THE NEW "PUBLIC"

The Globalization of Public Participation

Carl Bruch
Editor

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The New "Public": The Globalization of Public Participation

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THE STAKEHOLDER CONVERGENCE: PUBLIC PARTICIPATION AND SUSTAINABLE BUSINESS PRACTICES

*Ira Feldman**

People's right to know about and participate in decisions that could affect their quality of life is increasingly recognized as a critical element of sustainable development.[1] In this context, the environmental matters have been a "wedge issue," allowing advocates to open up government processes and make them more accountable.[2] Natural resources and the environment play a fundamental role in ensuring a safe, healthy, and productive life, thus people are more likely to demand opportunities to be involved in decisions that affect these natural resources.[3]

Why is opening up government processes important to business? Where is the business value of stakeholder engagement? Public and consumer pressure play an important role in providing market incentives to motivate and reward corporate change. The assumption has been that improving public participation in environmental decisionmaking could provide benefits to business in terms of increased public acceptance, and there has been grudging acceptance that better solutions and outcomes are possible through multi-stakeholder dialogues. However, active engagement with stakeholders and documented good performance can protect licenses to operate, drive product and service innovation, reduce legal liabilities, and improve business strategy:

> Rising public involvement in government and business affairs is seen in the growth and activism of non-governmental organizations, and in pressures to disclose environmental and social performance to investors. Civil society creates pressures for business to be more open and transparent in the way it deals with the public, government, other businesses, and local communities. International NGOs ensure that corporate activities anywhere in the world are under stakeholder and shareholder scrutiny. Failure to perform responsibly in a distant market or along the supply chain or in the launch of new products may erode corporate reputation and harm competitive position in core markets and in equity markets.[4]

Civil society is demanding greater accountability and transparency from both government and business.[5] The public participation dialogue—which has resulted in the general acceptance of its three pillars: access to information, access to decisionmaking processes, and access to justice—has focused primarily on governmental decisionmaking, with limited input from the business community. Regional efforts, such as the UN/ECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention) and the Inter-American Strategy for the Promotion of Public Participation in Decision-Making for Sustainable Development (the ISP), have translated the pillars into frameworks for implementation.[6]

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* *Ira Feldman is President and Senior Counsel of greentrack strategies.* *The author wishes to acknowledge the support of Carl Bruch, Sarah King, and Dorigen Fried at the Environmental Law Institute, and to convey appreciation to the many colleagues who have shared their insights and resources, including, Douglas Weinfield, Chris Laszlo, Adam Saslow, Deeohn Ferris, Bill Thomas, Adam Greene, Dennis Hirsch, Magali Delmas, Zoila Giron, Dan Roczniak, Chris Bates, Dan Fiorino, Jeffrey Barber, Stephen Davis, and Jan Mazurek.*

[1] Rio Declaration on Environment and Development, prin. 10, done at Rio de Janeiro on June 14, 1992, 31 I.L.M. 874 (1992).

[2] *See* Carl E. Bruch & Roman Czebiniak, *Globalizing Environmental Governance: Making the Leap From Regional Initiatives on Transparency, Participation, and Accountability in Environmental Matters*, 32 ENVTL. L. REP. 10428 (2002).

[3] *Id.* at 10428-29.

[4] WORLD RESOURCES INSTITUTE ET AL., TOMORROW'S MARKETS: GLOBAL TRENDS AND THEIR IMPLICATIONS FOR BUSINESS 53 (2002) [hereinafter TOMORROW'S MARKETS].

[5] UNEP, 10 YEARS AFTER RIO: THE UNEP ASSESSMENT 43 (May 2002) (summary report from UNEP's Industry as a Partner for Sustainable Development initiative) [hereinafter UNEP ASSESSMENT], *available at* www.uneptie.org/outreach/wssd/global/pub_global.htm (last visited July 26, 2002).

[6] *See* Svitlana Kravchenko, *Promoting Public Participation in Europe and Central Asia*, in this volume; Jorge Caillaux et al., *Environmental Public Participation in the Americas*, in this volume.

In the private sector, the "beyond compliance" theme has evolved into discussions of strategic environmental management, sustainable business practices, and triple bottom line thinking.[7] Separate, but closely related, is the current focus on corporate governance, corporate accountability, and corporate responsibility, which has received increased attention in the wake of high-profile financial and accounting scandals at Enron, WorldCom, and other companies. The consideration of the parameters of corporate social responsibility (CSR) has drawn varied players, from the European Commission[8] to the International Organization for Standardization (ISO),[9] into the dialogue, and the United Nations has launched its "Global Compact" in partnership with business and industry.[10]

This chapter posits that there are common links among all these initiatives in the spheres of public involvement and corporate governance, and that progress in both areas will require the development of enhanced mechanisms for stakeholder engagement. Some view sustainability and governance as the twin pillars of corporate responsibility.[11] A blurring of lines between public decisionmaking and private decisionmaking on environmental and sustainability issues, as well as emerging notions of collaborative governance, is driving what is described in this chapter as "the stakeholder convergence." From the private sector perspective, voluntary initiatives and partnerships have defined the position of business and industry in the preparations for the World Summit on Sustainable Development (WSSD); this chapter illustrates how these efforts are congruent with enhanced stakeholder engagement.

This chapter explores this rapidly changing field, drawing primarily on the U.S. experience. One needs to traverse a broad terrain in order to fully understand the stakeholder convergence. Some of the pieces of the puzzle remain to be linked through multi-disciplinary research, pilot implementation projects, and perhaps the emergence of new mechanisms for public involvement and institutions to support them. The first section recaps advances in public involvement and stakeholder engagement over the last decade. The section also discusses the traditional mechanisms for public participation, which until recently meant public input to governmental decisionmaking through notice and comment procedures and public hearings. The perceived shortcomings of these traditional approaches illustrate the need for models of enhanced public publication. The second section considers the appropriate role of business and industry in the sustainability dialogue, especially with respect to voluntary initiatives, partnerships, and so-called "Type II" partnerships. The third section begins with a short discussion of traditional mechanisms for engaging the public in environmental decisionmaking, and then discusses mechanisms for enhanced public participation. These include options within the U.S. statutory framework, voluntary excellence programs, industry code initiatives, good neighbor programs, and sustainable community efforts. The fourth section considers the leading academic work with implications for improving stakeholder engagement by the private sector, especially efforts to measure the business value of stakeholder engagement. Research activities are occurring across various disciplines, and the results promise to alter our view of stakeholder-industry partnerships and collaborative governance. A concluding section considers future prospects in light of the WSSD and beyond.

I. PUBLIC INVOLVEMENT FROM RIO TO JOHANNESBURG

The last decade has seen dramatic developments in the articulation and implementation of public involvement. Starting with Principle 10 of the Rio Declaration on the Environment and Development,[12] formal and informal efforts from the local to the global have started to ensure that public involvement. Bruch and Czebiniak summarized the experiences over the past decade:

> The 1992 Earth Summit seized an opportunity to recognize and affirm the importance of access to information, public participation, and access

[7] *See* JOHN ELKINGTON, CANNIBALS WITH FORKS: THE TRIPLE BOTTOM LINE OF 21ST CENTURY BUSINESS (1997); *see also* MATTHEW ARNOLD AND ROBERT DAY, THE NEXT BOTTOM LINE: MAKING SUSTAINABLE DEVELOPMENT TANGIBLE (1998). Elkington introduced the term "triple bottom line" to summarize his idealized corporate sustainability agenda: the balancing of economic prosperity, environmental quality, and social justice, i.e. achieving sustainability is more complex than simply harmonizing the traditional financial bottom line with emerging thinking about the environmental bottom line.

