The Changing Landscape of Liability
A Director's Guide to Trends in Corporate Environmental, Social and Economic Liability

SustainAbility

Swiss Re

Insight INVESTMENT
HBOS plc

FOLEY HOAG LLP
ATTORNEYS AT LAW

Definitions

Corporate Responsibility (CR)
A term that can embrace financial integrity, corporate ethics and dimensions of economic, social and environmental value added. In the wake of such scandals as the Enron collapse, the term has often focused back on narrower definitions of financial integrity. However, throughout this report we use CR to refer to a business approach embodying open and transparent business practices, ethical behaviour, respect for stakeholders and a commitment to add economic, social and environmental value. Corporate Social Responsibility (CSR) is also often used in this sense.

Sustainable Development (SD)
The best known definition is that of the World Commission on Environment and Development: development is sustainable when it 'meets the needs of the present without compromising the ability of future generations to meet their own needs'. It is linked to concepts like economic, social and environmental equity within and between generations.

Forewords

SustainAbility foreword

Over recent years, our work with companies has highlighted that there is growing awareness of a connection between the linked Corporate Responsibility / Sustainable Development agendas and risk management. Indeed, this has become the most compelling business case for boards to give these topics serious strategic attention. With this report we lay out the evidence that companies are operating in a new and more challenging environment where risks of legal action against them are greater than ever and where even if companies avoid trial and prosecution in real courts, society could put companies on trial in the court of public opinion. If these conclusions are true, they shift a company's corporate responsibility and sustainable development strategies from the side stage of public relations and reputation management to the centre stage of strategic risk management. It is the aim of this report to provoke debate and discussion among senior business leaders on this perspective.

As the final drafts were reviewed by SustainAbility's Council, it was noted that an increase in litigation or pressure for tougher regulations does not in itself necessarily result in increased liability. Indeed, as our report shows, many if not most of the legal actions in new areas of litigation, such as climate change or obesity, either become endlessly protracted or fail.

Our intention is not to overstate short term risks of new forms of liability, nor to propose prescriptive answers. Rather, we try to show that the challenges presented to companies on their social and environmental impacts are clearly signalling an era of heightened accountability.

Companies that address the issues we raise and that do so in an open, inclusive and pro-actively responsible way will, we argue, not only be aligned with twenty-first century standards of corporate governance, but will also be protecting and enhancing shareholder value.

Our work with business leaders highlights the increasingly difficult balancing act they are forced to pursue, often leading, as one of our clients observed, to a case of 'no good deed going unpunished'. In other words, even those following the highest standards of corporate governance and responsibility have no guarantee of fair treatment, let alone approval. But this, we argue, is no reason not to engage with, and respond accountably to, the widening range of social, environmental and economic issues that society expects business to address.

Our intent is to be helpful to directors in understanding some of the dynamics and dilemmas which are making business management ever more complex and unpredictable. There are no sure solutions in handling these issues, but we hope that this report will provide insight and constructive suggestions for ways to handle the new and emerging forms of risk that we explore.

Ultimately, we hope that companies will conclude, as we lay out in the report, that all of a company's stakeholders are likely to benefit from a planned and progressive shift from a 'passive' to an 'active' model of corporate responsibility.

Geoff Lye
Francesca Müller
SustainAbility

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Swiss Re foreword

In recent years adverse developments in liability regimes have raised concerns first and foremost in the US, with comparable trends now globalising. The emergence of a new compensation culture with an economic remedy for every harm, even when there is no damage, breach of duty or fault, is increasingly affecting corporations worldwide.

In 2003, Swiss Re was the first reinsurer to focus management attention on liability environments around the world. Our leadership had the foresight to consider the commercial and public policy issues resulting from the threat to the conditions essential for insurability. Today we continue to conduct our own as well as participate in third-party liability regime research. Our aim is to raise awareness among our clients and to encourage quality debate across the industry.

SustainAbility's initiative is critical for the better understanding of the inter-dependence of a company's legal and regulatory obligations with corporate responsibilities and strategies, and the resulting consequences with regards to its overall liability profile. We agree with SustainAbility that a corporation's 'license to operate' cannot simply be reduced to legal and regulatory compliance. We hope to demonstrate this through our own contributions in the area of sustainability and corporate social responsibility.

Beyond legal frameworks, it is societal, economic and most likely political considerations which have and will — without doubt — continue to shape the future liability landscape. The underlying trends need to be thoroughly understood and, where required, far-sighted adaptations in the arenas of jurisdiction, public policy as well as corporate and individual behaviour will need to be considered.

As one of the world's leading reinsurers, Swiss Re has a major role in understanding current and future risk landscapes. The identification and assessment of new risks as well as actively participating in building awareness of potential threats are ever important to our business of providing appropriate cover for risks. Only with the fundamental conditions for insurability intact can we responsibly create value for our shareholders, meet the demands of our wider stakeholder community and pursue the industry's social and policy objectives of spreading losses through insurance mechanisms.

We are delighted to be associated with this report which we believe adds a vital piece to the picture of the liability landscape and provides valuable assistance for corporate directors in correctly interpreting and operating in an ever changing liability environment.

Rick Murray
Chief Claims Strategist
Swiss Re

Insight Investment foreword

When a company has to pay out in a lawsuit, it is not usually the people who caused the problem — the company directors or employees — who end up paying the bill, but the shareholders. Investors therefore have a strong interest in understanding the true extent of the litigation risks facing companies, and using their influence to encourage managers to manage these risks carefully.

Insight Investment, a £72 billion London-based asset manager, is exploring how it can do both of these things better. We are looking at how to deepen our analysis of litigation risk in our investment decision-making. We also now routinely seek to encourage stronger risk management as part of our shareholder activism on corporate governance.

In the last couple of years we have become aware of the growing scale of litigation, particularly in the US, and the broadening front on which litigation battles are being fought. We are also learning that litigation can be damaging to a company's reputation even when it is unsuccessful in the courts. As yet, however, we are uncertain just how big a threat these new forms of litigation are to shareholder value. We are keen to learn more.


Geoff Lye


Francesca Müller


Rick Murray

We are therefore very pleased to support the publication of this report. In the pages that follow SustainAbility has offered a useful case for the prosecution. They believe that companies face some very significant and qualitatively different risks arising from litigation, both directly and associated with wider moral liabilities. The alarming picture they paint is one in which litigation could become an important factor driving share prices in numerous business sectors. It is too early to tell whether this picture is the right one. However, we very much hope that in making a forthright case, the report will provoke a productive debate on this subject. Some may believe that litigation is not going to be such a big deal for shareholders. If so, we look forward to hearing the case for the defence!

Craig Mackenzie
Head of Investor Responsibility
Insight Investment

Foley Hoag foreword

Businesses have always been expected to comport their activities to governing laws and regulations. Today, however, societal expectations are increasingly more demanding of companies than the legislated requirements that have traditionally guided the conduct of business. Moreover, corporate stakeholders have become very effective at employing laws and regulations as tools (or as weapons) to drive corporate conduct past literal compliance toward broader notions of responsibility and accountability.

Literal compliance with the law is of course necessary — it is the 'entry fee' for engaging in business. But mere compliance is no longer likely to be sufficient to protect companies from potential moral and legal liability. In this context it is noteworthy (and a bit ironic) that the new wave of laws and regulations emerging out of the recent corporate governance scandals in the United States require companies not merely to comply with the rules, but to build internal management systems driven by values and principles that — it is hoped — will make compliance with laws, regulations, and a far broader set of societal norms and expectations, more likely.

As one of the very few law firms in the world with an established Corporate Social Responsibility Practice, Foley Hoag recognizes the increasingly complex assessments that must be made by companies of their impacts on stakeholders' interests and of their legal and moral accountability to those stakeholders. We have the great pleasure of working every day with forward-looking companies and company leaders who well understand the importance and wisdom of thinking and acting beyond the minimums required by overly-narrow interpretations of the letter — rather than the spirit — of the law. We are, accordingly, very pleased to have been invited to participate as a sponsor of this report.

SustainAbility's report raises significant issues to which the business community and its stakeholders would be wise to pay heed. Although Foley Hoag expresses no views regarding the specific company examples cited in this report, we applaud the diligence, care, and thoughtfulness with which SustainAbility has analyzed the wide range of pressing concerns discussed in the pages that follow. We are grateful for the significant contribution that this report will certainly make to the larger dialogue on corporate accountability, responsibility and citizenship.

Phil Rudolph
Partner
Corporate Social Responsibility Practice
Foley Hoag LLP

Craig Mackenzie

Phil Rudolph

Executive Summary

The issue of past, current and potential liabilities has exercised boards of large companies for decades. This report makes the case that the landscape of liability — and therefore the risks for companies and to shareholder value — is changing and changing rapidly. It explores the evidence, maps the changes and attempts to guide business with the help of studies to navigate new and uncharted territory.

The changing landscape

This report is based on a number of key assumptions.

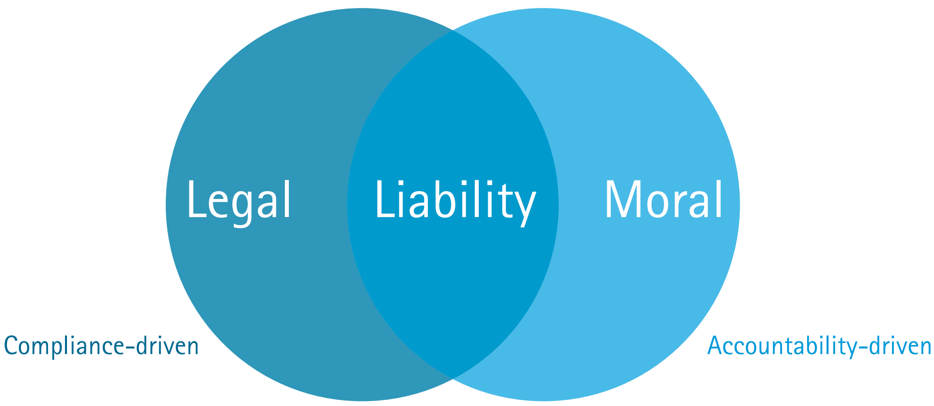
First, that legal liability is undergoing a period of significant change. The causes of action, standards of evidence and procedural rules that courts either tolerate or require are all shifting to describe a new legal landscape in which business must now operate.

Second, that business is vulnerable to new forms of 'legal activism'. This reflects three trends: the shift by NGOs away from attacking to exploiting legislation; the emergence, particularly in North America, of a highly profitable class actions industry; and the arrival of a new generation of lawyers, many of whom put correcting social and environmental injustice ahead of salary and career development.

Third, that there is an accelerating shift in societal values and expectations, and a corresponding mistrust of industry which feeds a demand for greater corporate accountability whether through new standards of governance, new disclosure requirements or accounting rules.

Fourth, that a progressive 'internalisation' of social and environmental costs is bringing business into the firing line of liability for its past and future impacts. This will not only bring huge costs to business for its on-going trading, but might also render companies vulnerable to legal action for past and future impacts resulting from corporate actions which are perceived to be 'irresponsible'.

01 **Legal and moral liability are converging**



02 **The shifting ground of liability**

Existing (Legal)		Emerging (Moral)
Court of law	→	Court of public opinion
Time-limited	→	Time-unlimited
Compliance to letter	→	Compliance to spirit
Ownership	→	Association
Money	→	Goodwill/badwill

Source: SustainAbility

Fifth, that there is a growing concern that companies (and others) should conform to the spirit as well as to the letter of the law. In other words, technical compliance may no longer be an adequate defence against social and environmental activists in the court of public opinion and even in the courts of law. Technical innocence or escaping accountability through legal expertise and subtle arguments on points of legal interpretation and precedent are becoming increasingly unacceptable in a society which expects real world performance and behaviour standards.

Finally, that laws and regulations often reflect and follow changing societal values and expectations. In other words, the legislative process serves as a lagging indicator of what society thinks, values and expects. We will argue that, in the early stages of social change, companies have always had — but never so much as now — an emerging and hardening 'moral liability' which affects a company commercially before it is felt as a trading or balance sheet liability, either by accounting regulation or in law.

Legal liability is deepening while moral liability is hardening

We look into what we see as 'hard' legal liability as well as 'soft' moral liability. We define legal liability as an obligation under local, national or international regulation or law. And 'moral liability' as developing when a company violates stakeholder expectations of ethical behaviour in such a way as to put business value at risk.[01]

'Moral liability' may also affect a company's licence to operate, which depends increasingly on compliance with stake-holder expectations rather than merely with the law.

We see increasing convergence between these two forms of liability as corporations come under scrutiny in both the courts of law and in the court of public opinion (Figures 01 and 02).

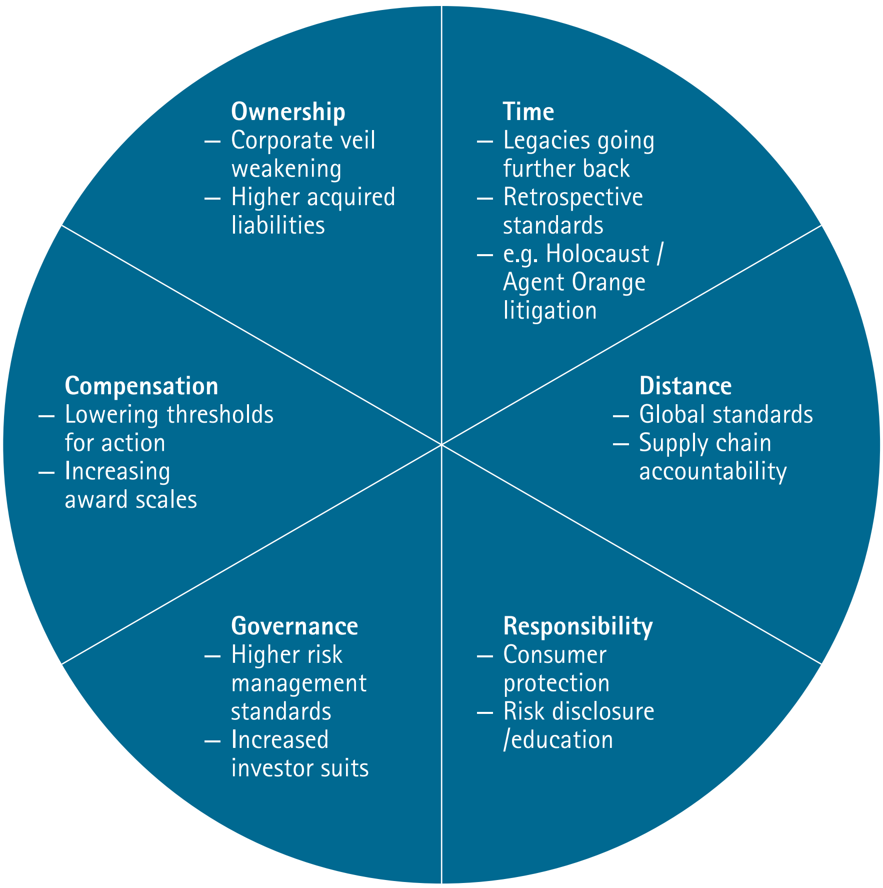
We also conclude that 'moral liability' is growing in its potential to adversely impact businesses that are still focusing exclusively on strict legal compliance.

The evidence points toward hard legal obligations presenting companies with accelerating and expanding current and potential risk. This risk is often related to areas which are also the subject of social and environmental activism. Because of this, company directors frequently either dismiss new risk issues as promoted by individuals or groups with no 'legitimate' authority, or see them as a problem to be delegated to the public affairs or corporate responsibility team.

It is our contention that companies need to distinguish between the two sorts of issues more methodically and more clearly, and that many of these issues are converging onto paths of liability.

Figure 03 illustrates the range of emerging hard liabilities and, in headline terms, the key areas of corporate exposure.

03 **Deepening legal liability**



Source: SustainAbility

Figure 04, by contrast, illustrates the range of softer, but equally powerful, issues facing business which fall under our banner of 'moral liability'.

We see the current corporate focus on Corporate Social Responsibility (CSR) and sustainability issues as the first response to 'moral liability'. Much of corporate activity is driven by public relations considerations with reputation protection as the primary driver. On the basis of our analysis, we recommend that this focus advance to a much more rigorous and robust process of risk assessment and risk management, at worst, and an opportunity for market shaping and winning strategies at best. CSR and sustainability issues for business are the soft signals of hardening liability potential.

Conclusions

1 Companies are at growing risk from litigation and liability more generally as a result of a well funded litigation industry; highly motivated legal activists; expanding boundaries of liability in both legal and accounting terms; and a decline in trust in business reflected in new governance and disclosure requirements.

2 New areas of liability are emerging that would not have made the radar screen of most companies a decade ago. Examples include climate change, obesity and human rights. In these and other areas, the accountability of business is irreversibly toughening, directly challenging the traditional compliance business model.

3 These risks will increasingly have to be assessed and disclosed either as a result of shareholder and stakeholder pressure or through tougher legal and accounting standards. In the short term, industry sectors are likely to develop voluntary codes and standards as a way of pre-empting regulation. Progressive companies will seek to get ahead of the curve through robust risk management.

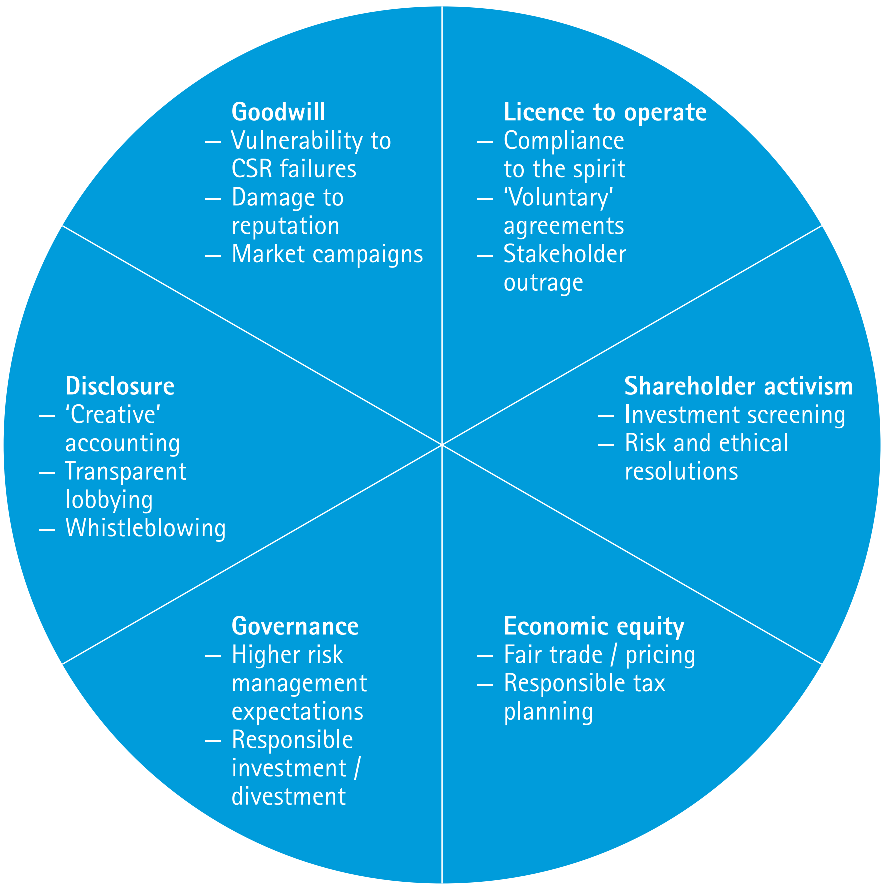
4 Beyond legal and regulatory liability, we have identified a powerful and accelerating range of risks which we term 'moral liability'. This reflects shifts in societal expectations of responsible business, which are forcing companies to adopt new business models in relation to accountability for past actions, supply chain issues and equity issues in terms of fair trade and fair pricing. The future earnings and balance sheet impacts of these are likely to be substantial.

