).

Generally, it is thought that government regulation has to leave as much room as possible for multistakeholder approaches and should aim to increase the institutional competence of the transnational corporation rather than aim to emphasise fixed rules, violations and fines. In the words of Selznick, responsive regulation tries to bring about the maximum feasible self-regulation (Selznick 1994: 401). However, it must be acknowledged that national and international state law will always impose some limi-

11 Published at the Dutch CSR Platform's website, www.mvo-platform.nl/pers/persbericht_24sept_ikea.html.

12 Available at the FSC website, www.fscoax.org/principal.htm<not found>.

tations upon NGO–multinational collaborations. For instance, NGO–multinational collaborations may, depending on the type chosen and the parties involved, lead to a cartel, thus restricting competition. This is not allowed under European and WTO law (Vedder 2002).

Secondly, a role for traditional government regulation may be to codify the norms that have been agreed on by companies and NGOs. There may be various reasons why this is desirable or even necessary:

a. To prevent free-rider behaviour. The level of ambition and the possibilities with regard to promoting sustainability differ from company to company, and the discussion and policy-making should not only focus on those companies that have shown commitment; it may be necessary to impose the negotiated norms on others as well. In this scenario, company–NGO collaboration influences national and international law by clearing the road for agreements on global, often complex, environmental issues. An example may be found at the national level in the Netherlands, where the Bill on Sustainably Produced Wood has been based upon the FSC.[13]

b. To ensure governmental supervision and enforcement. In particular, if company–NGO collaboration does not include a system of supervision and enforcement, the government may wish to codify the crucial norms in legislation to ensure government supervision and enforcement. For example, on the basis of a detailed study of an incident in the United States concerning StarLink corn—a genetically modified variety of corn—Rebecca Bratspies concludes:

> StarLink provides a chilling example of how badly an oversight system built solely upon voluntary compliance can fail . . . These failures undermine the basic assumption underlying compliance schemes based on cooperation and self-policing—a belief that public and private interests converge in environmental stewardship (Bratspies 2003: 631).

c. To protect the interests of third parties that may be affected without them being actively involved in the partnership (Verschuuren 2000: 20-21).

The above reasons for codification do not necessarily result in the establishment of two completely overlapping regimes (e.g. a partnership and government legislation). The result may well be that activities of companies are subjected to a combination of obligations and prohibitions in (international or national) legislation on the one hand and 'obligations and prohibitions' laid down in (international or national) agreements or codes of conduct on the other hand. For this phenomenon, the EU White Paper on European Governance introduces the term 'co-regulation', that is to say combining legislative and regulatory action with actions taken by the actors concerned, drawing on their practical expertise, but within the framework of (general) EU legislation (European Commission 2001a: 21).

13 Parl. Doc. I, 2000–2001, 23 982 and 26 998, No. 173a, 9.

19.5 Conclusions

In this chapter, we sketched the possible consequences of the changing relationships between the government, companies and NGOs in addressing various transboundary sustainability issues for national and international law. The reasons for dialogue and collaboration with NGOs go beyond the issue of 'reputation management'. We showed that, in particular with regard to transboundary sustainability issues, the limitations of national and international law might further stimulate active relationships between companies and NGOs. Although we think that these limitations are often presented as too absolute, it is clear that the issues are too complex to be solved by government regulation alone. We have shown that the relationships between companies and NGOs may play an important role in respect of all elements of the regulatory chain: norm-setting, implementation, monitoring and enforcement, and dispute resolution. In some cases, NGOs and companies may decide to start partnerships: the influence of NGOs in such partnerships is essential. Partnerships such as FSC and MSC differ from 'self-regulation' by businesses alone. Research into self-regulation in the field of the environment in the US shows that self-regulation projects should involve public interest groups (Steinzor 1998: 201). Co-operation with NGOs enhances corporate legitimacy. One could argue that, in these cases, there is no self-regulation, because the 'self' indicates the enterprise while, in the case of multistakeholder approaches, stakeholders together make rules and regulations. Therefore, these collaborations are sometimes described as *civil regulation*, as opposed to self-regulation (Bendell 2000: 245). In other cases, NGOs may decide to keep a distance in order not to complicate their watchdog role. An interesting question for further research would be whether and how NGOs can keep this watchdog role within partnerships with companies.

Let us, by way of concluding, turn once again to the three positions in the governance triangle. From the perspective of *governments*, they have to find a way to match state law with multistakeholder approaches. In our view, the changing relationships do not so much reduce the role of legislation as change this role. First of all, if the government is convinced of the value of a more intensive relation and collaboration between companies and NGOs, legislation may be used to support this development. Second, a role for traditional government regulation may be to codify the norms that have been agreed on by companies and NGOs, for example, to prevent free-rider behaviour and to ensure government supervision and enforcement if necessary. The ultimate goal of the ideal relationship between national and international law and multistakeholder approaches should be to legitimately, effectively and efficiently address global sustainability issues, that is to say issues that cannot be resolved by national or international law alone.

From the perspective of *business corporations*, it may be clear that the expectations of society go beyond the adoption of codes of conduct and 'partnerships'. The importance of adequate implementation and enforcement of the self-regulation systems and partnerships is widely acknowledged, and various international and national NGOs show that they are successful in their 'watchdog role'. Furthermore, companies will not have to deal with 'just' the NGOs. Government regulation will always remain a factor in regulating the 'ecological behaviour' of enterprises. A recent study by Thornton and others shows that corporate environmental management, market incentives and pres-

sure by local communities or environmentalists are the chief determinants of variations in firm-level environmental performance (Thornton *et al.* 2003). However, Kagan *et al.* <add to refs> also state that the larger improvements in corporate environmental controls have been associated with tightening regulatory requirements and intensifying political pressures.

From the perspective of *NGOs*, it may equally be clear that they are burdened with a heavy task. Governments may be pleased with the development that the relationship between companies and NGOs is becoming more intensive and may even use this development as an argument to play a less dominant role in finding solutions for transboundary sustainability issues. But are the NGOs sufficiently equipped? Peter Newell and Wyn Grant state: 'The shift towards self-regulation and voluntary codes may [...] thrust NGOs, however inadequately resourced or trained to perform the task, into a watchdog capacity' (Newell and Grant 2000: 228).

If the developments discussed in section 19.3 continue, multinational corporations and NGOs may have to perform tasks that are usually performed by large bureaucratic governmental organisations, staffed with thousands of civil servants. Many NGOs will not have sufficient financial capacity and personnel to play this role. Parallel to its legislative role discussed above, the government should consider this problem as well. Once it is clear that the role of states is reduced in favour of a more active role of NGOs and multinational corporations, it seems almost inevitable that in the future governments will offer NGOs financial and practical assistance.

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