[8] *See* COMMISSION OF EUROPEAN COMMUNITIES, COMMUNICATION FROM THE COMMISSION CONCERNING CORPORATE SOCIAL RESPONSIBILITY: A BUSINESS CONTRIBUTION TO SUSTAINABLE DEVELOPMENT. (2002) 347 (July 2, 2002).

[9] *See* ISO CONSUMER POLICY COMMITTEE (COPOLCO), THE DESIRABILITY AND FEASIBILITY OF ISO CORPORATE SOCIAL RESPONSIBILITY STANDARDS, final report presented at ISO COPOLCO meeting, in Port of Spain, Trinidad and Tobago, on June 10, 2002.

[10] The gateway webpage for the UN Global Compact is found at 65.214.34.30/un/gc/unweb.nsf/ (last visited August 3, 2002).

[11] *See, e.g.,* Ernst A. Brugger, Remarks at 2002 Conference Board Business and Sustainability Conference, "Getting There From Here: Aligning Environmental Economic and Social Objectives with Corporate Strategy," New York (June 26, 2002) [hereinafter Brugger Comments].

[12] Rio Declaration on Environment and Development, prin. 10, done at Rio de Janeiro on June 14, 1992, 31 I.L.M. 874 (1992).

> to justice in Rio Principle 10. Subsequent regional initiatives have put flesh on the skeleton of Principle 10 by establishing specific mechanisms, legal requirements and practices to ensure good environmental governance. Through binding and non-binding regional initiatives, more than 80 countries have publicly committed to taking specific measures to ensure public access to information, participation and justice. In some cases these initiatives continue to advance apace; in others a renewed commitment is necessary. In many instances, a more complete set of specific environmental governance approaches and mechanisms are necessary to assist local and national authorities and international institutions in operationalizing public involvement.[13]

As articulated in Principle 10 and elaborated elsewhere in this volume, the core components of public involvement are transparency and access to information, public participation in decisionmaking, and accountability and access to justice.[14] However, as discussed below, mechanisms for promoting access to information and public participation have received more attention than access to justice.

A. Minimal Business Involvement in Articulation of Regional and Global Norms

Most of the regional and international initiatives described in this volumn included the active participation of governments, nongovernmental organizations, and, as appropriate, international institutions. In most instances, business has not been well-integrated or involved in the process. For example, while some business interests were engaged in discussions regarding the ISP, generally speaking they have not had a significant role in its conception, development, or follow-up.[15] Similarly, the Aarhus Convention has been a largely NGO-driven initiative that has engaged governments in a regional framework.

As implementation of the various regional initiatives, and to a lesser extent international developments, proceeds, industry is starting to take notice. Indeed, in the United Kingdom, expanded public rights of access will take effect in April 2003, sooner than expected, catching industry somewhat off guard.[16]

Substantial progress has been made in environmental impact assessment (EIA), ensuring that people know about the potential impacts of proposed projects that could affect them and giving them a chance to participate in the decisionmaking process. The experiences with EIA at the regional and international levels are discussed throughout this volume.

Pollutant Release and Transfer Register (PRTR) systems are emerging as another key mechanism to ensure public access to information about pollution to which they may be exposed. A PRTR system is a database or inventory of releases of potentially harmful chemicals to the air, water, and soil, as well as wastes transported off-site for treatment and disposal. Unlike other environmental databases, a PRTR system provides individual facility-level pollutant data, which can be periodically produced and made publicly available in an easily accessible way.[17] The Organisation for Economic Co-operation and Development (OECD) has been promoting the development of PRTR systems, and many countries in transition have begun to establish PRTR systems, often with the help of international organizations.[18]

In the United States, the Toxic Release Inventory (TRI) requires industrial facilities in certain sectors to publicly report quantities of toxic chemicals annually released into the air, water, and land. In the wake of an accident at a Union-Carbide facility in Bhopal, India that killed thousands of people living nearby, Congress passed the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA). EPCRA established the TRI and required manufacturing facilities to calculate and report releases to air, land, and water of more than 300 chemicals listed as toxic by the government. The law also required EPA to compile the manufacturers' reports in a publicly accessible database. In the years

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[13] Bruch & Czebiniak, *supra* note 2, at 10453.

[14] *See generally* Carl Bruch & Meg Filbey, *Emerging Global Norms of Public Involvement*, in this volume.

[15] Personal communication, Zoila Giron, Organization of American States, July 9, 2002.

[16] *See* Jean Eaglesham & John Mason, *Fears over Access to Companies' Environment Information*, Fin. Times, May 21, 2002, at 2. Eaglesham and Mason report that:

> The government has decided to give the public rights of access to environmental information from April, opening companies to an unprecedented degree of public scrutiny two years earlier than expected. The move, due to be announced by the Department for the Environment, Food and Rural Affairs this summer, will shock industry. Business did not expect access rights to public sector information to kick in until January 2005, when the Freedom of Information Act comes into force … The rules, which implement the Aarhus Convention, an international agreement, will have added bite since the information commissioner is to be given an enforcement role.

Id.

[17] *Public Participation in Environmental Decision-making*, *in* EBRD Transition Report 40 (2001).

[18] *Id.*

since the law took effect, the number of chemicals reportable under the TRI has grown to more than 650. The number of manufacturing companies required to report also has grown significantly.[19]

In its early years, the TRI contributed to many emissions reductions, saving facilities money and reducing the environmental burden.[20] The TRI has been popular with citizens and government:

> In a sense, [TRI] is democracy in its purest form. Give everyone open access to information they consider important, and then let society sort out its preferences without relying on government intervention. TRI has performed pretty much as its drafters expected it would. It was intended to bring about behavioral changes and create a new way to think about improving environmental performance. TRI has proven popular and powerful because it involves information that many people care about, and it serves a deeply felt social value related to public safety and environmental stewardship.[21]

However, industry has become less enamored of the TRI, particularly as the emissions reductions have become more difficult.[22] Industry and some commentators have also expressed concerns that the TRI does not account for the entire "environmental footprint" of a facility or industrial sector, that comparison of TRI data across sectors or facilities is problematic, and that the TRI does not necessarily reflect exposure risks.[23]

After the terrorist attacks of September 11, 2001, federal agencies began to rethink what information should be made available to the public. Many government websites had documents removed or were shut down entirely.[24] Considering the growing concern about access to information and the significant strides that have been made already, pressure will continue to mount for greater stakeholder inclusion through enhanced mechanisms such as those explored in this chapter.