5 Given the evolution of the judicial system, which progressively embeds changing societal values in laws and regulations, we can expect the softer moral liabilities to progressively harden and ultimately be converted to carry the force of law. The trends are clear and businesses concerned to protect medium and long term shareholder value can take prudent measures to reduce their vulnerability. We offer recommendations below.

6 On the basis of this evidence, we see a rapid convergence between companies' risk management and their CSR and sustainable development programmes. Where the latter have traditionally been regarded by many boards as public relations or philanthropic exercises, they will — or, at least, should — become the focus of strategic review, debate and action as key items on board agendas.

7 Finally, we contend that liability avoidance by good governance, prudent risk management and progressive policies and strategies should be the preferred route to protecting and enhancing shareholder value and maintaining a licence to operate.

04 **Hardening moral liability**



Source: SustainAbility

Key recommendations

While specific recommendations are made at various points throughout the report, we highlight those which we suggest boards and senior management use to address the issues raised in the report.

1 Shift from passive to active corporate responsibility

— Regard compliance as no more than an entry ticket to a market and not a goal.
— Review business strategies and management through the lens of 'active' corporate responsibility (Figure 05).
— Assume in risk management reviews that boundaries of accountability will progressively expand through the value chain and through the whole lifecycle of a product's development, production, use and disposal.
— Map current, emerging and potential legal and moral 'liabilities' as a central element of strategic risk reviews.

2 Pursue the highest standards of corporate governance

— Move to a 'beyond compliance' mindset (as with best practice in environmental management) in corporate governance.
— Include material strategic business risks (e.g. climate change, human rights and obesity) within corporate governance processes and systems.
— Extend compliance to include societal (as opposed to legal) expectations and requirements.

3 Ensure alignment of standards and behaviours

— Review the company's values and business principles — ensure that they are robust and up to date in areas like human rights.
— Review current operations for inconsistency in operating standards or processes and assess for risk potential. Drive progressively to align standards globally.
— Do not see geographic distance, shared ownership or joint venture status as a justification for, or defence of, lower standards.
— Review all of the key codes, charters, voluntary agreements and public social/environmental commitments which your company has committed to. Test them for consistency and alignment with current and emerging societal expectations.[02]
— Ensure that they are being complied with, both to the letter and to the spirit.
— Review direct and indirect (e.g. trade association) lobbying for consistency with internal and external positions and commitments.

4 Make stakeholder engagement an essential and integral part of risk management

— Engage with stakeholders (especially customers, employees, investors, NGOs) on their expectations of responsible management of social, environmental and economic issues.
— Use stakeholder engagement to alert the company to shifting expectations and as an informing element of risk assessment and management. Be prepared to review and to address emerging issues.
— Recognising that familiarity generally breeds favourability, push the boundaries of transparency and openness. Report fully and frankly to stakeholders on all material risks and issues.

5 Recognise legal activism as a growing force for greater accountability

— Be prepared for creative legal activists to seek new routes (different laws / different countries) and remedies to hold companies to account.
— Ask legal advisers to undertake stretch analyses of weaknesses and areas of vulnerability. Use the results to identify potential risk exposure.
— Integrate legal and reputational strategies: ensure organisational and process alignment with this need.

6 Review on and off balance sheet risks

— Insist on board review of all 'hidden' or off-balance sheet transactions and liabilities.
— Progressively shift to more open accounting which conforms to the spirit of accounting standards.
— Avoid any 'creative' accounting that has the potential to mislead investors or others relying on published accounts.

7 Apply new diligence to due diligence in investment and divestment processes

— Broaden due diligence terms of reference beyond traditional legal and financial liability.
— Include less tangible but increasingly critical issues such as:
  — Potential 'badwill'.
  — Reputational risk.
  — Potentially uninsurable risks.
  — Retro compensation (distant past resurrected or closed litigation re-opened).
— Assess divestment options for potential negative environmental, social or economic impacts. Weigh conclusions into the decision making.

05 **From passive to active corporate responsibility**

Dimension	Passive (Legal)		Active (Moral)
Honesty	Not lying / Factually true Correct to the letter	→	The whole truth True to the spirit
Transparency & Disclosure	'Need to know' Compliance disclosure	→	'Right to know' Complete disclosure
Demonstration & Engagement	Information Exclusive / Narrowly defined	→	Engagement Inclusive / Broadly defined
Respect	Compliance-driven Messages to suit the moment	→	Accountability-driven Clear and consistent messages

Source: SustainAbility

Introduction

Around the world, boardrooms are grappling with new and expanded concepts of corporate responsibility, accountability, governance and – increasingly – liability. Companies that have long believed themselves safe from the type of crises experienced by Shell over Nigeria or Nike over child labour are now feeling increasingly vulnerable. In a world characterised by instant global communication and decreasing trust in business, disgruntled or outraged stakeholders are holding companies to account for perceived societal or personal damage, often in a court of law. Perhaps most worryingly for business leaders, companies are being challenged for actions and decisions taken outside their direct line of control, occurring decades if not generations ago, and for impacts never before interpreted as their responsibility. This demands, we believe, robust and strategic approaches to risk management by business leaders if they and their companies are to thrive in the 21st century.

In our work with major corporations, we have noted growing confusion and apprehension over potential legal liability for corporate social responsibility (CSR) issues. We judged it timely to explore how existing forms of legal liability and softer forms of 'moral liability' interrelate. This report provides, we believe, the first serious investigation of this critical issue.

Concerns over liability are unfolding against a background of rising expectations of responsible corporate behaviour and governance. The collapse in trust in business precipitated by the Enron / Worldcom debacles has been a major recent influence.

More fundamentally perhaps, the intense focus on companies reflects public unease over the concentration of economic power in the hands of ever fewer 'mega-corporations', and doubt that existing laws and regulations will ensure adequate levels of corporate responsibility.

Chapter 1
Legal Liability
Explores the shifting landscape of legal liability, defined as an obligation under local, national or international regulation or law. We show how and why legal liability is becoming an ever more significant business risk, with companies more likely to be challenged in court, and arguably more prone to suffer business harm, due to rising levels of litigiousness, legal activism, class action suits and compensation.

Furthermore, the boundaries of companies' legal liability are expanding, with companies facing challenge in court for activities undertaken in the distant past or in locations far removed from corporate headquarters. Many of companies' traditional protections from liability – separation by geography, incorporation or time – have been attacked and, in some instances, undermined in the last five years.

Chapter 2
Moral Liability
Investigates the growing risk of 'moral liability': we propose that moral liability develops when a company violates stakeholder expectations of ethical behaviour in such a way as to put business value at risk. We see how issues once dismissed as soft and unquantifiable, such as reputation, are increasingly tangible, in part because mainstream players like investors and insurers are linking CSR with business value. At the same time, the boundaries of moral liability are expanding, particularly with respect to economic equity, through fair trade, fair pricing, and fair taxation.

Finally, we present four Studies to outline what these trends in moral and legal liability might imply for companies seeking to understand and manage their exposure:

Study 1
Climate Change
Looks at the new risks facing companies arising from the gathering momentum to hold companies to account for the enormous social and economic costs associated with climate change.

Study 2
Human Rights
Shows how committed legal activists are using US and European courts to hold companies to account for alleged complicity in human rights abuses in developing countries.

Study 3
Obesity
Explores how business is increasingly being held accountable for broad societal problems, despite often indirect or weak connections between companies' activities and the alleged harm.

Study 4
Legacy
Examines the Bhopal disaster to assess how traditional due diligence can fail to protect an acquiring company from stakeholder demands for continuing reparations related to pre-acquisition legacies.

Note
While we draw general conclusions throughout the report and specifically at the end of each study, the overall conclusions and recommendations are reported in the Executive Summary and are not repeated in the individual chapters.

A key message from this investigation is that the longstanding debate over the balance between voluntary and mandatory requirements is increasingly academic. We see that in many areas, soft and hard forms of liability are converging and blurring: CSR standards are progressively shifting from the 'soft' voluntary codes into 'hard' regulation and legislation, and corporate moral liability is being used to challenge companies in the court of public opinion. Legal compliance is, in essence, the entry fee for companies doing business anywhere in the world. But legal compliance on its own may no longer be enough. Companies that cling chiefly to technical compliance as their business strategy are unlikely to prevail in the court of public opinion even if they succeed in the courts of law. Instead, we argue for a proactive, trust-based approach, firmly grounded in a deep understanding of emerging societal expectations for responsible corporate behaviour.

Chapter 1
Legal Liability
A growth industry

In this chapter we show how legal liability for environmental and social impacts has become an increasingly significant business risk, with more companies and industries likely to be challenged in court and to suffer greater harm to their business as a result. We define legal liability as a formal and enforceable obligation under local, national and/or international laws and regulations.

Legal liability — the growing risk to business value

A number of simultaneous and linked trends are increasing companies' exposure to legal action. These include:

— Litigiousness is on the rise, globally.
— Activist lawyers are targeting companies.
— Class action suits are spreading.
— Cost of litigation to companies is escalating.
— Securities litigation cases are increasing.

Rise in litigiousness

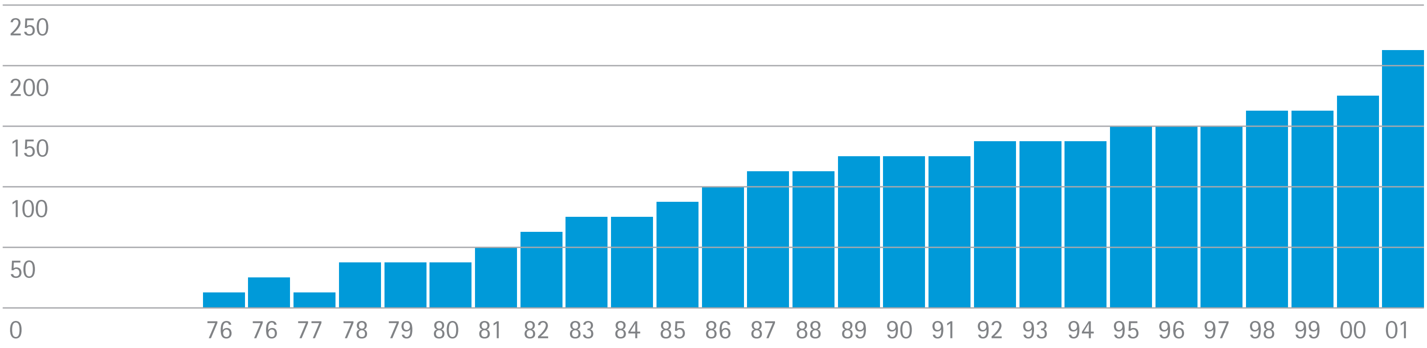
Companies' risk of being sued is arguably higher than ever before, with litigation by consumers,[03] workers, local communities, NGOs and investors all on the rise. While many, if not most, of these actions are unsuccessful, companies face a more immediate risk in the cost of defending cases and the exposure given to the underlying issue through increased media attention.

One indication is the cost of the US tort system, which has risen from 0.5% to 2.3% of gross domestic product (GDP) during the last three decades. Projecting forward, over 3% of GDP ($360 billion)[04] could be spent annually on US litigation within this decade: extraordinary as it may seem, this is the equivalent of total US defence spending in 2002. With only a quarter of this total cost going to compensate victims, it is clear that liability is a major growth industry in the US.

As recently noted by Phil Rudolph, partner with the CSR practice group of Foley Hoag LLP (sponsor of this report), 'Stakeholders have become increasingly sophisticated and are increasingly clued in to the effective use of tools of leverage and persuasion. The legal system (particularly in the US) offers up an incredibly usable and effective toolbox for these groups. Unique aspects of the US legal system that make litigation easier and more appealing for plaintiffs — e.g. contingent fees for lawyers, large potential punitive damages, no requirement that the loser pays the other side's costs, and the availability of civil juries who are more likely than a judge to "hold corporations accountable" even where the legal claims are weak or non-existent — create something of a "perfect storm" of factors that makes litigation an increasingly popular tool to achieve an array of social goals for which the courts might not otherwise be the best vehicle.'

Litigiousness is also expanding outside the US. In a number of continental European countries, regulatory and legal changes are encouraging people to seek courtroom redress. As Paul Bowden, an attorney at Freshfields, Bruckhaus Deringer notes, 'There is unquestionably an increased willingness to resort to courts and civil compensation claims, even in those countries without a tradition of litigiousness, like France and Spain.'[05] In some countries, the trend is so striking that it has earned its own label — the new 'compo culture' in Ireland or 'punting for cash' in the UK. Increasingly aggressive lawyers and keen awareness of multi-million dollar settlements in the US have further reinforced the trend.

06 **Total tort costs (US) 1975–2001**
$ billions



Source: Tillinghouse — Towers Perrin

Possible drivers include the weakening of Europe's welfare state, leading people to seek their own self-help remedies, often through legal action. In France, where some 1,500 plaintiffs recently launched coordinated cases against a government unemployment agency, workers' disenchantment with traditional union tactics may also be helping to fuel the litigation trend. And some have even cited American courtroom dramas, which have familiarised broad audiences with American litigation — and its huge potential payoffs — as drivers of Europe's new litigiousness.

Activist lawyers

Activist lawyers are increasingly using individual and class actions to challenge companies on environmental and social grounds. As we explore in Study 3, legal activism is pushing the boundaries of corporate responsibility to include obesity, considered by some to be the next tobacco saga. The parallel has not been lost on major food industry players who are scrambling to defuse the issue by reducing unhealthy fats and salt in their recipes and accelerating their consumer education programmes.

Undoubtedly, much of the new litigation facing companies over issues such as obesity is largely driven by potential for huge legal fees, reflecting the high degree of societal harm and the deep pockets of multi-nationals. Yet equally, if not more important, is the determination of activist lawyers to hold companies to account for perceived social and environmental damage. These lawyers often work within the not-for-profit sector, add legal expertise to the campaigning community and are akin in many respects to traditional activists.

Several law schools now teach specific courses in legal activism. According to one school, legal activism is 'the use of the legal process, not to benefit individual clients, but as a powerful tool for effecting social change and advancing the public interest.' The course aims to teach students to 'maximize legal leverage.' [06]

Activist lawyers are also playing a key role in the human rights arena. As we explore in Study 2, activists and victims from all over the world have created an increasingly sophisticated network to demand an end to gross human rights abuses, accountability for perpetrators and reparations for sufferers. In the last decade, the original focus on state accountability has shifted toward companies. With boycotts, 'name and shame' campaigns and finally litigation, activist lawyers are forcing the corporate world to recognize and terminate its role in human rights abuses.

International NGOs, including Human Rights Watch and Amnesty International, are actively monitoring perceived connections between human rights abuses and the actions of international corporations in places like Angola, Burma, the Congo and Sudan (where civil wars rage while political leaders are financially supported by corporations continuing to extract resources), and countries like Colombia, Ecuador, and Indonesia (where companies are charged with profiting from poor and often illegal labour standards).

The focus on legal remedies is fuelled in part by disillusionment with voluntary codes of conduct, such as the UN Global Compact.[07] As we discuss below, courts in the US and UK are increasingly rejecting traditional arguments of sovereignty and hearing cases where the violation occurred outside of the court's geographic location. And national courts are becoming increasingly open and amenable to human rights claims.

Class action suits

In the US, class actions are among the most powerful weapons in the plaintiffs' arsenal. They allow multiple claimants, who might otherwise lack the resources or incentive, to band together and press their claims against an individual or group of plaintiffs. Class actions are most often directed against companies, are costly and resource-intensive to defend against and they frequently result in large plaintiff awards or settlements.

In contrast to the US, many European countries do not allow the filing of class actions. But this is beginning to change. Recent changes in the UK (Figure 07), Spain, Sweden and Norway have opened the way for groups to file suits that are similar though not identical to class actions. Even in countries where class actions are still far off — including France, Germany, Netherlands and Ireland — legal tactics to approximate the class action, such as coordination of cases, are beginning to emerge.[08]

Escalating cost of litigation

In the US, award scales have escalated in recent years. Settlements for tort litigation now exceed $200 billion, or 2.2% of GDP annually.[09] Tort costs grew by 13% in 2002, on the heels of 14% growth in 2001. By contrast, tort costs grew only 3% in the previous decade, from 1991 to 2000.[10] Of course not all tort litigation targets business, but much of the recent growth is due to lawsuits against companies.

'The biggest emerging risk for insurance groups worldwide is the proliferation of the US tort system or elements of it.'
Raj Singh
Chief Risk Officer
Allianz AG

07 **Key differences between US class and UK group actions**

US class actions	UK group actions
~15 years track record	~4 years track record
Punitive damages	No punitive damages
Higher awards	Generally lower awards
Each side bears own costs	Loser pays winner's costs
Contingency fees	No contingency fees
Juries	Single judge / No juries

Source: SustainAbility

Among the reasons for these increased tort costs are the rise in securities litigation and the increase in class actions and large claim awards.[11] Over the past two decades, US class action recoveries have skyrocketed, jumping from around $3 billion in 1981–1985 to just under $20 billion in 2001–2003.[12]

The high awards and fees that business has had to pay in particular fields of litigation have played a role as well. Legal costs associated with asbestos litigation up to 2002 have been assessed at $54 billion.[13] Similarly, tobacco litigation costs are significant, with industry leader Philip Morris alone estimated to be spending $600 million a year on lawsuits.

Another indication of mounting legal liability is the insurance cost associated with litigation. Taking asbestos litigation as an example, US insurers have already spent about $21.6 billion on asbestos claims, while the total cost to US and non-US insurers and corporations has been estimated at $200 billion.[14] A M Best, the insurance industry experts, project that the industry was under-funded in 2002 by roughly $33 billion, relative to its ultimate asbestos liability.[15]

Significantly, they also report 'previously settled product liability claims are (being) reclassified under other areas of the general liability policy (thereby reopening formerly exhausted product liability aggregate policy limits to additional claims)'. Cases have also extended to second line claimants who have been exposed to asbestos in construction and other industries, thus setting the stage for further claims to come. In Europe, the absence of class actions and lawyers' contingency fees has so far kept litigation costs from climbing to US levels, although a number of changes including 'no win, no fee' actions are sparking fears of coming rises in litigation costs.