B. Shortcomings of Traditional Mechanisms for Public Involvement

Whether in the context of "notice and comment" rulemakings or public hearings relating to permitting or environmental impact assessment, public participation has become an accepted part of the process. Nonetheless, there has been a great deal of concern expressed by interested parties that their opinions in such processes amount to merely pro forma exercises. Within the academic community, considerable doubt has been raised about the level and effectiveness of stakeholder engagement under the traditional mechanisms, and skepticism about the applicability and effectiveness of newer hybrid approaches. Thus, the path forward is leading to the development of new mechanisms and institutions for enhanced stakeholder engagement.

In framing the current state of affairs in public participation, Susskind underscores the distinction between access to information and participation in the decisionmaking process: "While exposing the decisionmaking process to public scrutiny, access to information by itself does little to include the public in the pro-

[19] *See* Mary Graham & Catherine Miller, *Disclosure of Toxic Releases in the United States*, 43(8) Env't 8 (2001). *See also Reading Pollution Report is Tricky; EPA Offers Two Ways to Interpret Data, Producing Contradictory Conclusions*, Chattanooga Times/Chattanooga Free Press, July 29, 2002, at A1. The last round of reporting included data from approximately 23,500 facilities. *Whitman Announces Availability of Latest Toxic Release Inventory; Includes New "PBT" Data*, U.S. Newswire, May 23, 2002.

[20] Robert V. Percival et al., Environmental Regulation: Law, Science, and Policy 624-26 (1992); *see also* Kenneth J. Warren, *New Approaches Needed in Pollution Control; Dealing with Shortcomings*, 226(75) Legal Intelligencer, Apr. 18, 2002, at 5 (reporting that "The TRI also provided an additional incentive for companies to achieve source reduction: Companies devoted resources and ingenuity to reduce generation and emission of TRI chemicals to avoid the adverse publicity associated with disclosing significant emissions of toxic chemicals.").

[21] Ron Outen, *TRI: A First Step*, 43(9) Env't 34 (2001). While terming the TRI "something of a blunt instrument," Outen also noted that "it has been enormously valuable not only in terms of reductions … but also by creating the opportunity for a detailed discussion of emissions and recycling trends." *Id.*

[22] The TRI statistics show chemical facilities slicing their releases by more than half between 1988 and 1997. However reductions have been difficult since then. Bill Schmitt, *Public Disclosure, Warts and All*, Chemical Week, July 5-12, 2000, at 43 ("But if you look at the last three or four years, we are flattening out. Most people would admit that in the early years we got the low-hanging fruit. Now it's becoming more and more difficult to reduce those emissions."). *See also Chemical Industry Sees Benefits in Reporting Pollutant Emissions*, Trio, Spring 2001, at 9.

[23] Outen, *supra* note 21, at 34; *cf. Whitman Announces Availability of Latest Toxic Release Inventory; Includes New "PBT" Data*, U.S. Newswire, May 23, 2002 (acknowledging industry concerns that "TRI annual reports reflect releases and other waste management activities of chemicals, not exposures of the public to those chemicals. The release estimates alone are not sufficient to determine exposure or to calculate potential adverse effects on human health and the environment.").

[24] For a description of information taken off-line after September 11, see www.ombwatch.org/article/articleview/213/1/104/ (last visited Aug. 2, 2002); Laura Gordon-Murnane, *Access to Government Information in a Post 9/11 World*, 6(10) Searcher, June 1, 2002; Environmental Protection Agency, Chemical Emergency Preparedness and Prevention Office (CEPP), "*RMP" Info Temporarily Unavailable* (Oct. 21, 2001), *available at* epa.gov/ceppo/rmp_unavailable.htm (last visited Aug. 2, 2002).

cess, since people usually see the information only after a decision is made, and often it is in an incomprehensible form."[25] Review-and-comment, the predominant form of rulemaking in the United States, reflects what Susskind calls a "paternalistic" model of public participation, in which the governmental experts are expected to make decisions based on their objective vision of the public interest. The enhanced form of review-and-comment ("hybrid" rulemaking) involves participation by public interest groups as surrogates for the general public. Another variant, regulatory negotiation (Reg Neg), developed in response to growing interest in alternative dispute resolution and to what some decried as an"ossified" review-and-comment process.[26]

Applegate views the review-and-comment paradigm as "clearly capable of providing a quantitatively high degree of public participation in governmental decisions, and it is certainly flexible enough to permit a free-flowing dialogue among citizens and government…[but] in practice the three steps often amount to 'decide, announce, and defend.'"[27] He concludes that "if decide-announce-defend is the trap that review-and-comment procedures fall into, then the most important remedy is earlier public involvement in the decisionmaking process." But Freeman warns that merely convening a multi-stakeholder forum may not achieve meaningful participation, even if it creates an opportunity for dialogue:

> The administrative law landscape is littered with process reforms that have failed to provide meaningful participation, particularly in environmental decision making, because the responsible agency has reacted defensively to them or because public input has had little discernible impact on the way in which problems and solutions are conceived … Whether participation is meaningful depends in part, then, on the nature of the engagement among parties, as well as on the kinds of regulatory solutions they choose. Those solutions that foster continued engagement and require joint responsibility for implementation, monitoring, and revision are preferable to those that deny parties responsibility and encourage them to disengage after a single interaction.[28]

Fiorino refers to citizen participation as the "concept that lost its way," attributing some of the barriers facing enhanced stakeholder engagement to a confusing and inconsistent lexicon.[29] We should not be surprised that "citizens in a democratic society will eventually interfere with decisions in which they do not feel represented," notes Fiorino, highlighting the disconnect perceived by individual citizens.[30]

> Often participation is equated with opposition. The public is placed in a reactive posture: comments are noted, views are heard, opportunities are presented. But we rarely see a sharing of power or the codetermination of policy. The process concedes a marginal role to the individual citizen. Genuine influence is granted reluctantly, minimally, and to interests with the capacity to obstruct decisions later. Participation is biased, because it draws upon groups with the needed information, competence, and resources. It is skewed in the way that it solicits the participation of those with the most to lose or the greatest intensity of feeling on an issue.[31]

Fiorino also recognizes the link between public participation and democratic values. "Participation is just one element in the complex relationship between citizens and their political institutions … Its ethical basis should reflect democratic values and the intellectual contributions of democratic theory, not just the need to satisfy opposition demands as they arise."[32] He suggests that mechanisms for enhancing stakeholder engagement will require a new vision of participation theory that moves "beyond the interest group, adversarial, pluralistic conception and for stimulating institutional innovation and experimentation."[33]

Many commentators emphasize the qualitative difference in useful information that the general public can bring to the table. "Moreover, lay people tend to have a

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[25] Lawrence Susskind, *Overview of Developments in Public Participation*, *in* PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISIONMAKING 2 (ABA Standing Committee on Environmental Law ed., 1994).

[26] John S. Applegate, *Beyond the Usual Suspects: The Use of Citizen Advisory Boards in Environmental Decisionmaking*, 73 ILL. L. REV. 1 (1997) (citing Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1385-86 (1992)).

[27] Applegate, *supra* note 26, at 2 (citing Susan Rose-Ackerman, *American Administrative Law Under Siege: Is Germany a Model?*, 107 HARV. L. REV. 1279, 1292 (1994)).