Even legal victories can be very costly, as McDonald's found in the aftermath of the McLibel trial. McDonald's, believing it was protecting its reputation, was awarded £40,000 in damages after winning a lengthy legal battle against a small group of activists that had circulated unfavourable leaflets. In addition to incurring costs estimated at £10 million, however, the company also lost huge amounts of credibility and goodwill through negative media coverage. Indeed, the case served to generate huge publicity for the activists' case, and the offending leaflets continue to circulate on the Internet.[16]

Nestlé's action against Ethiopia to recover $6 million owed as a result of nationalisation fell equally foul of public opinion. Nestlé's action was a 'matter of principle', according to the company. 'In the interest of continued flows of foreign direct investment which is critical for developing countries, it is highly desirable that conflicts are resolved according to international law and in a spirit of fairness,' said a spokesperson. The company finally settled for a lower sum and donated the money to Ethiopian famine relief programmes.

Securities litigation

As discussed above, shareholders are increasingly likely to use the courts to press for change in companies.[17] In the US, private securities class actions have recently been running at about 200 cases a year.[18] More remarkable has been the rise in settlement values. In 2003, the average settlement value for securities litigation cases was $23.2 million (Figures 09 and 10). This was an increase over 2002, when average settlement value was $19.9 million, which itself was up 12% over 2001 and up 40% over average settlement value for 1996 through 2000.

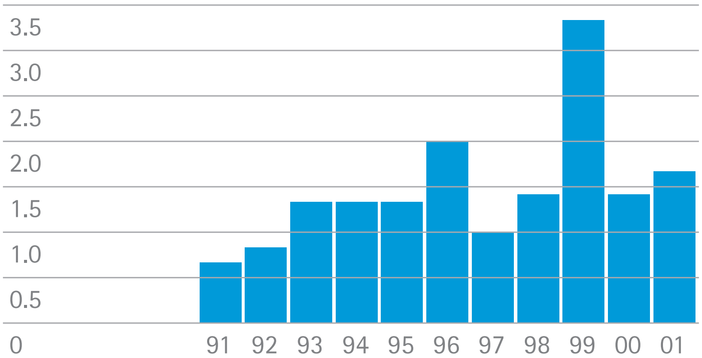
From 1998 to 2002 there was a steady rise in securities class action lawsuits filed against Fortune 500 companies. The latest data from PricewaterhouseCoopers show a marked decline in equivalent filings during 2003, although the reasons for this are unclear (Figure 11).

Fuelling these actions is a sharpening focus on corporate governance following the Enron and WorldCom debacles and the subsequent European scandal at Parmalat. The US has enacted the world's most stringent regulatory demands on corporations, with stiff penalties for the companies and directors who breach the new rules. The Sarbanes-Oxley Act is the toughest overhaul of securities litigation since the 1930s, and has significant international dimensions. In part influenced by Sarbanes-Oxley, US shareholders are increasingly likely to pursue claims against overseas companies. A November 2003 PricewaterhouseCoopers study found that since the start of 2002, foreign companies had faced unprecedented shareholder class actions and increasing settlement values in US securities litigation.[19]

In Europe, emerging regulations and heightened public pressure for improved corporate governance may lead to the spread of US-style securities litigation. As PwC's Andrew Gordon puts it, 'The reality is that the litigation roulette wheel is starting to spin "over here" as well as "over there".'[20] Sarbanes-Oxley is judged to be having an increasing impact on European companies both in the US and at home.[21]

'There's concern now that this blight is spreading to Europe . . . '
Lord Peter Levene
Chairman of Lloyd's of London
(commenting on the US tort-litigation system)

08 **Asbestos losses paid out (US) 1991–2001**
$ billions



Source: Insurance Information Institute

Moreover, in the European Union, over forty corporate governance codes have been adopted over the last decade, at national or international level, with the declared aim of better protecting the interests of shareholders and/or stakeholders.

In the UK, recent changes to the Combined Code[22] have increased the accountability of boards and non-executive directors. The government is also overhauling UK company law, with particular focus on corporate governance. The Company Law Review Steering Group is strongly recommending changes to make it easier for shareholders to sue. Although a final Bill on company law reform is not expected before the next general election, the pressure for change is evident.

One UK lawsuit is already sending ripples through boardrooms. In October 2003, the UK High Court held that Equitable Life, the troubled insurer, had the right to sue nine former non-executive directors and six former executive directors for their alleged role in bringing the company to the brink of collapse.[23] The trial — scheduled for April 2005 — will raise new issues such as the prospect of non-executive directors incurring liability for decisions taken at board meetings they did not attend.

Boundaries of companies' potential legal liability are expanding

Alongside the overall tendency toward greater use of the courts discussed above, a parallel set of pressures is building to expand companies' legal liability for CSR-type issues in particular.

In this section, we explore how:

- Momentum is building for tougher laws on corporate transparency.
- Accounting regulations are tightening.
- Liability is expanding over time.
- Liability is expanding over distance.
- Companies are being challenged across the supply chain.
- Companies can be held responsible for consumer behaviour.

New laws on corporate transparency

Momentum is building for tougher legal requirements for corporate transparency and disclosure. In 2001, the French Parliament approved legislation requiring mandatory disclosure of social and environmental issues in company annual reports and accounts. The legislation applies to all companies listed on the 'premier marché', or those with the largest market caps.[24] Denmark and the Netherlands have both enacted legislation to encourage 'triple bottom line' reporting, whereby social and environmental information is disclosed alongside financial information. Germany has introduced CSR reporting requirements for companies involved with pension funds.[25]

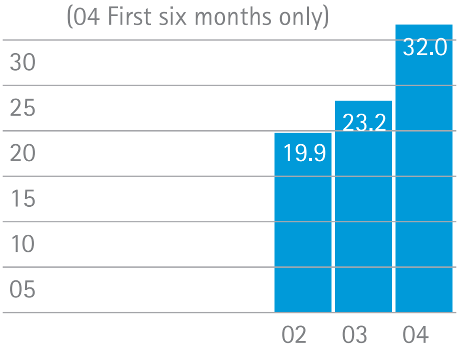
In the US, a Corporate Code of Conduct Act, introduced in Congress in 2001, would have required US-based multinationals to make full public disclosure of issues such as 'worker rights practices and labor standards, working conditions [and] environmental performance.'[26] Although this particular Act was not passed, a US-based International Right to Know Coalition is actively promoting legislation that would require US companies to report on key environmental, human rights and labour issues.[27]

A wave of transparency-related legislation has been targeted at institutional investors, requiring pension fund managers to report on the environmental or social screens they apply to their investments. The UK led the way with Parliament's approval of the Pension Disclosure Regulation in 1999. The Regulation requires all trustees of UK occupational pension funds to disclose the extent to which social, environmental and/or ethical considerations are taken into account in, 'the selection, retention and realization of investments.'[28] Belgium, Germany and Australia have since enacted similar legislation of their own.

In terms of litigation, perhaps the best-known transparency-related lawsuit is the Nike v. Kasky case in the US. In 1998 Marc Kasky sued Nike alleging that the company's public relations campaign regarding treatment of workers in overseas factories was misleading. Nike moved to dismiss the case on the grounds that its statements had constituted 'political discourse', protected by the US Bill of Rights. The case rose through the courts until May 2002, when the Supreme Court of California ruled against Nike. Nike's appeal to the US Supreme Court was dismissed in June 2003. The case was then set to go back to trial, to decide whether Nike's statements had in fact been false and misleading. But the parties settled in September 2003, with Nike agreeing to donate $1.5 million to an NGO focused on labour issues.

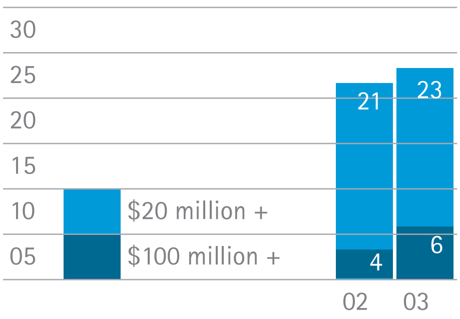
It is still unclear what the ultimate effect of Nike v. Kasky will be. There is a strong argument that the case has made companies less willing to speak out voluntarily, or at least more cautious when they do, thus putting a chill on transparency.

09 **Securities class action lawsuits average settlement values**
$ Millions
(04 First six months only)



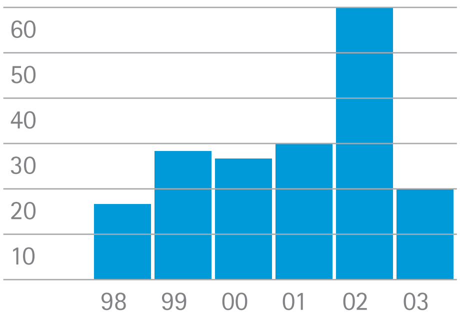
Source: PricewaterhouseCoopers

10 **Securities class action lawsuits increase in large settlements**



Source: PricewaterhouseCoopers

11 **Securities class action lawsuits against Fortune 500 companies**



Source: PricewaterhouseCoopers

But on the other hand, public pressure for factually correct information on social and environmental issues – acknowledged as matters of public interest by both the courts and the parties in the case – is unlikely to diminish. Furthermore, corporate reticence may only increase the pressure for mandatory reporting on environmental and social issues.[29] Thus, the ultimate repercussions of this case may yet be to increase transparency.

Both legislation and litigation are still developing in this area and both are likely to increase the pressure on companies for greater transparency over time.

Accounting regulations are tightening

The broadening and deepening of environmental regulation[30] has been strongly reinforced by more stringent disclosure requirements and new international accounting standards. In essence the new standards require a far more rigorous approach to the assessment and disclosure of environmental liabilities in financial accounts.

The International Accounting Standard 37, which came into force in 1999 and has to be adopted across Europe from January 2005, more clearly defines contingent liabilities and specifies the nature of liabilities that need to be provided for in financial statements. Its application to environmental issues has the potential to uncover past and future liabilities that were previously not recognised, disclosed or quantified. The implications for the accounting treatment of emerging issues like climate change are huge.

The issue of materiality comes into play for auditors who have to make a judgement with the directors of their client companies on the point in time when a liability under the new standards should be disclosed and quantified as a current or potential cost to the business. Given that materiality is also a key issue in the development of sustainability reporting, it is likely that the combination of regulatory and stakeholder pressures for earlier rather than later disclosure will build inexorably over the next decade.

Especially relevant to the CSR debate is the definition given by Standard 37 to a 'constructive obligation' which must be properly reflected in a company's accounts. As explained in the ACCA/KPMG report Environmental Liabilities: Paying for the Past, Providing for the Future, a constructive obligation 'derives from an enterprise's actions where:

– by an established pattern of past practice, published policies or a sufficiently specific current statement, the enterprise has indicated to other parties that it will accept certain responsibilities; and

– as a result, the enterprise has created a valid expectation on the part of those other parties that it will discharge those responsibilities.'

'The potential impact of "constructive obligations" in the CSR context cannot be overestimated', notes Preben Soerensen, the global leader of Environment & Sustainability, Deloitte Touche Tohmatsu. Allied to a general aversion to the creative accounting of the '90s and pressure to conform to the spirit rather than the letter of accounting and other regulations, these standards are likely to have a huge effect on companies' balance sheets and shareholder value.

Liability is expanding over time

Basic to any legal system is the concept that a cause of action may not exist indefinitely. Beyond a certain period of time, legal proceedings related to a given offence or civil wrong may no longer be brought. In common law systems, this period of time is defined by a *statute of limitation*. In civil law systems, this period is often set by a *period of prescription*. The periods vary by jurisdiction, area of law and nature of the offence.

In recent years, however, statutes of limitation related to corporate offences have been persistently eroded. The pursuit of corporate wrongdoing has been stretching ever further back in time. The pursuit of intergenerational equity, which has generally focused on future generations in the sustainability context, is now being put into reverse gear in the legal context. Over the last decade, Holocaust, slavery and Apartheid-related suits related to alleged wrongdoing many years ago have all made the headlines, with large companies in the defence dock in each instance.

As each retrospective case makes headlines, today's victims of ever more distant historic grievances see an opportunity to hold companies to account for past injustices – and a growing band of lawyers are ready, willing and motivated to take on their claims.

Liability is expanding over distance

Traditionally, court rules define the appropriate geographic venues for both the location of lawsuits and the location of parties who are subject to the jurisdiction of the court. Corporations meanwhile have avoided prosecution for geographically distant acts or those of their subsidiaries. They have done so by employing a variety of legitimate defence strategies.

'Just because slavery ended over 100 years ago doesn't excuse companies who benefited from it through unjust enrichment and ill-gotten gains.'
Deadria Farmer-Paellmann
(a lead attorney in the US slavery reparations litigation)

One common strategy is to invoke the legal principle of *forum non conveniens*, which is a claim of improper forum often used to remove a case to another geographic jurisdiction that is argued to be more convenient to the parties and the court.

But this strategy has been weakened in recent years, most notably in litigation involving human rights claims. Known as 'foreign direct liability' litigation, a new wave of cases is targeting parent companies for their impacts in distant geographical locations.[31] We explore this litigation in more depth in Study 2 (Human Rights). Even if these various cases fail, they send a strong signal to companies that the historic separation of one company from another by ownership or geographic location may be a successful short term defence, but one which may be subject to significant erosion over time.

Legislative initiatives are also emerging to hold parent companies to account in distant locations. In the US, a Corporate Code of Conduct Bill introduced in 2000 proposed a code of conduct for all US-based corporations with more than 20 employees abroad. The code covered labour rights, human rights, transparency and environmental protection and contained detailed liability provisions to ensure its enforcement. Significantly, the code would have applied not only to companies' direct operations, but also to subsidiaries, subcontractors, affiliates, joint ventures, partners, and licensees. Although this bill had limited support and was not passed, it signalled growing political interest in corporate accountability.[32]

Similarly, in the UK, two Corporate Responsibility Bills have been introduced in Parliament, backed by a coalition of high-profile NGOs.[33] The first, introduced in June 2003, aimed to establish a directorial duty of care with respect to environmental and social impacts (rather than just financial duties to shareholders), and it specified that companies would be liable in UK courts for environmental damage or harm to workers, no matter where it occurred.[34]

When the first bill did not succeed, a second scaled-down version was introduced and read in Parliament in January 2004.[35] It failed to pass committee stage, but the two bills have raised Parliamentary as well as public attention around corporate legal liability for foreign as well as domestic operations.

Taken together, these developments are making multinationals more vulnerable to litigation for their actions in legally and geographically distant operations, and less able to limit future liabilities by setting up subsidiaries or independent sourcing relationships in countries with lower local social/environmental standards or weaker judicial regimes.

Companies are being challenged across the supply chain

The traditional boundaries of moral and legal accountability have already been breached and companies are now exposed to environmental and social failings well beyond their direct operations and into the supply chain. In the Unocal ATCA case, the Ninth Circuit held that the company could be challenged in court simply for knowingly assisting human rights violations in the supply chain regardless of whether they wanted or requested them. When Ford became embroiled in the Firestone tyre crisis, their initial defence was that they were not responsible, yet alone liable, for the failings of the tyres which were warranted by the tyre manufacturer.

The hostile public reaction and barrage of legal actions rapidly caused them to accept responsibility for tyres specified by them as part of the vehicle they had made and sold. Indeed, it was Ford and not Firestone who initiated a second major tyre recall. In this and in many other cases, the distinction between moral and legal liability is being constantly tested, but companies are now having to weigh both aspects in deciding how they should respond to crises where responsibility could traditionally have been deferred to other parties in the supply chain.

Companies can be held responsible for consumer behaviour

The balance between personal and corporate responsibility is also shifting: whether reasonable or not, the trend is for increased consumer rights on the one hand, and increased corporate responsibility on the other. The tobacco and alcohol industries have long invoked the defence that they cannot be held responsible for the actions of consumers. But this defence has been comprehensively dismissed in the case of tobacco and extensively attacked in the case of alcohol. In the case of tobacco, their defence was undermined by their prior knowledge that nicotine was addictive.

Until recently, most other sectors would have comforted themselves with the thought that tobacco and alcohol were 'high liability' industries. But, as we show in Study 3, a wave of obesity-related challenges to the food industry is destroying this illusion. While these legal actions are generally regarded as having little chance of early success, the cases have opened the floodgates for challenges to the industry's products and marketing techniques. Indeed, as an indicator of how seriously the food industry is taking these threats, major players have moved with extraordinary speed on both sides of the Atlantic to modify product formulations, portion sizes and marketing practices to pre-empt regulation and potential litigation.

Even where the issue of personal responsibility affords the company protection, the second line of attack — as experienced by the tobacco industry in the US — is by the state seeking to recover the health related costs associated with the use of their products. There will be no shortage of creative lawyers seeking to make use of the deep pockets of opportunity this presents to seek compensation for the negative health impacts resulting from the way that companies have developed and marketed their products.

Chapter 2 Moral Liability
The court of public opinion

Let us start with the reality: though individual exceptions are plentiful, companies in this new millennium are not broadly viewed as holding the moral high ground. With trust in business having dropped to serious lows in recent years,[36] companies are unlikely to be granted the benefit of the doubt when adverse publicity arises and their conduct is called into question. Meanwhile, the shift to global free markets and instant communication means that corporate activities are scrutinised more closely and widely than ever before. Negative attention by the media or activists can cause a company to be condemned in the court of public opinion – judged 'morally liable' for societal damages – often very quickly, and without any judicial controls or procedures to ensure a fair and balanced hearing.

In our view, moral liability arises when a company violates stakeholder expectations of ethical behaviour in such a way as to put business value at risk.[37] Societal expectations of responsible business behaviour are broad and often fast evolving, spanning norms of fairness, honesty, promise-keeping, respect for rights, and due care to protect the interests of people and the natural world. Breaches of basic ethical norms can seriously undermine critical business assets, including the trust and loyalty of customers, the pride and advocacy of employees, and the confidence of shareholders in the probity of management.

In this chapter, we explore how moral liability has emerged as a significant and rising business risk. Recent well-known examples include:

– **Nike**
  Falls in sales and share price over allegations of the use of child labour in developing world factories working as third-party suppliers in the manufacture of its sportswear;

– **Shell**
  Temporary fall in European sales, as well as a collapse in internal morale, resulting from the Brent Spar[38] and Nigerian[39] crises in the late 1990s;

– **Monsanto**
  The CEO lost his job and the company its independence after ignoring public concern over its genetically modified seed technologies, particularly in Europe;

– **Huntingdon Life Science**
  Abandoned by banks and other financial institutions in the face of animal rights activism, taking the company to the brink of bankruptcy.[40]

– **South Africa**
  The 39 pharmaceutical companies who brought a case to prevent cheaper generic HIV/AIDS drugs being produced in South Africa: in spite of their huge investment in legal and PR advice and confidence that they had the full weight of the law behind them, they finally realised they couldn't win in the court of public opinion and abandoned their case.

Moral liability – the growing risk to business value

Companies have always been at risk of societal condemnation, but a number of trends are making the potential impacts on business much more significant. Below we explore how:

– The potential scale of societal damage from business-related activities is enormous, particularly from climate change and obesity;
– Reputation and brands are major components of business value, and are the first casualties when a company is deemed morally liable;
– Shareholder activism is on the increase, giving rise to risk of divestment and shareholder resolutions;
– Off-balance sheet risks, such as climate-related liability, are being targeted;
– Companies face increased premiums and even the risk of loss of insurance cover, as insurers actively strive to predict and avoid taking on liability risks which develop as society seeks to hold companies more accountable.

The scale of damage, particularly from climate change and obesity, is enormous

The greater the damage companies are perceived to have caused, the greater the business loss that can occur – making moral liability associated with greenhouse gas emissions one of the most significant areas for concern.

Climate change is widely regarded as one of the most critical global environmental and economic threats. Its effects, while unpredictable, are expected to include significant shifts in weather patterns, weather-related damage and rises in sea levels. The anticipated costs of these shifts are huge. The insurance company Munich Re estimated that damage from extreme weather alone would hit a record $70 billion in 2002.

Exceptional heat waves and drought in Europe during 2003 led to crop failures costing $12.3 billion economic damage followed by record flood losses of $16.9 billion in just three months. UNEP has estimated total costs of global warming to be around $300 billion dollars a year.

As we explore in Study 1, political, legal and activist resources are mobilising in an effort to hold accountable those responsible for climate change. Shareholder activists are filing and gaining support for growing numbers of shareholder resolutions. Companies perceived to be ignoring the issue are being targeted relentlessly by groups such as *Campaign ExxonMobil*, a coalition of religious and environmental groups working with institutional investors, corporate governance activists and financial analysts to highlight the financial risks to shareholders of ExxonMobil's current position.[41]

For now, at least, these resolutions rarely secure sufficient support for adoption. But increased numbers of resolutions and progressively higher levels of votes have brought public attention to the role of companies in environmental or social issues; and in many instances, such attention has forced strategic focus by the company on the issues raised.

Reputation and brand value are in the front line

As the Interbrand table suggests (Figure 12), the world's best-known corporate brands have a significant proportion of their market capitalisation invested in 'brand value'. Not surprisingly, the management of corporate and brand reputation is increasingly of board-level concern. Indeed, research by Aon, the insurance giant, shows that the top 2000 private and public sector organisations regard damage to reputation as their biggest risk.[42]

Corporate reputation — the public face of the company — is typically the first casualty of moral liability. In the past, the risk in relation to reputation and other intangibles has been difficult to quantify and therefore to manage. Yet, while most public relations crises have a relatively short-lived impact on share price, we have witnessed in recent years how damage to reputation can cause huge destruction of shareholder value. In the case of Andersen, the distress sale by the partners followed massive negative publicity from its association with Enron and the subsequent government indictment, while Merrill Lynch saw $4 billion wiped off their value in a matter of days amid accusations of dishonesty.

As AON puts it, 'It is only when a reputation incident severely damages the credibility of an organisation or one of its brands, or its standing in the eyes of its stakeholders, that the potentially catastrophic consequences of not managing the crisis properly become apparent. Studies of organisations that have handled crises affecting their reputation badly have identified long term and irreparable damage to share price, market share and brand value.'

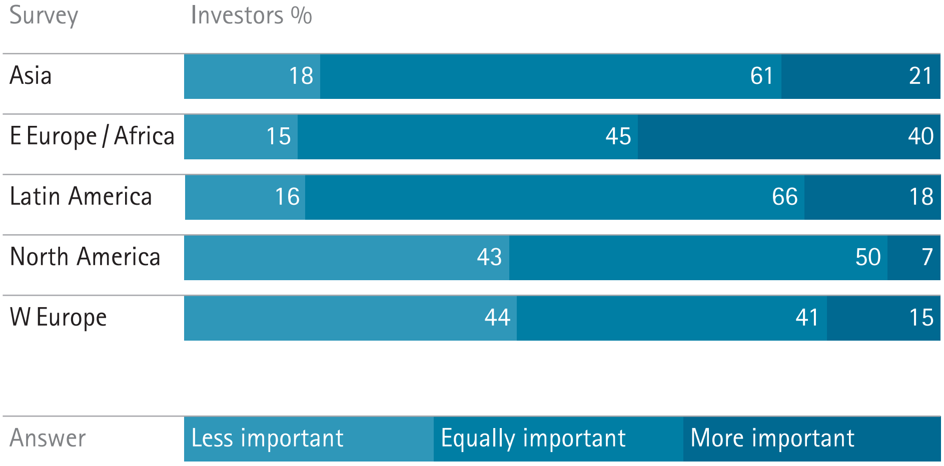
Some believe that ExxonMobil's reputation has taken a major hit due to its stance on climate change. In a leaked private analyst's report,[43] Deutsche Bank noted: 'Greenpeace is currently pursuing ExxonMobil in a PR war that focuses on forecourt boycotts of its biggest European market, the UK. While the company insists that it has suffered no fiscal impact from the boycott, being handed a reputation as environmental enemy number one for such a big customer-facing business has to be considered a brand risk.' In the same report, it adds: 'Behind the risk management failure lies a governance failure. By essentially abdicating responsibility for reviewing the management of one of the major risks facing ExxonMobil, the board is not serving the best interests of shareholders'.

12 **Best global brands 2004**

Rank 2004	Brand	Brand Value $ millions
1	Coca-Cola	67,394
2	Microsoft	61,372
3	IBM	53,791
4	GE	44,111
5	Intel	33,499
6	Disney	27,113
7	McDonald's	25,001
8	Nokia	24,041
9	Toyota	22,673
10	Marlboro	22,168

Source: Interbrand

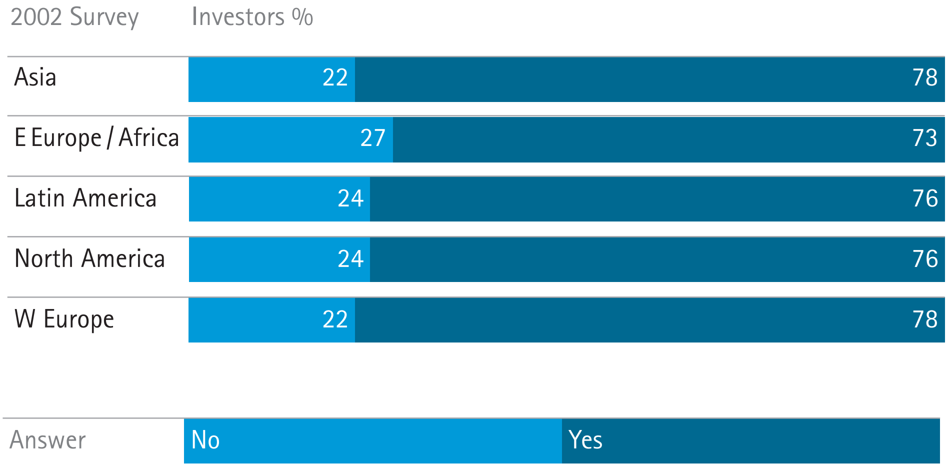
13 **How important is corporate governance[A] relative to financial issues[B] in evaluating which companies you will invest in?**



[A] Defined as effective boards of directors, broad disclosure and strong rights and equal treatment for shareholders
[B] Profit performance and growth potential

Source: McKinsey Global Investor Opinion Survey on Corporate Governance, 2002

14 **Are investors willing to pay a premium for a well-governed company?**



Source: McKinsey Global Investor Opinion Survey on Corporate Governance, 2002

Shareholder activism is increasing

With such significant levels of business value at stake, it is not surprising that shareholders are increasingly informed and active on CSR-type issues. The spectacular growth in ethical funds is one clear indication, with the power of this still-niche sector to secure board attention to social and environmental issues disproportionate to its size. Mainstream investors are coming under increasing pressure and are even facing legislated requirements, as in the case of UK pension trustees, to disclose their policy on the inclusion of environmental and social issues in their investment and voting decisions.

But the new story is the increased activism among mainstream investors. Part of this increase reflects the heightened focus on corporate governance, post-Enron. The huge losses in shareholder value have prompted investment managers to scour their portfolios for hidden risk, and investors are now keenly aware of the importance of good governance in protecting and enhancing the value of their investments. A survey by McKinsey[44] reported that more than half of investors in all world regions were as or more concerned with governance as they were with traditional financial performance (Figure 13). Fully three-quarters claimed to be willing to pay a premium for a well-governed company.

Even more significantly, mainstream investors seem to be gradually challenging some of the moral liability of the companies in which they invest. Shareholder resolutions have proliferated, demanding strategic reviews and responses on issues from climate change to genetically modified organisms (GMOs) to human and labour rights performance. Many have been able to achieve once unthinkable levels of support from the main body of shareholders.

For example, climate change represents a fast-growing area of shareholder activism, with record levels of votes cast in favour of proactive climate strategies. With 19 resolutions filed in 2002, and 31 resolutions filed in 2003 (mainly with US multi-nationals), the level of votes cast clearly signals mainstream investor support (Figure 17).[45] This trend has led many companies to review the issue more thoroughly and often to adjust their strategies or policies.

Insight Investment, a major UK-based fund manager and one of the sponsors of this report, believes there is a moral imperative for investors to engage more actively in their investee companies. As they point out, 'It is instructive to note that in UK company law, a sharp distinction is not made between companies and their shareholders. Indeed shareholders are described as members of the company, and membership carries with it a share in moral responsibility.'[46] Whether clear in law or not, an increasing number of shareholders feel a need to involve themselves more closely in the companies whose shares they own. Some are focused purely on protecting their share value, but many are driven by concern, even outrage, over the apparent greed and self-serving behaviour of the directors and executives; or the ethical dimensions of their company's performance.

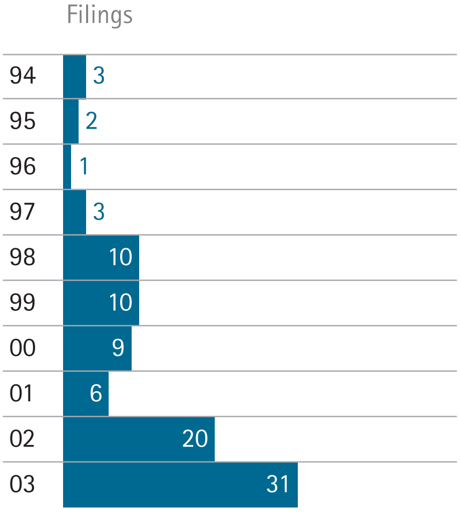
Insight is one of growing numbers of mainstream investors convinced of the link between corporate responsibility and shareholder value. Deloitte & Touche's Socially Responsible Investment survey in 2002[47] concluded 'For listed companies there is a clear message. Investors see value in a robust approach to corporate social responsibility'. 13 of the Top 20 fund managers in the UK agreed that CSR considerations will be a significantly important part of investment decision-making within three years.

In the US, fund managers have demanded that carbon-intensive companies in their portfolios accept climate change as a serious risk not only to society, but also to the companies' long-term competitiveness and prosperity.[48] And in July 2004, eight State Attorneys General filed a lawsuit against five power generators whose combined operations account for 10% of all US greenhouse gas emissions; observers cite this as a groundbreaking move in holding companies to account for their climate impacts.

Off-balance sheet risks targeted

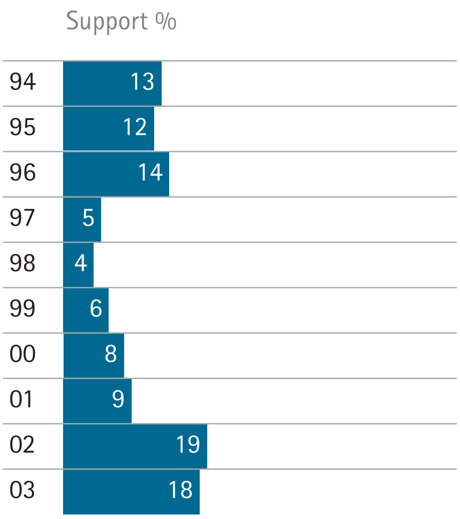
Some analysts expect a carbon-constrained economy to develop over the coming years, with carbon-intensive industries penalized and low-carbon sectors rewarded. It is standard international accounting practice to include or disclose current and likely future liabilities in the Profit & Loss account or in the Balance Sheet. Auditors are beginning to assess whether their 'climate-intensive' clients have properly evaluated and accounted for the off-balance sheet risks related to climate and there is growing pressure on the Securities Exchange Commission to require discussion of climate where it is material to a company's current and future performance. Indeed, post-Enron and Worldcom, the sensitivity to off-balance sheet risk is acute and has resulted in a string of major companies restating their accounts. Insurance companies are among those scrutinising this type of risk.

16 **Filings in favour of pro-active climate strategies**



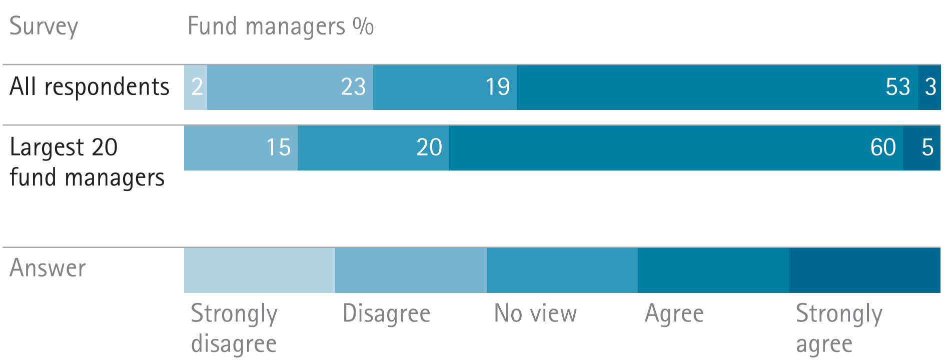
Source: SustainAbility

17 **Votes in favour of pro-active climate strategies**



Source: SustainAbility

15 **Will CSR will be a significantly important part of investment decision-making within three years?**



Source: Deloitte & Touche Socially Responsible Investment Survey 2002

Companies — and Directors — risk loss of insurance cover

The insurance industry is keenly aware of its exposure to company performance in the corporate governance, social and environmental arenas, and is taking steps to manage these areas of risk.

One option is to cancel or refuse cover for future liability for particular types of environmental or social damage, a decision with obvious and significant financial implications for affected companies. Insurers are also reviewing the Directors & Officers Liability cover of US directors, reflecting growing concern that directors of companies which deliberately lobby to resist precautionary action on climate change could face actions for negligence. As James Cameron, a leading international environmental lawyer and Founding Director of Climate Change Capital explains, 'These developments signal that there may be legal consequences flowing from the decisions of boards of directors when they actively lobby against regulatory action to reduce climate risk.'

Some directors have already been personally implicated in legal actions, as in Thor Chemicals where the company chairman was named in the lawsuit on mercury poisoning and Cape plc whose Italian subsidiary's managing director was charged with manslaughter in relation to asbestos exposure.[49]

Expanding boundaries of moral liability

As discussed earlier, societal expectations of responsible business behaviour are rising. The range of areas, therefore, in which moral liability can develop is expanding, particularly around:
- Transparency and disclosure.
- Following the spirit and the letter of the law.
- Accepting responsibility for legacy issues.
- Responsible divestment.
- Ethical sourcing.
- Economic equity, including fair trade, fair pricing, and fair taxation.

Greater transparency and disclosure

Transparency is widely accepted as a critical aspect of corporate responsibility, and is being reinforced by a range of laws and regulations in the US and Europe governing financial, social and environmental reporting. The US Securities and Exchange Commission requires companies to disclose any activities 'creating a material risk, or having a material impact, on the company's stock value'.[50] Auditors are becoming aware of their obligation to assess risks to the business arising from issues like climate change, and the corresponding balance sheet implications are potentially huge.

The last decade has seen huge increases in the number of multinationals producing stand alone environmental or sustainability reports; one review found two thirds of the Fortune Top 60 producing such reports in 2003.[51] There is strong evidence that stakeholder pressures and regulation are driving an irreversible trend towards corporate environmental/social reporting in most developed economies. Companies also face pressure to report voluntarily on specific aspects of a company's environmental and social performance and impacts.

The Carbon Disclosure Project, for example, represents $10 trillion of investment funds whose managers have collaborated to investigate the scale of risk and preparedness in relation to climate change of the Top 500 companies (measured by market capitalisation). In 2003, the project received a 59% response rate from the target companies, sharply up from the previous year's 47%.

And where companies decide not to disclose voluntarily, 'whistleblowers' rights are being strengthened in law. For example, the recently enacted Sarbanes-Oxley Act in the US contains provisions which give protection to employees who inform not just on fraudulent misconduct but also on any breach in SEC rules including the disclosure of material risk as noted above. As Tom Devine, Legal Director of Government Accountability Project, observes, 'This little discussed dimension of SEC rules creates unprecedented, comprehensive subject matter coverage for corporate whistleblowers'.[52]

Following the letter and the spirit of the law

One aspect of compliance that is still little discussed in companies is the difference between conforming to the spirit as opposed to the letter of the law. Many legal, financial and marketing advisers operate at the edge of compliance boundaries and, indeed, compete for business based on their ability to identify creative routes to expand the boundaries of technical compliance. This is the mindset behind Enron-style 'creative' accounting (the difference between 'creative' and 'deceptive' is a finely drawn line here). Enron created no less than 800 'subsidiaries' in tax havens such as the Cayman Islands to avoid paying any corporate federal income taxes in four of its last five years of operation.

In the US and the UK, P&G has been criticised for packaging, positioning and displaying Sunny Delight as though it were a juice (in fact only 5% of the product was real juice in the original formulation). Even though it did not mislabel the product or make factually untrue claims, it came under attack for irresponsible marketing.[54]

Narrowly meeting legal requirements but failing to honour the spirit or intent of the law is, therefore, no longer the responsible reference for business. Society is signalling that this is morally unacceptable and a growing number of campaigns aim to punish business through boycotts or to force policy shifts in the face of reputation threats.

Accepting responsibility for legacy issues

Moral liability appears to be transferable as a result of mergers and acquisitions, a development we explore in Study 4 with respect to Dow's acquisition of Union Carbide Corporation and the continuing fall-out from the Bhopal tragedy.

As Forbes magazine reported, '"Due diligence" has traditionally focused narrowly, but deeply, on financial and legal current and potential liabilities, ignoring less tangible but potentially significant risks to reputation or to the balance sheet more directly. In this spirit, Dow believed that Union Carbide's liabilities were fully settled long before acquisition, a position it has stoutly defended with investors, campaigners, customers, suppliers, politicians and its own staff. Yet, in the minds of many, it has a responsibility to address a range of legacy issues. Indian courts have reinstated the criminal portion of the original charges against Union Carbide, and activists are relentlessly pursuing actions in both US and Indian courts for further reparations.'[55]

Dow's position rejecting any such legacy liability is simple, consistent, and probably well-founded in law, but it has not won over critical stakeholders and it is unlikely ever to shift the views of many of its critics. A more open and public discussion of the issues raised and a more proactive engagement in the resolution of them would, we believe, create an environment conducive to a more balanced judgement by the broader body of stakeholders and observers.