[28] Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 27-28 (1997).

[29] "The term 'citizen participation' conjures up diverse images. To some people, it is synonymous with computer mailing lists, outreach meetings, well-publicized hearings, and slickly-packaged informational brochures. To others, the term evokes images of raucous public meetings, rising costs, lawsuits and delay. To still others, the term is a symbol for rallying opposition to government and corporate insensitivities, or a strategy for mobilizing otherwise disinterested publics. To the government administrator, participation can mean a nuisance or a strategy, to the public affairs staff an opportunity, to the public interest group a tactic, and to newly-organized groups a symbol. Few terms in our contemporary political lexicon have been used with so little semantic precision." Daniel Fiorino, *Environmental Risk and Democratic Process: A Critical Review*, 14 COLUM. J. ENVTL. L. 501, 523-24 (1989).

[30] *Id.* at 504 (citing B. Fischhoff, ACCEPTABLE RISK 148 (1981)).

[31] *Id.* at 529.

[32] *Id.* at 546-47.

[33] *Id.*

richer, more complex, and value-sensitive understanding of risk than the risk metrics that experts typically use."[34] Of course, a participatory process is important in itself in a society where governmental decisionmakers are ultimately accountable to the public.

II. THE ROLE OF BUSINESS AND INDUSTRY

Sir Mark Moody-Stuart, the former chairman of Royal Dutch/Shell, and now chairman of Business Action for Sustainable Development (BASD), has stated, "you can't have sustainable development without business; it's just not practical."[35] The member companies of the International Chamber of Commerce (ICC) and the World Business Council for Sustainable Development (WBCSD) companies encourage good corporate practice and responsible business conduct through principles developed by individual companies, as well as through their participation in the Global Compact, their contributions to the revision of the OECD Guidelines for Multinational Enterprises, and various other initiatives, such as the Global Sullivan Principles.[36] This section focuses on the growing recognition in industry circles that stakeholder engagement is an important aspect of any voluntary initiatives, partnerships, or self-regulatory programs and will help lead the private sector towards sustainable business practices.

A. From Dialogue to Partnerships

The WBCSD recognizes that stakeholder engagement is a critical vehicle for its organization's aspirational goals relating to sustainability.[37] According to WBCSD, business has much experience with stakeholder dialogue, but still too little with the next step: practical partnerships composed of players in different sectors. The United Nations Environment Program (UNEP), in its ten-year assessment, suggests that the time is right to move to that next level:

> Multi-stakeholder dialogue is increasingly gaining acceptance as a tool for business understanding of societal expectations, for avoiding problems, and for providing sustainable solutions. … Environmental and sustainability reporting by companies and associations is becoming increasingly valued as a tool for measuring and communicating corporate and industry performance. A key achievement has been the development of broad based stakeholder consensus on basic sustainability reporting indicators as developed by the Global Reporting Initiative (GRI).[38]

Some business leaders are already thinking ahead and innovatively. Brugger has articulated "A Sustainable Approach to Business", which shifts the corporate-stakeholder relationship from one of "islands of roles and responsibilities" to a framework of "seas of competencies and obligations." Brugger has concluded that such core business topics as issue management, risk management, and knowledge management all depend on stakeholder relations, and he is presenting sustainability and governance as "the twin pillars of corporate responsibility."[39] Davis has outlined a very similar vision of the changing playing field for business and industry, marking a shift to what he calls "A Civil Economy." Davis suggests that we are entering a "new era of capital markets" where "stakeholder issues *are* core business issues." He concludes that business will participate in institutions that will sustain a civil economy.[40]

B. Stakeholder Engagement and Business in the Run-up to Johannesburg

Pressure continues to build on the international business community to expand its commitment to corporate citizenship and sustainable development. Two principal routes have been established for business and industry inputs to the WSSD planning process. First,

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[34] *See, e.g.*, Freeman, *supra* note 28, at 63 (observing that local stakeholders were interested in issues that the company and EPA "had never considered"); *cf.* Michael J. Sandel, Democracy's Discontent 4-6 (1996).

[35] Jodie Ginsberg, *Business Role Crucial at Global Summit, Leader Says*, Reuters, July 5, 2002, *available at* enn.com/news/wire-stories/2002/07/07052002/reu_47739.asp (last visited July 19, 2002).

[36] Multi-Stakeholder Dialogue background paper submitted by the International Chamber of Commerce (ICC) and World Business Council for Sustainable Development (WBCSD), United Nations Commission on Sustainable Development (CSD), 10th Sess., WSSD Preparatory Committee II, held in New York on Jan. 28 - Feb. 8, 2002, *available at* www.basd-action.net/docs/documents/prepcom2-paper-business.doc (last visited July 26, 2002). The Global Compact, *supra* note 10; OECD Guidelines for Multinational Enterprises, *available at* www.oecd.org/EN/document/0,,EN-document-93-3-no-21-181096-0,00.html (last visited June 6, 2002); Global Sullivan Principles, *available at* www.globalsullivanprinciples.org (last visited July 26, 2002).

[37] WBCSD, The Business Case for Sustainable Development: Making a Difference Toward the Johannesburg Summit 2002 and Beyond 8 (Sept. 2001) ("Corporate stakeholders range through employees, shareholders, communities, NGOs, consumers, partners, suppliers, governments and society at large. Dialogue with these allows us to learn and to spread that learning throughout the company. This learning decreases uncertainty, misunderstanding, risk, and liability; increases public acceptance of corporate activity; and increases predictability of regulators.").

[38] UNEP Assessment, *supra* note 5, at 7.

[39] Brugger Comments, *supra* note 11.

[40] Stephen M. Davis, Remarks at 2002 CERES Conference on "The Future of Wealth on Earth: Opportunities and Risks for Investors, Corporations, and Activists in a Changing Global Climate," held in Washington, DC on Apr. 17, 2002.

the WBCSD and the ICC have created Business Action for Sustainable Development (BASD) to develop a business position for the Summit. Through the BASD, business seeks to "fully participate in the dialogue with governments and other stakeholders."[41] Second, UNEP has conducted regional stakeholder dialogues with business worldwide and developed a summary of key issues for each region.

The Taskgroup on Business and Industry (ToBI), which since 1997 has focused on voluntary industry initiatives and corporate accountability issues, has significant implications for the private sector and engagement with civil society.[42]

UNEP has coordinated its Industry as Partner for Sustainable Development initiative as a multi-stakeholder process. Twenty-two sectors prepared global reports under a common format developed by UNEP. The UNEP process brought labor and nongovernmental organization (NGO) stakeholder interests into the sector report drafting process on an advisory basis.[43] Each sector report outlines achievements and unfinished business, as reported by the participating sector, while noting the perspectives and concerns of NGO and labor organizations. The result has been a formidable collection of informative reports intended as a basis for the WSSD dialogue.