Responsible divestment

Companies often choose to divest a problem business or asset. Increasingly, however, companies are being urged to act responsibly in their divestment decisions, and divestment can no longer be considered a final settlement of responsibility and liability.

As Halina Ward notes, 'When in October 2002, Canadian company Talisman announced that it was pulling out of Sudan, British development NGO Christian Aid argued that withdrawal is not a socially responsible thing to do . . . Talisman should have stayed in the country and said to the government: "We are suspending our operations until you come up with a peace deal."'[56]

Similarly, some years ago Shell faced calls to divest from Nigeria in order to stop current oil production, thereby bringing the then military regime to its knees. Shell's response was that a withdrawal would not only not stop production, but would also put at risk its social and environmental programmes which were committed to the benefit of the people and environment of the Niger Delta.

Underlying the complexity of being seen to act responsibly on these issues is the risk on the other side of the equation. Companies enforcing their belief that accountability and responsibility demanded that they not 'cut and run' but rather work from within to effect positive change in Apartheid South Africa, now find themselves confronted with Alien Tort Claims Act lawsuits in the US for continuing to do business under the Apartheid regime.

Companies may be tempted to manage this sort of dilemma passively, since every option carries risk. We detect the early signals that a company which fails to take divestment decisions on a balanced and inclusive basis (namely, taking due account of the social, environmental and economic consequences for affected stakeholders) may find itself being charged with irresponsible behaviour.

Economic equity

The concept of economic equity as a business responsibility has largely been lost on the business community who tend to assume that economic and financial accountability are one and the same. Yet new expectations are arising around the source and allocation of the wealth created by business – the contribution to economic equity.

The principle of fair trade is becoming increasingly well established. Particularly in the UK, fair trade is seeing mainstream adoption, with increasing market share for a growing range of goods.[57] Consequently, companies are now under pressure to work closely and transparently with their supply chain to ensure a more equitable sharing of value created.

> 'The race to the bottom, seeking ever-lower manufacturing costs, in the long run has no winners. For example, the total sewing and assembly cost of a $20 Disney *101 Dalmatians* pajamas in Haiti is only 6 cents, but today's corporations will not be able to sustain such unfair margins without repercussions in terms of lawsuits, reputation, shareholder advocacy, and consumer outrage.'[53]
>
> Heather White
> Executive Director of Verité

Similarly, companies' pricing strategies and tactics are coming under scrutiny from regulators, consumer watchdogs, NGOs and the media. Issues include absolute pricing (e.g. pharmaceuticals in developing countries) and comparative pricing (e.g. disparities in price levels between the UK and the US). Fair pricing as an issue is currently ill-defined, but is pointing toward greater condemnation of companies perceived to be profiteering, abusing their market power or insensitive to affordability issues.

Regulators are also adding a moral dimension to their view of anti-competitive or cartel price fixing. In 2001, the EU fined various vitamin manufacturers a record £500 million for price fixing. As the EU Competition Commissioner observed at the time, 'It is particularly unacceptable that this illegal behaviour concerned substances which are vital elements for nutrition and essential for normal growth and maintenance of life.' Similar sentiment caused public outrage over pharmaceutical manufacturers' attempts to block availability of generic HIV drugs in South Africa. Affordability may prove to be an issue which companies need to factor in to their pricing decisions as part of their perceived responsibilities in a freer and more globalised market to protect their licence to operate and their bargaining power with governments in emerging markets.[58]

To date, discussions of pricing affordability have centred on life saving drugs in poorer countries, but the principle of fair pricing is likely to extend to developed economies and other market sectors. In the UK energy sector, for example, concerns are rising over higher per unit electricity charging for poorer customers on the basis that they are less economic to serve.

Fair pricing principles may also extend to the perceived value of the product itself. The Coca-Cola Company has been pilloried in the UK press for marketing Dasani — local tap water (as the company openly acknowledged) purified through reverse osmosis with trace additives — as mineral water. As the media observed, the Dasani price of 95 pence per half litre would buy over 3,000 litres of the original tap water. Following massive negative media coverage on the pricing issue and a subsequent contamination crisis, the product was withdrawn from the UK market in 2003.

Expectations are also rising around fair taxation. Most CFOs would argue — often correctly — that fiduciary duty demands that they minimise the tax burden on their business and retain the maximum wealth created for the benefit of the company's direct stakeholders (employees and shareholders). This is the defence for such common strategies as legally manipulating transfer-pricing of goods and services to minimise profits reported in high and to maximise them in low taxation regimes. The 2003 Lifeworth Annual Review of Corporate Responsibility, supported by the New Academy of Business, suggests, however, that such activity 'costs Europe about £100 billion a year and the developing world well over $50 billion a year'.[59] These are no mean sums when measured against, for example, the World Bank's estimate of the cost of poverty alleviation as approximately $80 billion a year.[60]

Greater focus on the distribution of the economic cost and benefits of a company's activities may produce the perception among stakeholders that companies' legal tax avoidance strategies are akin to unethical 'tax dodging'. At issue is whether directors are accountable only to their shareholders whose immediate short term interest is apparently best served by tax minimisation, or also to the other stakeholders in the countries and societies where the wealth was created.

Economic accountability principles

Economic diversity
Multi-national corporations should encourage open and competitive markets; discourage monopolistic and anti - competitive activities; and support the role of small and medium enterprises, particularly those which underpin local cultural and social diversity.

Economic equity
Corporations should have a responsible and transparent stance on the equitable distribution among stakeholders of the economic costs and benefits of their activities. In particular, economic activity should promote the principles of fair trade up and down the supply chain. Furthermore, corporation taxes should be accounted for and paid within the local economies in which they are due; profits should not be transferred to countries of lower taxation in pursuit of tax avoidance.

Sustainable investment and divestment
Return on capital will always be a key criterion for capital commitments. This should, however, be balanced against the social and environmental impacts of the investment/divestment with due regard to past and future obligations.

Economic accountability
Companies should understand and acknowledge the scale, breadth and depth of their economic power and influence, and demonstrate responsible use — and avoid abuse — of that power. They should actively seek to deploy economic influence and power to promote and protect human rights. Political contributions and lobbying for own business interest should be fully disclosed.

Guidelines developed by SustainAbility

Study 1 Climate Change Battles building on many fronts

Climate change is almost universally accepted as one of the most critical global environmental and economic threats. Its effects, while unpredictable, are expected to cause significant shifts in weather patterns, weather-related damage and rises in sea levels adversely impacting coastal regions around the globe. What makes climate change so important is that, if legal liability is established, the potential costs are enormous: climate change costs are estimated by United Nations Environment Program to be in the order of $300 billion a year.[61]

In this section, we outline the multiple fronts being fought by political, legal and activist forces to hold those responsible for climate change to account. As we show, regulation is brewing, climate lawsuits are now a reality, auditors are assessing climate liability, shareholders are demanding action, and NGOs are increasingly seeking to attack individual companies' brands.

None of this proves, of course, that real liability can or will attach to individual companies. We believe that it is a reasonable conclusion, however, that companies ignore the risks at their peril. In a carbon constrained economy businesses which fail to address their climate impacts are highly likely to be punished by enforcement of regulation; by penal financial incentives; or by market shifts.

Regulation

Greenhouse gas emissions are increasingly regarded in policy development as 'pollutants'. In Europe, the Polluter Pays Principle is strengthening as reflected in the June 2003 agreement to implement the Directive on Environmental Liability. Caps on carbon dioxide (CO_2) emissions come into force in 2005: under the Emissions Trading Directive, Member States have to set limits on emissions from energy-intensive plants by allocating them CO_2 emission allowances. In the US, the failure to develop regulation at the federal level has provoked some states to limit greenhouse gas emissions. Most notably, California's Assembly Bill 1493 requires the California Air Resources Board to develop CO_2 standards for vehicles that achieve the maximum feasible and cost-effective reduction of greenhouse gas emissions (GHG) from passenger cars and light trucks sold in California by 2009.

Legal and regulatory liability

Climate-related litigation is now a reality. In July 2004, top US lawyers filed suit against five major power companies, collectively alleged to be responsible for 10% of US carbon dioxide emissions. Attorneys-general from eight states, along with New York City lawyers, are calling on the companies to cut emissions by at least 3% a year.

'Climate change could be the next legal battlefield: Compensation claims for man-made environmental damages would make the tobacco sector payouts look small.'
Financial Times 14 July 2003

'Human induced global climate change is a weapon of mass destruction at least as dangerous as nuclear, chemical or biological arms, a leading British climate scientist warned. The impacts of global warming are such that I have no hesitation in describing it as a weapon of mass destruction.'
The Guardian, quoting John Houghton (former key member of the Intergovernmental Panel on Climate Change)
28 July 2003

There will undoubtedly be more cases. The Climate Justice Programme[63], based in London, is one of a number of legal activist campaigns seeking to use the judicial process to spur company action on climate change. NGOs are also collaborating with each other on legal challenges in the US. According to their joint website (www.climatelaw.org), Friends of the Earth and Greenpeace have determined that legal action is necessary to persuade the Bush Administration to take meaningful action on climate change.

Though such cases rarely run all the way to judgement, the legal costs and reputational damage associated with defending climate change actions could be enormous. As Dr Garz, the director of equity research at the German investment bank WestLB Panmure, recently put it, 'This litigation could be a catalyst or a trigger for markets to really look at climate change issues, not only with respect to the expected costs of litigation, but also in terms of a general economic assessment . . . Climate change litigation will similarly arouse the interest of the markets and raise the perception of the topic.'

Insurers too are showing increasing concern for their potential exposure to litigation against companies on climate change. Swiss Re acknowledges that directors and officers could possibly face legal action if shareholders believed that company executives did not adequately address the potential threats of climate change related regulation.[64]

Financial liabilities — on and off the balance sheet

All the indicators point to a carbon-constrained economy developing over the coming years, with carbon-intensive industries penalized and low-carbon sectors rewarded. As companies are increasingly forced to internalise carbon costs — resulting in fossil fuel producers and users having to fund the environmental and social costs of climate change — the balance sheets of carbon-intensive companies could be rapidly and adversely transformed. Shareholder value will be severely at risk.

It is standard accounting practice to disclose or account for current and likely future liabilities in the Profit & Loss account or in the Balance Sheet. Auditors are beginning to raise with their 'climate-intensive' clients the issue of whether emerging risks are being properly evaluated and accounted for. John Dutton, dean emeritus of the Penn State's College of Earth and Mineral Sciences, estimates that $2.7 trillion of the $10 trillion US economy is susceptible to weather-related loss of revenue,[65] meaning that an enormous number of companies currently have 'off-balance-sheet' risks related to climate.

Post-Enron and WorldCom, shareholder and insurance company sensitivity to 'off-balance-sheet' risk is acute and has resulted in a string of major companies restating their accounts.

Furthermore, as discussed in the previous chapter, new accounting standards coming into force across Europe in 2005 require auditors to ensure that current commitments to stakeholders on major issues like climate change are included as current and/or future liabilities on balance sheets as a 'constructive obligation'. Empty public relations' promises carry more than reputational risk under this new standard.

Governance obligations

Market-led initiatives, lawsuits, new government requirements and rising shareholder pressure are converging to make climate change a core component of the emerging corporate governance agenda. A 2002 report by CERES outlined the principal ways in which climate issues are likely to be incorporated within corporate governance obligations, including:[66]

— New listing standards require corporations to have a majority of **independent directors**, and the SEC is considering new rules allowing shareholders to nominate their own board candidates. This could lead to nomination of directors who understand and commit to address climate change.

'The Directive on Environmental Liability is based on the polluter-pays principle. It establishes a framework whereby environmental damage can be prevented or remedied. It requires operators to take preventive action where there is an imminent threat of damage and remedial action — at their own expense — when damage occurs.'
Brussels, June 2003[62]

'It is only a matter of time before companies like Exxon Mobil or General Motors will be facing litigation.'
Jon Sohn
Friends of the Earth

- Emerging efforts to redefine 'pay for performance' – and align executive performance with long-term investor value – could result in attainment of greenhouse gas targets as a component of **executive compensation.**

- New SEC rules require mutual funds to disclose their **proxy guidelines** and **proxy votes,**[67] opening them to scrutiny and client pressure to support climate change-related shareholder resolutions.

- A legal settlement involving major US investment banks is putting greater separation between banks' brokerage and underwriting arms, potentially resulting in greater analyst focus on companies' responses to climate change as part of **investment research.**[68]

Shareholder activism

As discussed earlier, shareholder activism is not simply the domain of environmental and social campaigners with token shareholdings. Attitudes of mainstream analysts and fund managers are shifting rapidly, driven by a growing realization of the potential risks to shareholder value and reinforced by deepening expectation regarding social responsibility by all sectors of society. This is further reflected in the mushrooming over the last decade of investments in funds screened for environmental and social impact.

As noted earlier, climate change is one of the fastest growing areas of shareholder activism with record levels of votes cast in favour of proactive climate strategies.

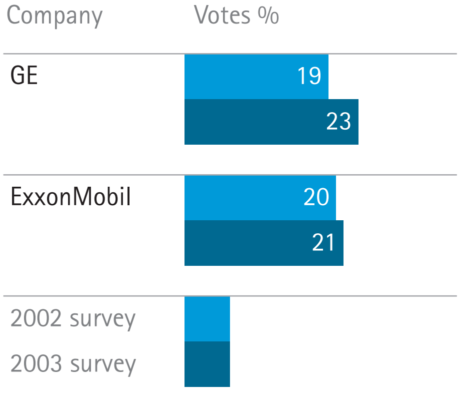
Despite this growing interest in and concern about climate change, markets 'have yet to price climate change as a risk factor or differentiate companies that manage this risk well from those that do not', says WestLB Panmure's Garz. Given the convergence of pressures, however, it is reasonable to expect that the link between climate risk and shareholder value will be more clearly quantified.

Corporate Boards have a fiduciary duty to ensure that risks to shareholder value are properly assessed and managed. In this light, it is surprising that while 80% of the Global 500 who responded to the Carbon Disclosure Project in 2003 explicitly acknowledged climate change as a significant business risk, only half of those companies acknowledged taking concrete action to address the issue.

NGO pressures

Activist campaigns on climate change can take a traditional approach like the Esso boycott in Europe. But we are also seeing newer approaches evolve deploying analytical research and reporting to bring the issues to the attention of boards, financial analysts and investors using their own language.

18 **Votes in favour of pro-active climate strategies**



Source: SustainAbility

May 29 2002: 20% of shareholders ($55 billion) voted against management of ExxonMobil on a climate change related resolution. Why?

'Neither the CEO, nor the board, nor management have a plan for appropriately managing the assets of the company given the challenge of climate change. [Investors] are going to treat it as a governance issue, not as an environmental issue.'
Mark Bateman
Investor Responsibility Research Center

The outputs disseminated through reports, media campaigns and on conference platforms are generally very well researched, rooted in a strong business case and are cogently argued. Indeed, some of the best brains are deployed on such projects – brains that historically would more likely be working for the corporations they are now challenging. Notable examples include *Sleeping Tiger, Hidden Liabilities* (Claros) and *Value at Risk: Climate Change and the Future of Governance*, a CERES Sustainable Governance project output.

NGOs are also promoting greater reporting of greenhouse gas emissions, through projects like the WRI-WBCSD Greenhouse Gas Protocol and the Global Reporting Initiative's *Sustainability Reporting Guidelines*.

Reputation / brand attacks

From a business perspective, few companies continue to deny that climate change is a real and growing threat. Many commentators suggest that those who do are putting at risk their company's reputation; prejudicing their shareholders' investments; and even exposing their directors to charges of failure of governance. As discussed in Chapter Two, the leaked Deutsche Bank document on ExxonMobil showed that analysts are taking note of the reputation risks.

ExxonMobil's defensive position has drawn adverse appraisals in a range of reports.[69] Possibly as a result of such scrutiny, the company's stance appears to be softening. In its response to the 2003 Carbon Disclosure Project, ExxonMobil acknowledges that 'the potential impacts of greenhouse gas emissions on society and ecosystems may prove to be significant'.

Campaigners' attentions are also moving downstream. The automotive industry is now firmly in their sights, with multiple attacks on the Ford Motor Company in the US and its CEO Bill Ford by NGOs who judge the company to have failed to deliver earlier promises. Realising the value of brand equity, they see icon brands like Ford as soft targets. In the case of Ford, their campaigns highlight the key role SUVs' (Sports Utility Vehicles) poor fuel economy plays in worsening climate change and increasing US dependence on oil from politically unstable regions.

The NGOs are given greater confidence by the evidence of shifts in public opinion on climate change. The issue is well established in European public consciousness, but recent polls indicate that US public opinion is rapidly catching up, with over three quarters of Americans believing that global warming is a real problem and requires action.[70]

Recommendations for business

The issues we raise are relevant not only to the most climate intensive industries, but to all companies (with obvious differences in the degree of risk exposure). We recommend that all companies:

Conduct a thorough assessment of the Greenhouse Gas intensity of the full lifecycle of their products and value chain. Seemingly 'climate light' products such as computers and TVs which consume significant power in stand-by mode, or the importing of food and animal feed[71] will come under increasing scrutiny.

Backcast from a future in which climate follows asbestos and tobacco to court.

Impose a 'carbon lens' on major investments/divestments. For example, Shell impose a notional carbon cost to any investment with an annual impact of 200,000 tonnes or more of CO_2 equivalent. Extend 'due diligence' procedures to incorporate climate change risks.

Undertake a thorough risk management review process to identify and quantify the risks (and/or opportunities) a carbon-constrained world will present to your business.

Build internal expertise and experience with respect to new market mechanisms such as emissions trading.

Consult auditors on current or emerging balance sheet issues in relation to climate.

Engage with stakeholders (especially customers, employees, investors, NGOs) on their expectations of responsible management of the climate issue.

'It [Swiss Re] has also identified a climate risk in its directors and officers [D&O] liability policies. Premiums should reflect the risk of litigation against senior managers who have failed to protect their companies against such risk, it says.'
Financial Times, 27 April 2004

Study 2
Human Rights
Expanding liability across time, distance and the supply chain

Over the last fifty years, activists and victims from all over the world have demanded an end to human rights abuses, accountability for perpetrators and reparations for sufferers. These efforts have recently expanded from an initial focus on states to scrutiny of the role of business in the perpetration of such abuses.

With boycotts, 'name and shame' campaigns and, most recently, litigation, activists are forcing the corporate world to acknowledge and address its role in human rights abuses. International NGOs including Human Rights Watch and Amnesty International argue that by doing business in places like Angola, Burma, the Congo and Sudan, transnational corporations eager to extract these countries' natural resources help to support corrupt leaders and prolong civil war. In countries like Colombia, Ecuador and Indonesia, activists claim that poor labour standards allow companies to make profits while subjecting local labourers to unacceptable working conditions.