Of the 22 sector reports, two are of particular interest for their comments on the importance of stakeholder engagement. The Chemicals sector found that input from stakeholders was important for the preparation of their UNEP report. Looking ahead, the trade association ICCA "wants to build on this involvement to more effectively implement the propositions and reach the goals here presented."[44] The Finance and Insurance sector report is perhaps the most sophisticated in its treatment of stakeholder issues, stating that "the lending sector must continue to come up with innovative financing solutions…that integrate divergent stakeholder expectations."[45]

UNEP itself has prepared an overview ten-year assessment report as part of the Industry As Partner in Sustainable Development initiative. The UNEP report summarizes the numerous efforts developed by industries in reducing their environmental footprint, while noting concern over the widening gap between those efforts and a worsening global environmental situation.[46] The UNEP report is structured with recommendations directed not only at business and industry, but also to governments, civil society groups, and international organizations. With regard to public participation and stakeholder engagement, UNEP identified certain gaps and stakeholder concerns related to: imple-

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[41] www.basd-action.net/docs/documents/prepcom2-paper-business.doc (last visited Aug. 5, 2002).

[42] ToBI successfully pressed for a multi-stakeholder review of voluntary initiatives in the CSD process. The review was ultimately undertaken by ToBI with the ICC and the International Confederation of Free Trade Unions (ICFTU). Within ToBI's agenda, known as "Seven Steps Towards Corporate Accountability," public participation has been a constant theme. For example, the following specific goals were articulated:

> 5(b) encourage "good neighbor" practices, in which companies, especially foreign companies and national chains (1) establish meaningful dialogues and negotiations with the communities in which they locate; (2) make adequate information and independent technical expertise available on those processes and practices which may have negative environmental or social impacts; and (3) provide mechanisms for meaningful public participation in company decisions that could impact the community's health and well-being;
>
> (c) support and help create mechanisms by which the public can more actively participate in decision-making processes which may affect them and their communities; one set of recommendations is in the UNECE Convention on Public Participation;
>
> (d) promote national dialogues with local authorities and citizen organizations on economic strategies to promote sustainable community development and local self-reliance. Special attention should be given to the value of local consumption of locally produced goods and services; and
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> (e) provide support to local authorities and citizen organizations in developing community-based criteria and indicators for sustainable community development, including full-cost measures of local consumption, production and investment.
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> …
>
> 6(e) provide sufficient funding and support to government agencies and community-based monitoring efforts to properly check and enforce progress in meeting pollution, toxics, and energy reduction targets; and
>
> f) require annual, independently verified reports from all companies regarding their progress towards clean production goals. These reports should include community impact statements or environmental and social audits, not only for each location in which a company has factories or production operations but also regarding the impacts of the products and the extraction of raw materials used in making these products.

For more information on ToBI activities, see JEFFREY BARBER, MINDING OUR BUSINESS (1997); TOBI, CAN CORPORATIONS BE TRUSTED? (1999).

[43] *See* UNEP ASSESSMENT, *supra* note 5.

[44] INTERNATIONAL COUNCIL OF CHEMICAL ASSOCIATIONS (ICCA) AND UNEP, INDUSTRY AS A PARTNER FOR SUSTAINABLE DEVELOPMENT– CHEMICALS 9 (2002), *available at* www.uneptie.org/outreach/wssd/sectors/chemicals/chemicals.htm (last visited July 26, 2002) [hereinafter CHEMICALS SECTOR REPORT].

[45] UNEP FINANCE INDUSTRY INITIATIVES, INDUSTRY AS A PARTNER FOR SUSTAINABLE DEVELOPMENT – FINANCE AND INSURANCE 29 (2002), *available at* www.uneptie.org/outreach/wssd/sectors/finance-insurance/finance-insurance.htm (last visited July 26, 2002) [hereinafter FINANCE AND INSURANCE SECTOR REPORT].

[46] UNEP's priority areas with respect to business and industry are identified as: mainstream decisionmaking; improve voluntary initiatives; reporting (defined as "help ensure transparency, assess performance improvements and spread environmental and sustainability reporting practices beyond the pioneering companies to the silent majority"); integration of social, environmental, and economic issues; and global responsibilities and opportunities.

mentation and verification; linkage with public policy framework; and stakeholder consultation.

Recognizing that voluntary initiatives cannot provide a substitute for an effective regulatory framework, UNEP calls for government and business interests to collaborate to find the right balance of regulations, economic measures, and voluntary initiatives, appropriate to specific socio-economic and cultural contexts. UNEP observes that most voluntary initiatives are still characterized by problems of effective implementation, monitoring, transparency, and free riders; many voluntary initiatives are still being developed with little real consultation of those outside the industry. UNEP suggests that the sector reports prepared under its auspices have helped "to move one step further in providing greater transparency needed for multi-stakeholder discussions and better mutual understanding."[47]

C. Type II Partnerships

In addition to the traditional, consensus-based negotiated outcomes (termed "Type I"), the WSSD will see the conclusion of a set of "Type II" partnerships and initiatives. These Type II documents will not be negotiated by all present but instead by those partners—governments, intergovernmental bodies, businesses, and other stakeholders—committed to implementation of the specific initiative. These partnerships will focus on concrete and specific initiatives to strengthen the implementation of Agenda 21. Any such agreements entered into at the WSSD, especially those with private sector partners, have the potential to create new mechanisms of stakeholder engagement and new institutions to support multi-stakeholder activities. These proposals have been solicited during the run-up to WSSD to be announced at the Summit.[48]

The idea is to "enable all stakeholders to make concrete contribution to the outcome of the Summit by launching implementation initiatives," and to use partnerships as the vehicle "to improve the quality of implementation by involving those stakeholders whose activities have direct impact on sustainable development."[49] While business and industry have favored the partnerships approach, NGO support has been mixed.

Currently, there are no strictly defined criteria for selection, review, or assessment of Type II outcomes, nor is there a formal selection process. Rather, there are basic requirements and guidance from the WSSD Chair and Vice-Chairs. These include that partnerships should be regional or international in scope; that they should have clearly defined targets, expected results, and a time frame; and that arrangements for funding, monitoring, and implementation should be set forth.[50]

At the Preparatory Committee meetings (PrepComs) for the WSSD, NGOs and some governmental representatives voiced significant concern that the potential links between the Type I documents and the Type II partnerships were ill-understood. Some felt the linkage was inadequate, either because the Type I's lack structure or detailed commitments, or because too many Type II's of limited relevance might be accepted. As one NGO observer noted, "There is also a danger that the development of the Type II [partnerships] drains the negotiating process of its energy and thus weakens the multi-lateral attempt to arrive at a strong and concrete global consensus. But there is also a chance that the development of the Type II [partnerships] will have a positive impact on the negotiations, demonstrating how the sustainable development agreements can be implemented."[51] Lord Holme, the Vice Chairman of BASD, has offered strong support for the Type II mechanism as consistent with the ICC and WBCSD interest in encouraging partnerships.[52] In particular, the BASD has noted that its position is that, "the partnerships cannot work properly if they are not transparent in their aims and activities, and mutually accountable between parties."[53]

III. MECHANISMS FOR "ENHANCED" PUBLIC PARTICIPATION

If the traditional mechanisms for engaging the public in environmental decisionmaking are falling short of the goal of meaningful involvement, then where can we find templates for enhanced mechanisms for public participation in environmental policymaking and corporate decisionmaking? As discussed above, the involvement of the general public adds value to both public sector and private sector decisions, especially decisions that involve technical and complex questions of human health, the cost of available technologies, and assessment of socio-economic conditions. The following section explores five mechanisms for enhanced public participation, beginning with enhancements to media-specific statutory programs and then considering more in-

[47] UNEP Assessment, *supra* note 5, at 45.