At a minimum, activists are calling for companies to acknowledge international human rights standards — a campaign which has met with some measure of success. The UN Global Compact, which asks participants to support nine principles in the areas of human rights, labour and the environment, has attracted more than 1,500 company signatories since its launch in 2000.[73] Another year 2000 initiative, the Voluntary Principles on Security and Human Rights, drafted by the US and UK governments, calls for improved risk assessment when businesses contract with local governments, and for human rights protections to be written into contracts with security forces.[74] Again, several multinationals have signed on, including BP, Royal Dutch/Shell, ChevronTexaco and Enron.

Most recently, the UN has put forth Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights.[75] The Norms carry the weight of a formal UN-authorised consultative process.

The difficulty with such norms is that they are not legally binding, and human rights lawyers are increasingly turning to litigation as a tool for change. Notably, courts in the US and UK are becoming more willing to hear cases where the violation occurred outside of the court's geographic location. And national courts are increasingly sensitive to human rights claims.

'We are going to spend the next couple of years suing every company we can find that is engaged in human rights violations,' declares Terry Collingsworth of the International Labor Rights Fund (ILRF). 'And in the long run, we are going to get help from the investment community. When we win just one case, the companies are going to have to add this to their evaluation criteria. We then won't have to police this anymore. The investors will.'[76]

Litigation in the US

The ILRF and a number of other non-profits including EarthRights International, The Center for Constitutional Rights and The Center for Justice and Accountability are looking to US courts for remedies. With the help of a law originally passed in 1789, some US lawyers are determined to see courts declare multinationals liable for the negative human rights consequences of their projects. The Alien Tort Claims Act (ATCA) states that 'district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.'

> 'Financial failure can destroy individual companies; moral failure will destroy capitalism. The law, intelligently devised and applied, has an undoubted role in helping to instil the behaviour needed to sustain that morality.'[72]
>
> Sir Geoffrey Chandler, Founder Chair of Amnesty International UK Business Group 1991–2001, and former Director of Shell International

In some courts this has been interpreted to mean that there is a private right of action in the US for victims of violations of international norms, including, activists argue, gross human rights abuses, such as genocide, extrajudicial killing, slavery, torture, unlawful detention and crimes against humanity.

At present, over a dozen ATCA cases have been filed against a wide range of companies, including Texaco, ExxonMobil, Royal Dutch Petroleum, Del Monte Foods, Dyncorp, Chevron, Gap Clothing, UNOCAL, Southern Peru Copper, Coca-Cola, Rio Tinto, Freeport-McMoRan, Talisman Energy and Union Carbide/Dow. Plaintiffs groups have consisted of union leaders, workers and residents from Ecuador, Indonesia, Papua New Guinea, Nigeria, Sudan, India, Siapan, Burma, Peru, Colombia and Guatemala.

ATCA cases are lengthy and complex, with arguments over the various motions to dismiss often lasting several years. So far none of these cases have gone to trial and no damages have been paid out. But the debate over ATCA cases rages. Plaintiffs claim both that the US is an important venue because so much business is headquartered there, and that gross human rights violations should not go unpunished. Defendants often claim that the statute of limitations prevents the lawsuit from continuing, that the torts in question do not amount to a breach of international law, or that the US federal courts are not an appropriate forum.

The Bush Administration has sided with business. In an amicus brief filed in one case, the Justice Department argued that these lawsuits interfere with American foreign relations and 'bear serious implications for [the] war against terrorism.'[77] Other critics argue that these suits could deter much needed foreign investment in developing countries.

Many of these cases are brought for 'aiding and abetting' human rights violations. Plaintiffs' lawyers must demonstrate that the defendant corporation knew or should have known of the violations. In the case of *Doe v. UNOCAL*, plaintiffs contend that they were forced into slavery by the Burmese military during the construction of an oil pipeline in Burma. After three years of discovery proceedings, the Ninth Circuit held that the plaintiffs need only demonstrate that UNOCAL knowingly assisted the military perpetrating the abuses for UNOCAL to be held liable, not that UNOCAL wanted or requested the military to commit abuses.

As the UNOCAL case garnered media attention, shareholders representing 34% of all UNOCAL stock voted for a resolution urging the company to adopt a code of conduct based on the standards of the International Labour Organisation (ILO), which would prohibit forced labour. Shareholders declared that the vote was a direct outcome of the company's decision to continue its investment in the Burmese gas pipeline project and of its moral liabilities stemming from lawsuits by Burmese plaintiffs.[78] In a statement of support for UNOCAL's shareholder resolution, one shareholder asked 'What damage has been done to our goodwill and public relations? Would this money not be better spent investing in our company's future?'[79]

In the case of *Khulumani et al v. Barclays et al*, a class action brought by hundreds of black South Africans against 24 corporations for complicity in apartheid abuses, there can be no doubt that the companies were aware of apartheid policies. This case therefore presents different challenges. Though the world condemned apartheid eventually, it was considered a legal policy of an internationally recognised government. Nonetheless, plaintiffs argue that 'the participation of the defendants, companies in the key industries of oil, armaments, banking, transportation, technology and mining, was instrumental in encouraging and furthering abuses. Defendants' conduct was so integrally connected to the abuses that apartheid would not have occurred in the same way without their participation.'[80]

Several apartheid cases are pending in US courts, notwithstanding the remoteness – both in time and geographic distance – of the wrongs for which vindication is being sought. Notably, many of the defendant corporations in these cases continued to do business in South Africa specifically and explicitly out of a desire to attempt to effect positive change from within, and specifically and explicitly to avoid the perception of 'cut and run' tactics that create a different category of moral liability. That they are now defendants in these ATCA lawsuits underscores the tremendous moral and legal challenges confronting multinationals operating in today's globalised economy.

'These legal developments offer a new perspective on what corporate responsibility really means. Just as commerce has gone global, so liability is going global – and just as it took time for the rules of commerce to become clearly defined, now we're entering an era where the rules of liability are getting sorted out.'
Elliot Schrage, former senior vice-president of global affairs at Gap, now professor at Columbia Business School and Columbia Law School

'Historically privileged business as a whole must accept a degree of co-responsibility for its role in sustaining the apartheid system of discrimination and oppression over many years.'
African National Congress submission to the Trust & Reconciliation Commission.
TRC report volume 4 page 32

Critics of ATCA were hoping that the Supreme Court would intervene and halt this stream of litigation. But in June 2004, in *Sosa v. Alvarez Machain* the first ATCA-related case to reach the Supreme Court, the Supreme Court ruled to keep US federal courts open to lawsuits by foreigners who allege that they were victims of serious human rights violations anywhere in the world.[82] As this case did not involve a corporate defendant, the ruling does not conclusively resolve the status of corporate human rights cases under the ATCA. Indeed, the Supreme Court decision explicitly left that question unanswered. It also acknowledged concerns about the impact of such cases on the US government's foreign policy concerns, by inviting the government to intervene and seek dismissal of cases in which the Administration believes its foreign policy prerogatives are being undermined. In fact the US government has done this in a few cases to date. Attention now turns to the lower courts with corporate cases on their dockets, which had been deferring decisions until the Supreme Court ruling.

Litigation outside of the US

The US is not the only country where extraterritorial jurisdiction is becoming more likely. In 2000, the UK House of Lords opened the English courts to foreign plaintiffs injured overseas as a consequence of the operations of British companies or their subsidiaries. The decision was reached in a case in which three thousand South African plaintiffs alleged they were made ill while working with asbestos.

The defendant, Cape plc, argued that the cases should be dealt with by the South African judiciary (where damages would be much lower). But with the Lords' decision, the case proceeded in a UK court, and in June 2003, was finally settled out of court for £10.6 million.[83]

Recent decisions by the European Court of Justice regarding the application of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters have also provided the basis for the jurisdiction by European courts over a wide range of cases. Article 2 of the Brussels Convention has long been held to preclude the application of *forum non conveniens* where a defendant is based in the European Union. A July 2000 decision by the European Court in *Group Josi Reinsurance Co v UGIC* held that a plaintiff domiciled in a State that was not a contracting party to the Brussels Convention could still invoke the rules of the Convention.

The recently established International Criminal Court could be the site of future criminal cases, specifically relating to the war in the Democratic Republic of Congo. In an October 2002 report, a UN Panel of Experts alleged that 85 companies involved in business activities in Congo breached international norms, including the Guidelines for Multinational Enterprises formulated by the Organization for Economic Cooperation and Development (OECD).

To date there have been no investigations into the business conduct by any of the governments participating in the OECD. NGOs claim that some governments have encouraged the Panel to remove names of companies registered in their jurisdictions. The Prosecutor of the ICC, Luis Moreno Ocampo declared that 'The Office of the Prosecutor will work together with national investigators and prosecutors in order to determine the contribution, if any, that businesses are making to the commission of crimes in the DRC.'[84]

While there have been several ATCA cases filed in relation to crimes during World War II, there are now cases outside of the US as well. In Japan, four Chinese, allegedly forced to work as slave labourers by the Japanese between 1937 and 1945, filed a lawsuit against both the Japanese Government and Mitsubishi Corporation in November 2003. They claim they worked in a coal mine owned by Mitsubishi Corporation together with another 800-plus Chinese civilians.[85] The case is now pending.

After a failed ATCA claim against Total in the US, a group of Burmese refugees filed a criminal claim against TotalFinaElf in Belgium in 2002. The refugees' claim alleges that they suffered crimes against humanity committed by the Burmese military junta. The claim names TotalFinaElf and its CEO Thierry Desmarest as defendants for their complicity in those crimes, on the grounds that the company used forced labor while constructing a gas pipeline in Burma from 1995-1999 and lent 'moral and financial' support to the Burmese military junta.

'While recognizing that corporations are not rights agencies, we believe that the corporate sector has a critical role to play in enhancing respect for universally recognized human rights. A good human rights record is good for business.'[81]
Arvind Ganesan
Human Rights Watch

The case was filed under a 1993 law that gives Belgian courts the power to try human rights cases regardless of the nationality of the victims and regardless of where in the world the human rights violations took place. A separate legal action against TotalFinaElf and its CEO has been filed in France. As in the Belgian action (and the ATCA case pending in the US against Unocal), the plaintiffs claim that they were forced to labour on the company's pipeline, and that Total acted in complicity with the Burmese military junta. This action, however, arises under the French criminal law on kidnapping. Both cases are still pending.

Recommendations for business

For companies operating in areas with human rights concerns, we would recommend a thorough assessment of the political condition and human rights practices of the countries in which they seek to do business. Seek out experts from human rights NGOs who can provide current information as to the country's human rights protections.

Assess the business for current or potential exposure to human rights risks using progressive codes such as those from the International Labour Organization, The UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises, or The Global Compact as a reference point. Pay particular attention to the supply chain (including those elements outside of the company's direct control) and to potential legacy issues (e.g. South Africa or Nazi 'collaboration').

Make sure the company's business principles, codes of conduct and internal policies are up to date on human rights. Confirm that conformance is not only to the letter but also to the spirit.

Compare human rights standards for consistency in all operations globally. Where local regulations allow lower standards, assess for alignment with internal business principles/codes/policies as well as with current and emerging societal expectations. Explore and test dilemmas and alternative responses with constructive NGOs / opinion formers.

Consider active rather than passive support for human rights where passive covers local norms of working conditions, diversity and gender equality and active extends to endorsing and promoting (for example) the Universal Declaration of Human Rights and using economic power and influence to improve conditions and to fight abuses in the countries in which it operates.

If involved in areas requiring abnormal levels of security by public or private forces at the site of a project, contracts with security should include a requirement to respect human rights. A monitoring system should be established to ensure human rights guidelines are being followed, and disciplinary proceedings should be initiated when rights are violated.

Know which voluntary principles or standards your company is signed up to and commitments your company has made and check for compliance to the letter and the spirit.

Build internal education at all levels of management to new norms and expectations of corporate behaviour in relation to human rights.

Study 3
Obesity
Shifting respon-sibility means no sector is safe

Obesity is a growing international problem that is imposing huge costs on the economy and society as a whole. During the past two to three decades, the prevalence of obesity has increased two to three-fold in most developed countries, reaching an estimated 10–25% of the population in the 1990s[86] (Figure 19). In the US, a staggering two-thirds of adults are now overweight or obese,[87] and recent UK figures show that one in four men and one in five women is now obese.[88]

Obesity and overweight levels are also rising rapidly among children, according to studies in the UK, US, Canada and France.[89] In the US, the number and prevalence of obese children has doubled over the past 20 years, while in the UK, *conservative* estimates predict that if current trends continue, one in five boys and one in three girls will be obese by 2020.[90] Obesity in childhood is highly correlated with subsequent obesity in adulthood.

Obesity has been linked with a long list of chronic illnesses, including heart disease, diabetes, high blood pressure, asthma and cancer. Since 1990, the prevalence of Type II Diabetes in the US population has increased from 2% to more than 6%.[91] In both the US and UK, obesity is predicted to overtake smoking as the leading cause of preventable disease. The price tag is enormous. According to latest estimates, obesity and related illnesses cost the United States about $120 billion per year and cause 300,000 premature deaths.[92] In the UK, obesity costs the economy an estimated £25 billion a year and reduces life expectancy by nine years.[93]

Legal liability

With such serious economic and social costs, the inevitable search for 'culprits' has begun. The food industry — in particular, fast food — is being blamed for its role in processing, portion-enlargement and price-cutting to achieve higher sales.

In the US, obesity-related litigation is well underway, with lawyers seasoned in the tobacco trenches now rounding on the likes of McDonald's, Burger King and KFC. Several high-profile cases have already captured considerable attention.

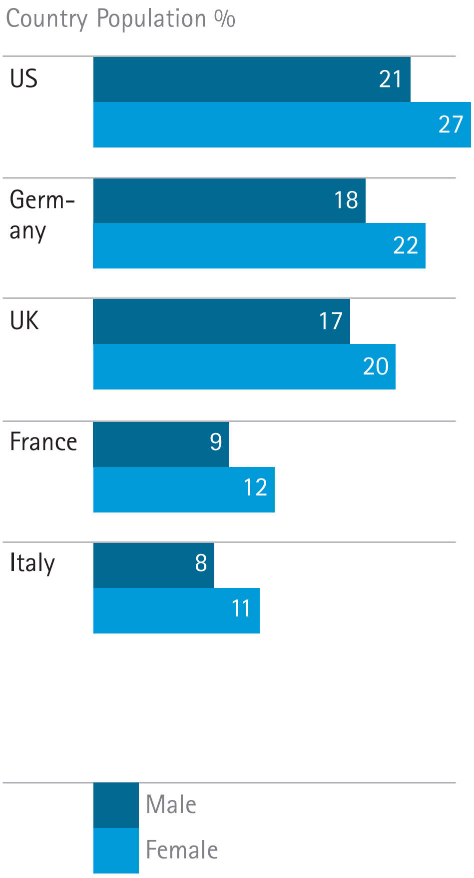
In 2002, lawyers representing a group of obese New York teenagers sued McDonald's for acting negligently by selling foods that were high in fat, sugar, cholesterol and salt. In 2003, the judge dismissed the suit, but gave the plaintiffs' lawyers 30 days to file an amended suit, with suggestions on how to frame it. The lawyers duly filed their amended suit, this time alleging that McDonald's had engaged in deceptive practices in the promotion and sale of its products. In September 2003, however, the judge again dismissed the case, criticising the lawyers for failing to show that McDonald's had misled customers or that there was a clear connection between the company's menu and the plaintiffs' health problems.

Another highly publicised case was the 2003 lawsuit against Kraft Foods, manufacturer of Oreo Cookies. The plaintiff, a non-profit group, asked the court to order the company to cease marketing and selling Oreo cookies to children in California, in large part out of concern over the health impacts of eating trans fats. Though the enormous publicity generated by the case raised public awareness of the danger of trans fats, ultimately the plaintiffs withdrew their case.

Though neither of these cases succeeded in a strict legal sense, the ensuing publicity enabled them to strike significant blows against the defendants, denting their purses as well as their reputations.[94] And though a case against the food industry has yet to be won, plaintiffs have the slow-burn precedent of the tobacco lawsuits, which were rejected for years before the first legal breakthroughs. Victor Schwartz, general counsel to the American Tort Reform Association, estimates that it will take at least five years before these suits mature and potentially strike a real hit against the food industry.[95]

'Food is the new tobacco.'
The Sunday Times
6 July 2003

19 **1990s: prevalence of obesity**



Source: International Obesity Taskforce

It will not be easy for plaintiffs to win such a case. First, there is the problem of causality – the need to prove that any company's products were the definitive cause for obesity or related problems, rather than sedentary lifestyles or any number of other factors. Then there is the issue of multiparty defendants. Even if food were accepted as the definitive cause of a person's health problems, it would be hard to pin plaintiffs' ills down to one defendant – to argue, for instance, that they ate only in McDonald's or Burger King and that only that company is liable.

Finally, perhaps most crucially, there is the issue of free will versus addiction. Unlike tobacco, it is not clear to what extent fast food is addictive. In the tobacco lawsuits, the allegations included claims that the companies artificially boosted the amounts of addictive nicotine in their products. No comparable claims have yet been successfully made with regard to fast foods, although some new research has begun to indicate that the fat and sugar in fast foods may be as dangerously addictive as tobacco and some drugs.[96]

In the US there may ultimately be legislation to curb obesity lawsuits. In March 2004, the House of Representatives passed the so-called 'cheeseburger bill' to shield restaurant franchises and food firms from blame for making customers 'dangerously fat'. The bill, which received White House endorsement and passed by a vote of 276 to 139, would ban lawsuits seeking to blame the food industry for their customers' waistlines. The bill now moves to the Senate, where it is not expected to pass.[97]

Nonetheless, as the publicity over obesity intensifies, the number of lawsuits against the food sector is growing. In summer 2003, a group of US lawyers, public health officials and consumer advocates held an obesity-litigation conference to plot legal strategies and discuss possible regulation of the fast food industry. Significantly, the conference was led by litigators and academics who had spent years taking on the big cigarette companies.[98]

While the fast food giants are the most obvious initial targets, litigation challenges are forecast to extend to snack foods, soft drinks and packaged foods.[99] Further potential targets could include food distributors, advertising agencies and toy manufacturers who co-market their products with foods claimed to be unhealthy. And though obesity litigation has not yet migrated beyond the States, the cases are being closely watched in Europe, where obesity has also become a public concern. Tighter regulation of food marketing and labelling looks inevitable: there are already widespread calls in Europe and Australia for the regulation of food advertising to children, and even for health warnings on food packaging.

In what many see as a response to the threat of regulation or litigation, the food companies have begun to announce changes to their products and marketing techniques. McDonald's recently announced that it would stop 'super-sizing' meals, start offering healthier options, and in some markets, advise customers to eat in its restaurants no more than once a week.[100] The company has also changed its marketing approach in some markets, emphasising a healthier menu and image, while promoting an active lifestyle and encouraging children's exercise programmes. After the California lawsuit, Kraft subsequently announced that it was looking for ways to reduce artery-clogging trans fats in Oreos, and also announced plans to reduce portion sizes, cut the fat and sugar content of products and stop marketing in schools. A spokesperson later admitted that the move was made in part to reduce the risk of further legal action.[101] Other companies have taken similar steps. Pepsi has said it will broaden its portfolio of reduced fat and low calorie products over the next two years, while Nestlé will put health warnings on most of its chocolate bars to remind customers of the need to exercise.

This new wave of litigation suggests that no sector is immune from attempts to attach liability for broad social, health and economic issues to private sector defendants. A decade ago, few would have expected the food industry to be targeted for obesity – liability issues in this sector were focused on more obvious issues, such as contamination.

Insurance liability

Unless the current increase in obesity is addressed, it is likely in the long term to have direct consequences for the life insurance industry around the world. For life cover, the increased relative risk of death attributable to obesity-related conditions has clear scope to reduce the life expectancy of the obese insured population (including those insured under employer-sponsored group schemes, where insurance cover is not typically underwritten according to the individual risks presented by each employee in the scheme). In respect of health policies, obesity can result in increased health problems affecting disability income and critical illness cover; private medical insurance (alongside government and, ultimately, taxpayers) may also be exposed to a share of the costs of treatment.

Liability and excess casualty insurers are potentially vulnerable to a wide range of exposures arising from lawsuits against their policyholders.[102] 'Insurers losing appetite for junk food and alcohol,' one recent headline proclaimed.[103] Following a number of high-profile cases, insurers fear that the sector will face more litigation, possibly leading to further increases in premiums and exclusions and withdrawal of insurance cover for unknown risks.

John Inwood, head of public liability for Zurich London, insurer of restaurants and hotels, has warned, 'We are urging the food and drink sector to revisit their risk management policies, as insurers will be looking more closely than ever before at what the food and drink sector is doing to demonstrate that they are being socially responsible.'[104]

Apart from obesity liability, the general cost of insuring business against rising liability awards has been increasing for some time. In particular, the extraordinary long tail nature of many liability claims, whereby the injury giving rise to the claim may take place years after exposure to the product in question, has left carriers paying out huge sums for risks they never anticipated and never accounted for in their original pricing.

This is one factor that has driven up the cost of cover, to the point where many businesses now find insurance increasingly difficult to afford and face a widening gap between their level of insurance protection and their potential liability risk.

A study by Marsh, the world's largest insurance broker, found that in the US, the average cost for liability insurance rose 63.4% in the 12-month period ending 31 January 2003.

At the same time, average liability limits purchased by companies fell 9.4%, reflecting a sluggish economy as well as the rise in insurance costs.[105] In the UK, Marsh found that companies purchased on average 19% lower limits of cover than in 2002. In Europe companies purchased 11% less liability protection while costs for protection were on average 82% higher.[106]

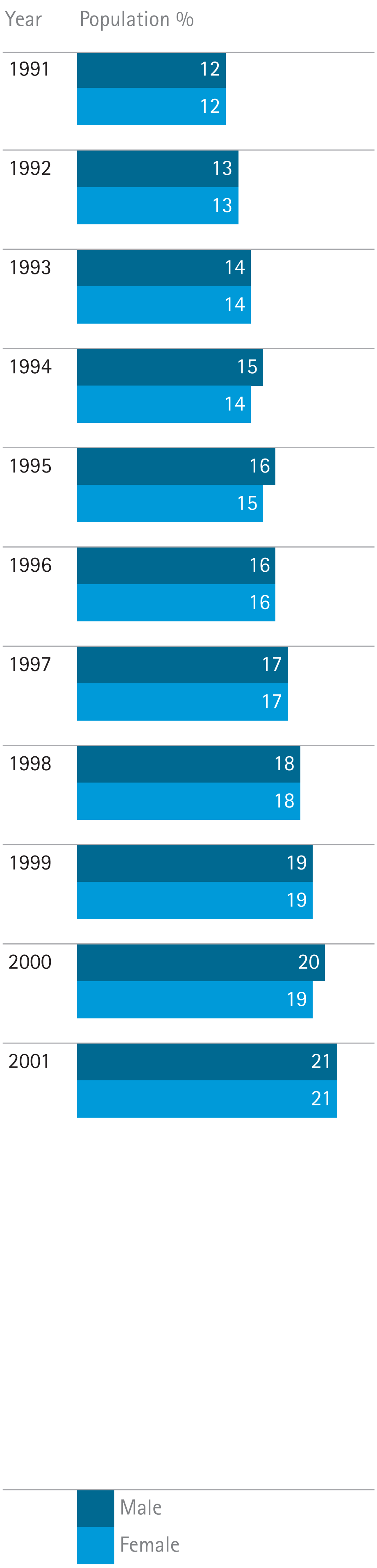
Financial liability

Litigation and insurance worries in the food industry are also sparking financial concerns. In 2003 JP Morgan advised food companies to exercise caution in their advertising to guard against obesity and health-related litigation. At the same time, the bank issued a warning that food makers' share prices could be at risk from such litigation as well as increased regulation – particularly in Europe – of labelling, advertising and distribution.[107] Already in the UK more than 100 leading health and consumer groups have urged the Government to ban junk food advertisements,[108] and the Food Standards Agency has unveiled plans to tackle obesity and children's diets.[109]

Taxation of the food industry may become another issue. In the United States, a New York State legislator has introduced a bill into the state assembly seeking a one percent sales tax on 'junk food' in an effort to combat the problem of obesity. The approach is modelled on tobacco taxation.[110] Meanwhile, in the UK, the British Medical Association has proposed a tax on fatty foods, lobbying for a tax of 17.5%,[111] and the Blair Government floated the idea of a fat tax before later striking it down.[112]

Fast-food companies may already be suffering the financial repercussions of concern over obesity. In December 2002, McDonald's posted its first quarterly loss in its 47-year history,[113] while Burger King has seen a drop in global operating profit of 20%. In the UK, some attribute this loss to the fall-out after the McLibel trial and BSE or Mad Cow Disease, but if losses continue, the connection with obesity concerns will increasingly be drawn.

20 Prevalence of obesity in US adults



Source: Center for Disease Control Atlanta

What are the implications for business?

Food companies must recognise that the bar for transparency and accountability in their sector has been raised. The food and obesity debate has spotlighted companies' legal vulnerability with respect to information provided to customers – the early cases have alleged that fast food and snack companies failed to make sufficiently clear the risks of consuming their products and misled customers into thinking their products were safe or healthy when they were not.[114] These were the very arguments upon which much of the tobacco litigation ultimately turned. Figure 21 lists some of the potential legal avenues which US food industry cases could take.

Recommendations for business

Companies outside the food industry should recognise that they are not beyond the line of fire. Pharmaceutical, chemical, automotive and mobile phone companies are some of the businesses that could find themselves the next target of litigation and civil activism.

All companies should review their exposure to the food and beverage sector through the whole of their value chain and assess for potential risk.

Backcast from a world in which high fat, sugar and/or salt products are heavily penalised through regulation, taxation and/or consumer avoidance.

Engage with NGOs and Government agencies to develop the optimum mix (from a societal health perspective) of voluntary and regulated responses.

Consider pre-emptive and pro-active actions to reformulate, label and market products (including consumer education) to the highest standards as a route to protecting future value. Pay particular attention to marketing and advertising which target children.

21 **Potential focus of litigation**

Theory	Notes
Product Liability	Product is dangerous/defective and caused health hazard
Personal Injury	Plaintiff suffered obesity, overweight, diabetes, heart condition, high blood pressure, stroke
Negligence	Company knew product hazardous to health; knew product was addictive
Strict Liability	Product poses extreme hazard
Failure to Warn	Company failed to disclose that product is associated with various diseases
Breach of Warranty	Product is not as healthy as purported
Misrepresentation	Company's health claims about the product are not valid
Negligent/Reckless Marketing or Distribution	Company marketed product without stating health risks; questionable marketing to children
Advertising Liability	Advertising misled consumers (especially children)
Government Subrogation	As in tobacco settlement with states – a fast-food 'sin tax'

Source: SustainAbility / Insurance Information Institute

Study 4 Legacy Lessons in hidden liability

In the spirit of transparency, SustainAbility wishes to disclose that Dow is a partner in its *Engaging Stakeholders Program*, paying £7,000 per annum for participation. Dow has not had (nor have they sought) any influence on the content of this report, beyond correction of factual errors. SustainAbility has had extensive exploratory discussions and correspondence with Dow management on the Bhopal issue and appreciates the inputs they have made; we have also visited Bhopal as part of the research for this case study. All time and expenses related to this were borne by SustainAbility.

Bhopal ranks alongside Chernobyl as one of the worst industrial disasters of all time. In December 1984, a pesticide manufacturing plant operated by Union Carbide India Limited (50.9% owned by Union Carbide Corporation) leaked vast quantities of MIC gas. Thousands of victims died,[115] and campaigners on the ground claim that the toll grows by about thirty victims a month as a result of exposure two decades ago. Hundreds of thousands more suffer chronic injury, social dislocation and psychological distress. Victim support groups contend that the next generation is suffering a range of illnesses and development defects as a result of *in utero* exposure, and that historic ground and water contamination continue to harm local health.

Union Carbide, the parent company of the operators of the plant, became the focus of huge media coverage and legal exposure overnight. In this Study, we show how Dow — by acquiring Union Carbide in 2001 — is itself now facing demands to address ongoing issues surrounding the Bhopal disaster.

Dow steadfastly maintains that it has no responsibility, legal or moral, for the Bhopal legacy, and has maintained its position against investors, campaigners, customers, suppliers, politicians and even its own staff. Dow's position is simple and may — or may not — be well founded in law, but — in light of new interpretations of moral liability — probably unsustainable.

The challenges of Bhopal are, however, by no means limited to the roles of Union Carbide and Dow. Any analysis of the Bhopal tragedy and subsequent events is bound to conclude that the state and federal governments of India have failed the victims as well.

Two decades after the tragedy, much of the settlement funds paid by Union Carbide to the government has still to be distributed to the benefit of the victims.[116] The medical follow-up has been inadequate, unsustained and cloaked in secrecy. The site which reverted to state control still awaits decontamination and is not sealed from the local community whose children and animals wander into the site. The Indian government has much to answer for in the continuing crisis in Bhopal

But the focus of this report is new and emerging forms of risk for business and the experiences of Union Carbide and more recently Dow illustrate how hidden liabilities can and will emerge to threaten reputations and licence to operate. While the case study concentrates, therefore, on the issues and learning from Bhopal for business, there are clear lessons too for the need, as globalisation develops, for new models of cooperation and collaboration between governments and business in jointly securing a fair and efficient resolution of the health, environmental and social impacts of industrial accidents.

Dow's acquisition of Union Carbide creates new wave of activism

The 1989 settlement ($470 million paid to the Indian government) was negotiated as a comprehensive final settlement at the end of protracted legal actions, but was amended in the Indian Supreme Court in 1991 to reinstate the criminal charges. Yet, numerous campaigners, journalists, professionals and opinion-formers argue that facts have been concealed; that failures in safety systems, processes and equipment were the primary cause of the accident; that the medical legacy is vastly greater in terms of death, disability and congenital defects than any official estimate; and that current groundwater contamination is directly attributable to Union Carbide's activities.

'We have no responsibility in this matter. There is nothing more we can do.'
A Dow spokesman, when challenged on the Bhopal legacy shortly after the announcement of their acquisition of Union Carbide in 2001

The Bhopal tragedy: a brief history

1984 December
Union Carbide India Limited's (50.9% owned by Union Carbide Corporation) pesticide manufacturing plant suffers catastrophic release of MIC gas. Over 3,000 local inhabitants die and many more are injured. Final tolls of deaths and injuries vary wildly from under 8,000 to over 20,000. Union Carbide's early responses to the tragedy are proactive, but progressively thwarted by the political climate at the time: as the litigation issues mushroomed, the matter rapidly shifted to lawyers to resolve.

1985 March
India adopts the Bhopal Gas Leak Disaster (Processing of Claims) Act (the 'Bhopal Act') to give the Indian government exclusive authority to represent victims of the Bhopal disaster in courts around the world.

1989
A 'final' settlement is reached. Union Carbide Corporation agrees to pay $470 million to the Indian government who will be responsible for its application to the benefit of the victims. $330 million (much of this being accrued interest) still awaits distribution. In 2004 a court order has been issued requiring the balance to be paid to the victims and their families.

1991
Indian Supreme Court affirms the civil part of the settlement, but reinstates the criminal portion of the original charges against Union Carbide India Ltd, Union Carbide and its former CEO Warren Anderson. These cases remain pending.

1994
Under threat of seizure of their Indian assets, Union Carbide Corporation disposes of their shareholding in Union Carbide India Limited by selling its interest to another Indian company for $90 million, all of which is put into a trust and ultimately gifted to provide for the building and running of a hospital in Bhopal dedicated to the victims.

1997
Indian government closes the victims' compensation claims applications.

1998
The Bhopal site reverts to state control when the state government revoked the lease: the issue of responsibility for site decontamination is still under legal dispute.

2001
Dow's acquisition of Union Carbide Corporation re-kindles activist, legal and media interest and there are continuing legal actions in relation to environmental damage and victims' compensation.

Present
Dow's position officially remains that it has no responsibility for the tragedy and its aftermath given that all liabilities were agreed and settled in 1989; that neither Union Carbide nor Dow had or has direct or indirect ownership of the Bhopal site; and that there is conflicting evidence of new health or environmental residual impacts.

Dow has discussed the issue with groups representing survivors with little progress to report from either side.

At the time of acquisition, Dow claimed their due diligence gave them complete comfort on past and future liabilities (in spite of outstanding criminal charges). A variety of stakeholders, however, believe Dow to have inherited an obligation to address the most serious continuing environmental and health consequences. Campaigners who attacked Union Carbide for 16 years with limited success refocused their efforts at the time of Dow's acquisition of Union Carbide and fought hard to ensure that Bhopal was not forgotten with the disappearance of the Union Carbide name (the Union Carbide Corporation still exists but does not trade).

Campaigns focused on Union Carbide (and now Dow) are wide-ranging and include:

– **Victims' groups**
  The victims' campaign has refused to accept the compensation as equitable and continues to press for the criminal case to be pursued in court.

– **NGO campaigns**
  Greenpeace has adopted the issue as an international icon campaign in the lead up to the 20th anniversary of the tragedy in December 2004. Bhopal Medical Appeal continues to run awareness and fund raising ads in the UK.

– **Shareholder resolutions**
  Boston Common Asset Management – a fund manager specialising in socially responsible investment – argued in favour of a resolution: 'Dow Chemical senior executives purport to be committed to sustainable development but they continue to deny any legal or moral responsibility for the victims of the Bhopal disaster. We feel that if Dow continues to do nothing to resolve this issue it may cause serious damage to Dow's reputation, which may affect its growth prospects in Asia and beyond.'[117] Although the resolution was rejected by 96% of voted shares, it led to negative media coverage.

– **Investment ratings**
Innovest – a US firm that analyses companies' performance on environmental, social, and strategic governance issues – issued a risk report on Dow early in 2004. In the press release accompanying the report, Innovest observe: 'Moreover, Dow's ability to carry out transactions and move into new markets could be hindered by its reputation related to its connection with Union Carbide. Union Carbide's status as "absconder from justice" in India may also jeopardize Dow's assets in that country, and create conditions by which the US becomes an alternative legal venue for claims against the company. Efforts are currently underway in the US congress and UK and European Parliaments to force Dow and Union Carbide to take full responsibility for Bhopal. The issue has the potential to become a significant public relations problem for the company.'[118] It should be noted, however, that there is no evidence to date that mainstream equity and bond analysts covering the chemicals sector have changed their ratings of Dow as a result of the Union Carbide acquisition.

– **Political pressure**
A group of 18 US Congressmen recently called on Dow Chemical to 'finally address the extreme environmental and health problems created 20 years ago'. They held that the company had 'not yet addressed the liabilities it inherited' and should immediately take steps towards reparations in Bhopal. In a speech on the House floor, their leader, Congressman Frank Pallone, announced, 'In an effort to restore basic human rights to the people of Bhopal, [we] are circulating a letter to the CEO of Dow Chemical asking that Dow take responsibility for the disaster it inherited in 1984 and that it co-operate in meeting the demands of its victims.' A similar plea was made by 53 UK parliamentarians.

– **Media**
Investigative writers and journalists have drawn broadly critical conclusions. *Five Past Midnight in Bhopal* which has already sold more than one million copies in Europe gives an alarming account of corporate incompetence and short-sighted decision making. An article in *The New Scientist*, a respected British journal, concluded that Union Carbide and Dow's responses reflect a staunch adherence to the company line, and alleged that both companies have been in possession of documents that contradict their public positions. A Union Carbide attorney rejected these accusations in a letter to the journal[119] which attracted a rejoinder from campaigners – whatever the intricacies of the argument, the damage to Dow's reputation was probably already done.

– **Students**
Campus protests have been developing in the US and in Dow's home state, students campaigning in 2003[120] began looking for other skeletons in Dow's cupboard as a means of gaining leverage.

In spite of Dow's denial of responsibility, these public protestations have the potential to progressively undermine the company's reputation, staff morale, 'licence to operate', and ultimately shareholder value. As Dow acknowledged in our discussions with them, their confidence in their legal innocence is proving ineffective at disarming residual perceptions of company responsibility with concerned stakeholders.

What stakeholders want from Dow

Some of the main demands of Bhopal activists include:

– **Decontamination of the site.** Technically, responsibility for the site now rests with the state government to whom the lease reverted in 1998. More recently, however, the Indian Government, with the state's support, has made a submission to a US court which could open the way to hold Union Carbide still responsible for the clean-up.

– **Development of a comprehensive Bhopal database.** The Indian authorities stopped routine medical assessments in 1992. There are no comparative studies to test whether Bhopal is suffering abnormal disabilities, deaths and congenital problems.

– **Revisiting the scale of damage agreed in the 1989 settlement.** Union Carbide (and now Dow) maintained that there are no residual impacts beyond those accepted in the settlement attributable to the tragedy in terms of health. Yet as discussed above, activists argue that the damage is much greater than originally thought, as gynaecological problems in girls and growth abnormalities in boys become apparent.

– **Opening of a new case** seeking compensation for the health and social impacts of soil and groundwater contamination unrelated to the gas leak.

'The year 2003 was a special year in the history of the campaign for justice in Bhopal. It was the year when student and youth supporters from at least 30 campuses in the US and India took action against Dow Chemical or in support of the demands of the Bhopal survivors. As we enter the 20th year of the unfolding Bhopal disaster, we can, with your support, convey to Dow Chemical that the fight for justice in Bhopal is getting stronger and will continue till justice is done.'
Rasheeda Bi, Champa Devi
Bhopal Gas Affected Women Stationery Employees Union, International Campaign for Justice in Bhopal

Dow's response to date

At the time of the accident in 1984, Union Carbide's initial response was textbook crisis management. The company claimed moral responsibility within 24 hours, the CEO Warren Anderson insisted (against the advice of some of his own advisers) on flying to the scene of the tragedy, and teams of chemical and logistics experts were assembled to address a range of critical health and safety issues at the Indian plant and in its locality.