[48] *See* Proposals for Partnerships/Initiatives to Strengthen the Implementation of Agenda 21, *available at* www.johannesburgsummit.org/html/documents/prepcom2.html (last visited July 26, 2002).

[49] United Nations, Division for Sustainable Development, Type II Frequently Asked Questions (FAQ), *available at* johannesburgsummit.org/ (last visited July 26, 2002).

[50] Minu Hemmati, *Type 2s Explained*, 3(2) Stakeholder-Forum 7 (July 2002). The Stakeholder-Forum electronic newsletter can be viewed at www.earthsummit2002.org.

[51] *Id.*

[52] Lord Holme, *Stakeholder Responses to Bali Prep. Comm.*, 3(3) Stakeholder-Forum 4 (July 2002) (transcription of comments).

[53] *Id.* (but also expressing concern about establishing a mechanism to monitor the type II agreements).

novative approaches to stakeholder engagement. Each mechanism offers business and industry a potential vehicle for improving environmental decisionmaking and moving towards sustainable business practices.

A. Statutory Programs

The vast majority of U.S. federal—and many state—environmental laws rely heavily on public access to information, participation, and accountability mechanisms.[54] These mechanisms include monitoring and reporting, public hearings and consultations, and citizen suits.

For example, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), which is the Superfund hazardous waste site cleanup program, has evolved to better recognize the need for stakeholder engagement. The Environmental Protection Agency (EPA) has found that the public needs to be involved:

> In the original 1980 version of CERCLA, Congress made a deliberate choice to focus clean-up decisions on technical issues and limit delay in implementation by limiting public participation. As a result, CERCLA practically mandated the decide-announce-defend version of the review-and-comment model by placing public participation in a narrow time frame after the remedial decision was made. Subsequent EPA policy directives and amendments to CERCLA increased opportunities for public participation along the lines of hybrid rulemaking.[55]

Now, public access to information and participation are anticipated at a wide range of decision points under CERCLA.[56] Despite the programmatic evolution, CERCLA remedy selection often remains a "decide-announce-defend" process.

> In sum, the review-and-comment models, as exemplified by CERCLA, provide an opportunity for public reaction to agency proposals, but they do not draw the public into the decision-making process at a point at which they can be influential…[S]uch narrow participation can be counterproductive in that it further alienates the public by considering only agency-defined problems and solutions. This satisfies neither outsiders who want a seat at the table, nor insiders who are regularly faced with rejectionist posturing.[57]

This limited regulatory mandate for stakeholder engagement in hazardous waste remediation is particularly inadequate when placed in the context of urban brownfields revitalization or when environmental justice concerns are raised.[58] Some efforts have been made to address these deficiencies outside of the regulatory box, for example, through the National Environmental Justice Advisory Council (NEJAC), which has developed a model plan for public participation.[59] From a business perspective, public participation in this could improve the remedial approach itself and minimize the chances of protracted litigation.

The Clean Air Act (CAA) offers an example of how command and control provisions may work with the flexibility of facility-level environmental management systems and private sector accountability mechanisms, such as third-party certification. The Clean Air Act amendments of 1990 authorized the EPA to require owners or operators of any facilities handling a regulated substance that exceeded a threshold quantity, to prepare a risk management plan (RMP). Section 112(r) of the Clean Air Act establishes a system of risk management for specific substances.[60] Under a RMP, the EPA must audit selected sources for adequacy. Audit sites are determined by the facility's accident history, hazards identified in the plan, and other factors. It has been observed that an ISO 14001 environmental management system could provide a useful framework for meeting their obligations under RMP, or the similar requirements which have been promulgated under the European Union's Seveso II Directive.[61] Under a proposed pilot study, a firm could obtain automatic approval of an RMP and low priority in regard to compliance inspections if the firm agreed to certain steps, including making environmental audit results publicly available and holding public meetings to discuss the audit and surveillance reports.[62]

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[54] *See, e.g.*, Conservation Foundation, Toward Clean Water: A Guide to Citizen Action (1976).

[55] Applegate, *supra* note 26, at 3.

[56] *E.g.*, 42 U.S.C. § 9617; 40 C.F.R. § 300.430(c).

[57] Applegate, *supra* note 26, at 3.

[58] Deeohn Ferris, *Communities of Color and Hazardous Waste Cleanup: Expanding Public Participation in the Federal Superfund Program*, 21 Fordham Urb. L.J. 671 (1994).

[59] National Environmental Justice Advisory Council (NEJAC), Model Plan for Public Participation (Nov. 1996), *available at* www.epa.gov/projectxl/nejac.htm (last visited July 19, 2002).

[60] *Industry Network Helps Companies Prepare For CAA Risk Management Rule Compliance*, Daily Env't Rep. (BNA), June 4, 1997, at A2; *see also*, Chemical Manufacturers Association (CMA) and American Petroleum Institute (API), Compliance Guideline for EPA's Risk Management Program Rule (1997).

[61] *See* William L. Thomas, *Use ISO 14001 as a Manager for Process Risks*, 11(76) Hydrocarbon Processing 109 (Nov. 1997).

[62] *Id.* at 112 (citing Isadore Rosenthal & Donald Theiler, *Use of ISO 14000 As an Option in Implementing EPA's Rule on Risk Management Programs for Chemical Accidental Release Prevention*, Wharton Risk Management and Decision Processes Center, Working Paper No. 96-11-25).

As more firms elect to be inspected through their insurance companies, those not participating increase their likelihood of being inspected by the EPA. Rather than facing potential government scrutiny, it is expected that this option will create a virtuous cycle.[63] This proposal is presented as a "win-win" for regulatory agencies and the public. The initiative would allow regulators to target resources on those facilities most likely to be out of compliance. Since it provides better information and a more meaningful opportunity for local community input, the pilot would give concerned citizens greater confidence in the company's RMP exercise. "In many communities, RMP roll-out sessions have provided a vehicle for public discussion of the issues between industry and community stakeholders. The results have been confrontational at times, but in most cases the dialogue has been a very constructive exchange of information."[64]

B. Voluntary Excellence Programs

Project XL[65] may be the most vilified—and certainly the most misunderstood—initiative in the relatively short history of the EPA. Project XL was envisioned as a series of 50 experiments to test innovative approaches to environmental management. Offering regulatory flexibility in exchange for accountability and collaborative decisionmaking, Project XL's experiments —if successful results emerged—would be integrated into the regulatory system. During the Clinton-Gore administration, Project XL was EPA's flagship program for introducing systemic change and "reinventing" how EPA protects the environment.[66]

Project XL has had its share of successes and failures; XL's future is not entirely clear given the emergence of EPA's Performance Track program.[67] However, Project XL produced much fodder for further discussion and analysis, and from a process perspective perhaps the most valuable outcome from Project XL's successes and failures has been its contribution towards a better understanding of stakeholder dynamics.

Project XL did not get off to a good start. In retrospect, EPA officials recognized that the early problems stemmed from several sources: political ties created in the program's initial announcement; EPA's decision to provide no predetermined program structure or policy in the initial stages; and minimal stakeholder input in the original program design.[68] Some praised EPA for allowing industry to generate creative, innovative proposals with limited bureaucracy, but others criticized EPA for lack of clarity and structure and for creating "a regulatory free for all."[69] As project applications were received and negotiations were begun, the problems encountered included:

- Widely differing expectations from within EPA and among stakeholders,
- Lack of early public input,
- Lack of clear legal authority and protection of project sponsors,
- Lack of clarity on what constitutes superior environmental performance,
- Difficulty in achieving meaningful stakeholder involvement,
- Lack of understanding of EPA's ability to offer flexibility, and
- High transaction costs.[70]

After publishing two notices, Project XL struggled to work through the first proposals and reach negotiated agreements. At the time there was genuine fear that the XL program might collapse of its own weight. Indeed, many projects proposals were withdrawn. Stakeholders craved a clear structure and specific objectives for the process. EPA responded with a further notice in April 1997[71] and initiated a reengineering exercise that

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[63] Howard Kunreuther et al., *Third Party Inspections as an Alternative to Command and Control Regulation*, *in* Environmental Contracts (K. Deketelaere & E.W. Orsteds eds., 2001).

[64] *Risk Management Plans Due*, The Advocate (Baton Rouge, LA), June 15, 1999, at 6-B.

[65] For an excellent, authoritative insider review of Project XL, see Lisa Lund, *Project XL: Good for the Environment, Good for Business, Good for Communities,* 30 Envtl. L. Rep. 10140-10153. *See also* Lisa Lund & Helga Butler, *Project XL: Cleaner, Cheaper, and Smarter Ways to Protect the Environment*, Envtl. Quality Mgmt. 75-89 (Spring 2000). For legal and regulatory perspectives, see Dennis Hirsch, *Project XL and the Special Case: The EPA's Untold Success Story*, 26 Colum. J. Envtl. L. 219-257 (2001); and Dennis Hirsch, *Bill and Al's XL-ent Adventure: An Analysis of EPA's Legal Authority to Implement the Clinton Administration's Project XL*, 1998 Ill. L. Rev. 129-172.

[66] *See* US EPA, Innovation at the Environmental Protection Agency: A Decade of Progress (Apr. 2000) at 22-23; and US EPA, Project XL: Encouraging Innovation, Delivering Results (Sept. 2000). Generally, XL projects were designed to achieve better environmental outcomes, create operational flexibility and other benefits, and generate greater involvement and support among stakeholders. Project XL sought targeted changes by using site-specific experiments to test innovative solutions while building upon and enhancing protections of the past.

[67] US EPA, Innovating for Better Environmental Results: A Strategy Guide to the Next Generation of Innovation at EPA (Apr. 2002) at 18. *See also*, EPA's Performance Track website at www.epa.gov/performancetrack/program/report.htm (last visited Aug. 4, 2002).

[68] Lund, *supra* note 65, at 10142.

[69] *See, e.g.*, Timothy Mohin, *The Alternative Compliance Model: A Bridge to the Future of Environmental Management*, 27 Envtl. L. Rep. 10345, 10347 (1997); Rena Steinzor, *Regulatory Reinvention and Project XL: Does the Emperor Have Any Clothes?*, 26 Envtl. L. Rep. 10527, 10529 (1996).

[70] Lund, *supra* note 65, at 10142.

[71] Regulatory Reinvention (XL) Pilot Projects, Notice of Modification to Project XL, 62 Fed. Reg. 19872-82 (Apr. 23, 1997) [hereinafter April Notice].

spurred basic changes in the negotiating process and generated a set of tools, including guidance on involving stakeholders.[72] The next round of solicitations announced a new operating policy guidance,[73] which clarified that the notice should invite stakeholders to be co-sponsors of proposals, an idea put forth by environmental groups during outreach sessions. This notice also defined different tiers of public participation in Project XL:

- "Direct participants" are involved in the day to-day aspects of project negotiations. They influence the design and development of projects, and their views strongly influence both the details of the agreement and EPA's ultimate decision to approve or reject the project. They can be local or national stakeholders.
- "Commentors" are stakeholders who have an interest in the project but do not participate in day-to-day negotiations and project develop ment. EPA requires sponsors to provide information to potential commentors and create periodic forums in which they can express their comments.
- The "general public" is involved by having clear access to information on the development and environmental results of the project.[74]

Public participation was one of the most challenging components of the XL program from the outset. Lisa Lund, the former XL program director, is quite candid in assessing the stakeholder engagement lapses in the early going: "Though public involvement was described as a cornerstone of Project XL, very little input was sought from stakeholders before the announcement. In fact, it took more than six months before EPA was ready to talk with stakeholders about how it intended to run the program. By that time the first projects were already in trouble and EPA's credibility had already been damaged. Though EPA has increased discussions with stakeholders over time, it has been difficult to overcome this initial lapse."[75]

EPA commissioned a review of the stakeholder issues,[76] and the results of that study, performed by the not-for-profit RESOLVE, are illuminating. The RESOLVE study analyzed stakeholder involvement in four projects: HADCO, Merck, Intel, and Weyerhaeuser.[77] The RESOLVE study reported that many XL project sponsors said stakeholder involvement had helped increase mutual understanding and networking. Some XL project sponsors who had little or no prior experience in working with stakeholder groups were able to build new relationships. Others more familiar with outreach efforts, such as Intel, Weyerhaeuser, and Merck, used XL to develop more meaningful community involvement in the development and issuance of permits and in redesigning reporting mechanisms to suit community needs.[78]

EPA also gained some insight on stakeholder-to-stakeholder interactions. In several XL projects, local stakeholders have given the national environmental groups high praise for assisting local citizens and bringing substantive expertise to the table that local citizens themselves may lack. In other projects, however, especially when they have come late to the negotiations, the locals described the national groups as "inconsistent," "interventionist," and "disconnected from local citizen involvement."[79]

Former Administrator Christine Todd Whitman recognizes the continuing potential of Project XL. "The ground has shifted. We are ready for a new approach, finding common ground to achieve shared goals. Project XL:

- Is a model of how EPA should work with all environmental stakeholders;
- Focuses on results and builds partnerships that help achieve those results;
- Provides positive incentives and produces posi tive results; and,
- Proves EPA is ready to move from command and control to cooperation and accomplishment."[80]

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[72] Project XL Stakeholder Involvement: A Guide for Sponsors and Stakeholders (Mar. 1999), *available at* www.epa.gov/projectxl/032599.pdf (last visited July 26, 2002). "In EPA's stakeholder guide it is strongly suggested that newly-formed stakeholder groups perform a needs assessment to determine whether they require training or technical assistance. The project sponsor, state or federal government, a national environmental organization, or an academic institution might provide technical information or assistance to local stakeholders. When these means are not available, EPA has set up a mechanism to provide task-specific technical assistance to XL stakeholders. The Institute for Conservation Leadership manages this service under a cooperative agreement with EPA. Assistance is available to "direct participant" stakeholder groups up top $25,000 per project." Lund, *supra* note 65, at 10148.