But the instinctive, proactive and accountable approach was to be short lived. On his arrival in Bhopal, Anderson was arrested, sparking a diplomatic incident resulting in his release and rapid retreat to America. Meanwhile, the company's stock came under pressure as the scale of the potential liability became clearer. Soon, lawyers began to take control and have had a major influence on Union Carbide's and – following acquisition – Dow's management of the issue since.

Publicly, Dow has held firmly to the line that the company inherited no legal or moral liabilities for the Bhopal legacy. As then CEO Michael Parker wrote to employees just before the 18th anniversary of the tragedy, when the company had become a target for Greenpeace campaigning, ' . . . what we cannot and will not do – no matter where Greenpeace takes their protests and how much they seek to undermine Dow's reputation with the general public – is accept responsibility for the Bhopal accident.'[121]

One of Dow's arguments is that because Union Carbide Corporation was primarily a shareholder in the Bhopal plant with minimal involvement, it cannot be held responsible for standards at the plant or for the results of events such as the 1984 gas leak.

Union Carbide Corporation had, at the time of the tragedy, a 50.9% shareholding in Union Carbide India Limited, which had explicit responsibility for the design, build, running and maintenance of the plant. Agreements imposed by the Indian government required that all stages of the plant's lifecycle be managed and operated by Indian nationals. Furthermore, it is argued, if shareholding involvement alone gave rise to responsibilities for remediation and compensation in the event of an accident, small or institutional investors would also have a proportionate obligation. To distance the issue even further, Union Carbide Corporation's shareholding in Union Carbide India was sold in 1994 for $90 million, all of which was given to a trust to establish a hospital for the victims outside of the terms of the settlement.

Yet many dispute this interpretation.[123] Union Carbide Corporation was a principal party and partner to the Indian venture, which was established to develop its Sevin business in a major sub-continent. At the time of the tragedy, it had majority control of the business, it lent the Union Carbide name to reflect its parentage and it provided expertise and training to the Indian design and management teams. As majority owners it could be argued, therefore, that Union Carbide Corporation then had – and Dow has now inherited – a special responsibility for the consequences of accidents such as the gas leak.

Dow has had numerous meetings with victim support groups and declared its willingness to listen to concerns and to consider humanitarian gestures in Bhopal. Yet it is unwilling to admit a link: 'despite the fact that we clearly have no legal obligations in relation to the tragedy, we have, for some time, been exploring various philanthropic initiatives which might address some of those needs – just as we do in other parts of the world where we have business interests.'

On the whole, Dow's communication related to Bhopal is brief and factual, plays down the profile of the issue, and avoids being drawn into the minefield of subtle legal and moral arguments that still surround the case. As a result, the balance of information and opinion in the public domain is heavily weighted to adverse comment on and assessment of both Union Carbide and Dow's handling of the tragedy and its aftermath. An informed researcher finds limited data from Union Carbide / Dow, with the main source being www.bhopal.com.

Paradoxically, Dow's approach may be helping to keep debate and protest alive. The sparse facts provided fail to acknowledge – let alone address – many of the key points and concerns raised by stakeholders. Figure 22 lists some of the issues that neither Union Carbide nor Dow has answered to the satisfaction of various stakeholders.

Legally protected, but morally liable?

While Dow may be proven right in denying any legal obligations (though criminal charges are still outstanding against Union Carbide), expectations of corporate responsibility have changed significantly since 1984. Perceived failure to act responsibly can leave a company 'legally innocent but morally guilty' in the eyes of society.

As discussed earlier, intergenerational justice now looks backwards as well as forwards, as seen in the recent payments made by multinationals for collaboration with the Nazis or for the use of forced or slave labour. Similarly, distance in time or on along the value chain offers ever less protection, as Nike and others have seen in relation to contractor working conditions. Moreover, compliance to the letter and even to the spirit of legislation and regulation can still leave a company heavily exposed to adverse public opinion (as in the case of Shell and the Nigerian controversy).

Undoubtedly, the Bhopal legacy is complex, and there is no silver bullet solution. Dow's response to this issue would inevitably set precedents that could adversely affect a range of other current and potential liabilities for the company. Nonetheless, if activists prove their case that health and environmental legacies are worse than originally thought, there is a powerful moral argument that Union Carbide India, Union Carbide Corporation and (now) Dow may face 'moral responsibility' for addressing them.

22 **Issues that neither Union Carbide nor Dow has answered to the satisfaction of stakeholders**

Topic	Issues raised by stakeholders
Accountability	Legacy obligations reflecting societal rather than legal expectations Ensuring a just outcome for the victims
Responsibility	Do Dow sustain the 'moral responsibility' accepted by Union Carbide Corporation in 1984?
Disclosure / Transparency	Full public disclosure of medical and chemical test data held by Union Carbide pre and post the gas leak
Legal	Dow's position on the outstanding homicide charges against Union Carbide and Warren Anderson in India
Financial	Status of original settlements View on Indian government's handling of settlement funds
Medical	Lack of monitoring and assessing evidence of reproductive and growth abnormalities in the next generation
Environmental	Site contamination Groundwater contamination
Political / Cultural	Justification for Union Carbide's majority holding in Indian subsidiary (against prevailing Indian policy) and implications for liability Allegations of corruption and undue influence prior to 1984
Social	Impacts on disrupted families Marriageability of victims' children

Source: SustainAbility

Implications and conclusions

Without doubt, the Bhopal accident and its aftermath are of a scale and level of complexity that set it apart from other industrial disasters. Yet, we believe that the case offers useful lessons to companies that:
— Are considering major acquisitions.
— Have unresolved legacies in their current portfolios.
— Manage their business on the basis of a narrow compliance focus.
— Are under pressure from stakeholders on issues with moral/ethical dimensions.
— Apply different standards of environmental, health and safety protection in different countries.

Need for more robust due diligence processes and content

The clearest lessons are in the area of due diligence. Companies considering acquisitions or mergers are well advised to pay close attention to the unfolding Bhopal controversy. Traditional 'due diligence' has focused narrowly but deeply on financial and legal current and potential liabilities. This could well give a clean bill of health to an acquired company that is nonetheless vulnerable to a range of less tangible risks to reputation or to the balance sheet more directly.

New lenses of current and potential liability offer a very different assessment of value at risk. As US consultants to the energy and chemical industries observe in a recent paper entitled 'EHS Due Diligence in Global Transactions',[122] 'In our experience, it is not unusual to see the biggest risks at the smallest, most remote sites. A company may be selling or buying a dozen sites around the world and the smallest site in "East Nowhere" will cause the biggest headaches in negotiations and create the largest liabilities. We've seen major, well-respected multinational companies operate in ways that you wouldn't believe in out-of-the-way places, unknowingly incurring Bhopal-type risks.'

Exposure to market risks in spite of compliance

As discussed earlier, the court of public opinion is becoming at least as powerful as courts of law in terms of potential impact on a company. Societal views of justice shift over time and make compliance an increasingly inadequate strategy: winning in the courts or with regulators can still lead to losing in the market. Even when companies hold to the letter of the law they can run into serious and expensive problems if they are seen to breach society's values or expectations, as Shell found out with Brent Spar (sea disposal of oil platform), Nike with child labour, and Monsanto and others over genetically modified crops.

Changing boundaries of accountability

In the case of Bhopal, significant failings arguably fall to the Indian federal and state governments whose bureaucracy and inefficiency have resulted in the majority of the compensation funds still not being distributed to the victims and in the Union Carbide site (owned and controlled by the state of Madhya Pradesh) lying contaminated. Yet it is the corporate players who have been most criticised. Both Union Carbide and more recently Dow have been very silent on this issue. Shell were similarly silent during the Saro Wiwa trial in Nigeria, and the worldwide moral outrage that episode provoked caused Shell to revisit their Business Principles to include a commitment to actively uphold human rights.

The strategy of transferring accountability elsewhere, even though legally sustainable, is an increasingly weak defence. Ford initially distanced themselves from responsibility for the spate of fatal accidents involving tyre separation on certain SUVs, arguing that the problem lay with the tyre manufacturer, Firestone. Ford quickly realised that this was out of tune with society's — and indeed customers' — expectations: it was they who took the lead and initiated a second major tyre recall.

Increasing importance of engagement and disclosure

Engagement and exceptional disclosure are essential tools in addressing stakeholder concerns. Yet it is seen by many business leaders as either an abdication of management responsibility, or a transfer of control to groups with no legitimate role in a company's decision-making process. However, the companies that have begun to experiment with increased disclosure and stakeholder engagement almost always draw strategic value from the process, in addition to enhancing their position in the eyes of campaigning adversaries.

Increasing risk of previously legally settled cases being reopened

As expectations of corporate responsibility harden, previously legally settled cases risk being reopened. As discussed above, Bhopal activists are seeking to reopen the 1989 settlement on the scale of health and environmental damages caused by the accident as well as pursuing new actions for compensation on contamination issues not covered by the original settlement. Dow are also potentially exposed in this respect to the legacy of Agent Orange with victims whose symptoms first appeared after the closing date for compensation applications seeking to reopen the case in US courts.

Consistency of global environmental and social standards

In the case of Bhopal, it appears likely that standards of safety design, maintenance and emergency response were not equal to those applied in Union Carbide's US operations (but see Dow's position in Endnotes).[124] Whilst there may be sound historical reasons why this should be so, it raises issues in terms of global as opposed to local application of safety standards, and whether Union Carbide's ownership position obliged it to be more proactive in ensuring and assuring high safety standards. As globalisation develops, demands for corporate consistency will sharpen.

Appendix 1
Websites of Interest

Law and environment / SD

Foundation for International Law and Development (FIELD) is a non-governmental organisation bringing together public international lawyers committed to the promotion of environmental protection and sustainable development through law
www.field.org.uk

Law and climate change

Climate Justice Programme
www.climatelaw.org

Company-specific sites with relevant legal angles

McDonald's
www.mcspotlight.org

Bayer
www.cbgnetwork.org

Dow/Bhopal
www.bhopal.org
www.bhopal.net

ATCA pro and con

www.usaengage.org
www.notortureforprofit.org

Class actions and the 'legal industry'

Class action portal — stop and shop for class actions by category
www.bigclassaction.com
www.worldjustice.com

Right-leaning site to address America's 'Lawsuit Industry'
www.triallawyersinc.com

Class action information and facilitation
www.classaction.com

'Overlawyered.com explores an American legal system that too often turns litigation into a weapon against guilty and innocent alike, erodes individual responsibility, rewards sharp practice, enriches its participants at the public's expense, and resists even modest efforts at reform and accountability.' Run by Walter Olsen, author of *The Rule of Lawyers*
www.overlawyered.com

General corporate watchdogs with spotlights on legal issues

www.corpwatch.org

www.multinationalmonitor.org

www.corpwatchindia.org

www.earthrights.org

Miscellaneous

Blog site for corporate lawyers
www.corplawblog.com

Appendix 2 Endnotes

01 With acknowledgement to Craig Mackenzie of Insight Investment.
02 Useful references for understanding 'societal expectations' include The Universal Declaration of Human Rights (and allied conventions), the Convention on the Rights of the Child, the International Labour Organization's Declaration on Fundamental Principles and Rights at Work, and the UN Human Rights Norms for Business.
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04 Assuming $12 trillion GDP in 2010 vs. $11 trillion in 2003.
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06 www.law.gwu.edu/acad/620-638.asp (Under 637 Legal Activism).
07 See SustainAbility's report *Gearing Up.* www.sustainability.com/publications/gearing-up.asp
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11 Note, however, that there are contrarian voices. A new study in the US, for example, covering a wide range of class-action cases, from civil rights violations to securities fraud, argues that the average price of settling class-action lawsuits and the average fee paid to lawyers who bring them have remained broadly unchanged for a decade. (Jonathan Glater, Study Disputes View of Costly Surge in Class-Action Suits, *New York Times*, 14 January 2004.)
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16 www.mcspotlight.org/case/pretrial/factsheet.html
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20 www.pwcglobal.com/gx/eng/about/svcs/cfr/euromoney/euromoney-june03-dai.pdf
21 www.cliffordchance.com/uk/news/press-releases/template.asp?file=/uk/news/press-releases/articles/2003-11-11.html
22 The new Combined Code came into effect in November 2003, largely based on the recommendations of the *Higgs Report*. www.frc.org.uk/publications/content/combined.pdf
23 For press coverage of the decision, see http://money.guardian.co.uk/equitablelife/story/0,10788,1065822,00.html
24 www.occes.asso.fr/fr/comm/nre.html
25 www.ccbe.org/doc/En/guidelines_csr_en.pdf
26 www.theorator.com/bills107/hr2782.html
27 www.irtk.org/what_is_irtk.html
28 www.legislation.hmso.gov.uk/si/si1999/19991849.htm
29 The surprise decision by Cintas to support a shareholder resolution for greater disclosure on supply chain working conditions may be a signal of this. http://money.excite.com/jsp/nw/nwdt_rt.jsp?section=news&news_id=dji-00041920040813&feed=dji&date=20040813&cat=industry
30 'Broadening' refers to the broadening range of issues covered while 'deepening' refers, for example, to the growth in international and multilateral agreements http://europa.eu.int/comm/environment/international_issues/agreements_en.htm
31 For an excellent discussion of foreign direct liability, see Halina Ward, 'Legal Issues in Corporate Citizenship', February 2003. www.sweden.gov.se/content/1/c6/02/39/81/3ce0b609.pdf
32 The bill was introduced by US Congresswoman Cynthia McKinney, who lost her seat in the 2002 elections. www.theorator.com/bills107/hr2782.html
33 The Core Coalition includes Amnesty International, Christian Aid, Friends of the Earth, the New Economics Foundation, Save the Children, Traidcraft and the Unity Trust Bank.
34 For details of the first Bill, sponsored by MP Linda Perham: www.publications.parliament.uk/pa/cm200203/cmbills/129/2003129.pdf
35 For details of the second Bill, sponsored by MP Andy King: www.publications.parliament.uk/pa/cm200304/cmbills/027/2004027.pdf
36 Environics 'Voice of the People' 2002.
37 With acknowledgement to Craig Mackenzie of Insight Investment.
38 Shell was forced in the face of huge negative media coverage to abandon its plan to dispose of an oil storage tank in the North Atlantic in 1996.

[39] This particularly related to the trial and execution of Ken Saro Wiwa with Shell under huge pressure to intervene on his behalf. Shell subsequently amended its Business Principles to commit to active support for human rights.
[40] This example is included not to endorse the actions of animal rights extremists, but to demonstrate how 'moral crusades' can adversely impact a company outside of traditional legal processes.
[41] www.campaignexxonmobil.org
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[44] Survey sample: 200 institutional investors managing assets of $2 trillion. www.mckinsey.com/clientservice/organizationleadership/service/corpgovernance/pdf/globalinvestor opinionsurvey2002.pdf
[45] The resolution filed with IPSCO, a Canadian steel company very nearly succeeded (at 49.2%). www.socialfunds.com/news/article.cgi/article1297.html
[46] www.insightinvestment.com/responsibility/project/the_role_of_investors.asp
[47] www.deloitte.com/dtt/cda/doc/content/SDI7.pdf
[48] Institutional Investor Summit on Climate Risk held at UN headquarters, November 2003.
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[50] www.whistleblower.org/article.php?did=183&scid=110
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[59] www.jembendell.com/lw2003/lw2003.pdf
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[61] www.unep.org/documents/default.asp?documentid=192&articleid=2758
[62] http://europa.eu.int/rapid/pressreleasesaction.do?reference=ip/03/849&format=html&aged=0&language=en&guilanguage=en
[63] The programme is an initiative hosted by Friends of the Earth International. It aims to encourage and support the enforcement of the law internationally to combat climate change in the run up to the start in 2005 of negotiations for further cuts in greenhouse gas emissions under the Kyoto Protocol. Over 70 organisations and lawyers are signatories to its Statement of Support, including Greenpeace, WWF and organisations based in developing countries.
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[65] 'Who is going to pay for climate change?' *TIME Magazine*, 7 February 2003.
[66] Corporate Governance and Climate Change: Making the Connection, commissioned by CERES. http://ceres.org/newsroom/press/ceresirrcrel.htm
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[74] These principles are available online at www.fco.gov.uk/files/kfile/da85e5dbm-5frights-5f13dec,0.pdf
[75] www.unhchr.ch/huridocda/huridoca.nsf/0/64155e7e8141b38cc1256d63002c55e8?opendocument
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123 'Union Carbide's 50.9% share in UCIL enabled it to maintain total management control: control of UCIL's board, budgets and the proprietary MIC technology in Bhopal. Carbide's engineers oversaw design, build and operations until the end of 1982; after, they provided ongoing technological know-how and safety reviews. A US executive management team, the 'Bhopal Task Force', oversaw fatal cost-cutting at the plant, reducing staff numbers, training and maintenance from 1982 onwards. Poor training, maintenance and design were all key factors in the disaster.'
ICJB in correspondence with SustainAbility (2004)
124 'This is the activist position but it totally discounts UCC's position. UCC safety-audited each of its subsidiary plants, including the plant in Bhopal. These audits were standard worldwide. The last such audit of the Bhopal facility occurred early in 1984 and although the noted infractions were all corrected (also documented) they had no relation to anything that occurred at the time of the tragedy. Arguably the UCIL plant in Bhopal was a superior design compared to the UCC plant in the US.'
Dow in correspondence with SustainAbility (2004)

Publication Details

The Changing Landscape of Liability
First Edition 2004
ISBN 1-903168-13-9

Acknowledgements
This report has benefited from a huge range of inputs for which we are extremely grateful. We would like to express particular appreciation to our sponsoring partners for their inputs, insights and support through a long and complex research, writing and production process; thanks especially to Catherine Burger, Rick Murray and Mark Way of Swiss Re; Craig Mackenzie and Kerry Ten Kate of Insight Investment; and Sarah Altschuller and Phil Rudolph of Foley Hoag.

The extended SustainAbility team including our Council has, as ever, been unstinting in generosity of spirit and practical advice; and we were especially fortunate to have the very capable and enthusiastic support of Maria Burnett who spent an internship with SustainAbility researching the topic widely, but with a lead input into the Human Rights study. We are also indebted to the many experts who gave generously of their time and expertise to our research. While we attribute specific quotations from Halina Ward's excellent paper, *Legal Issues in Corporate Citizenship*, we would like to acknowledge the influence her work has had on the content of this report more generally. Shelly Fennell made critical editorial improvements through the writing process, while Sarah Ellis kept us on track through later drafts and proofing. All of these inputs have improved this report immeasurably. Any outstanding errors of fact or judgement, however, are ours and ours alone.

Information Design
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This report is available free of charge thanks to the generosity of Swiss Re

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