[73] April Notice, *supra* note 71. *See also* XL Guidance Documents, *available at* www.epa.gov/projectxl/guidexl.htm#3 (last visited Aug. 4, 2002).

[74] *Id.* at 19877.

[75] Lund, *supra* note 65, at 10143.

[76] US EPA, Office of the Administrator, Evaluation of Project XL Stakeholder Processes (Sept. 1998) at 23-24 [hereinafter Stakeholder Evaluation]; *see also* Lund, *supra* note 65, at 10147.

[77] Summaries of all XL projects can be found on the EPA XL website, *available at* www.epa.gov/projectxl/ (last visited Aug. 5, 2002).

[78] Lund, *supra* note 65, at 10150.

[79] Stakeholder Evaluation, *supra* note 76, at 23-24; *see also* Lund, *supra* note 65, at 10147.

[80] Christine Whitman, Remarks at the National Environmental Policy Institute Conference, held in Washington, DC on Oct. 2001, *available at* www.epa.gov/projectxl (last visited July 19, 2002).

C. Industry Code Programs

The American Chemistry Council (ACC), formerly the Chemical Manufacturers Association (CMA), has developed the Responsible Care program, a set of voluntary environmental management commitments. ACC bylaws obligate its member companies and partners to participate in Responsible Care as defined by the ACC Board. This includes ascribing to the Guiding Principles, participating in the development of the initiative, and making good faith efforts to implement the program elements of the Responsible Care initiative.

According to the ACC, the heart of the Responsible Care initiative are six Codes of Management Practices: the Community Awareness and Emergency Response (CAER) Code, the Pollution Prevention Code, the Process Safety Code, the Distribution Code, the Employee Health and Safety Code, and the Product Stewardship Code. These Codes of Management Practices provide a series of practices which generally include personnel qualifications; hazard identification, evaluation, prevention, and control; communication requirements; requirements for reporting data to the ACC; product risk management; and a requirement of self-evaluation.[81]

Some ACC member companies have established community or citizen advisory panels (CAPs) to address environmental or safety concerns and have advanced them as a model for involving the public or the work force in key environmental decisions. "Citizens advisory boards are an outgrowth of regulatory negotiation, which move away from rigid, expensive, adversarial resolution of environmental issues. They also respond to regulatory negotiation by expanding participation beyond a small group of insiders."[82] The ACC encourages member companies to establish community advisory panels.[83] Over 240 CAPs have been established in the U.S. under the Responsible Care banner. Some of these community advisory panels "have taken on lives of their own, bringing Responsible Care to neighborhoods around the country in new and evolving ways."[84] Typically, however, CAPs focus on the causes and effects of recent facility accidents, health and safety effects from products, and preparedness strategies. Many CAPs find plant tours and open houses to be most effective in reaching the community, while others engage in community service activities outside the fenceline.[85]

The 25-member CAP in Houston is one of several that groups together several facilities owned by different companies. The Houston CAP was formed in 1995 and now includes the participation of ExxonMobil Chemical, Lyondell-Citgo, Goodyear, Kemiron-Gulf, Rhodia, Texas Petrochemicals, and Valero. Monthly meetings of this CAP focus on quality of life issues in Southeast Houston. Almost half of the members of the Houston CAP are employees of the local facilities, and the immediate goal is to increase community involvement, ideally three to four citizens to every plant representative. The industry goal for the CAP is to operate with minimal nuisances and disruptions to the local residents. To that end, the plants provide monthly updates on environmental and safety incidents to the CAPs. From the community perspective, the CAP process has been positive, but some would like the participating companies to use the CAP framework to lead to more involvement in the community.

Several of the more sophisticated CAP programs begin to resemble sustainable community projects. The ACC acknowledges that it views the CAP program as a potential springboard towards sustainability activities.[86] The Canadian chemical industry has already charted out how an expanded Responsible Care program might embrace sustainability concepts.[87]

Some suggest, however, that the CAP concept as implemented by ACC members is flawed, arguing that most of the panels' members are handpicked by the corporation or its consultants, agendas are often set by the company, and critics are kept out or outnumbered. Moreover, "[t]he panels also generally are not provided with the independent technical support needed to evaluate corporate performance. Thus, the role of these panels in serving as an accountability mechanism has been less than one might expect."[88]

D. Good Neighbor Programs

Good Neighbor Agreements involve organizing local community residents and factory workers to negotiate directly with the companies for toxic use reduction, job security, and community economic and physical health.[89] As Sanford Lewis, the intellectual progenitor

[81] American Chemistry Council, Guide to Community Advisory Panels (Jan. 2001) [hereinafter CAP Guide]. Personal communication with Dan Roczniak, American Chemistry Council (July 9, 2002).

[82] Applegate, *supra* note 26, at 1.

[83] *See* CAP Guide, *supra* note 80.

[84] *The Grass Roots: CAPs Take on a Life of Their Own,* Chemical Week, July 3-10, 2002, at 47- 57.

[85] *Id.* at 47.

[86] Personal communication with Dan Roczniak, American Chemistry Council (July 9, 2002).

[87] Canadian Chemical Producers' Association, A Primer on Responsible Care and Sustainable Development (Dec. 1994).

[88] Sanford Lewis et al., The Good Neighbor Handbook: A Community-Based Strategy for Sustainable Industry 256 (1992); *Industry's Critics Make Respect an Elusive Goal*, Chemical Week, July 3-10, 2002, at 42.

[89] Sanford Lewis & Diane Henkels, *Good Neighbor Agreements: A Tool for Environmental and Social Justice*, 23(4) Social Justice 134 (1997), *available at* www.cpn.org/sections/topics/environment/stories-studies/lewis_henkel.html (last visited Aug. 3, 2002); *see also* Sanford Lewis, Precedents for Corporate-Community Compacts and Good Neighbor Agreements (1996); Michael K. Heiman, *Community Attempts at Sustainable Development through Corporate Accountability*, 40 J. Envtl. Planning & Mgt. 631-43 (1997).

and champion of good neighbor agreements, explained, these agreements rely on a contractual relationship:

> Contract law provides a possible tool for problem solving and legal resource for community groups. The law provides a remedy for the breach of contract, or set of promises, the performance of which the law may recognize as a duty. The private nature of contractual agreements provides an avenue for legal enforcement that can be as flexible and creative as the parties intend, but that remains legally binding.[90]

These contracts have a range of material provisions to be negotiated, including:

> the formation of stakeholder alliances between labour, community and company management to find common ground in sustainable manufacturing; the maximum use of existing legal rights to unionize, to access information under Right-to-Know legislation, and to protect corporate whistleblowers; full product information labelling; access by labour and community interests to an independent outside technical review paid for by the implicated industry; the right to inspect company operations; workers' right of first refusal to purchase a plant when closure or sale is intended; and a host of similar reforms designed to hold companies accountable to the communities in which they operate, the workers they employ, and the consumers they provide for.[91]

The first such agreement was signed in 1978 in Worcester, Massachusetts. Since then, numerous agreements have been negotiated that provide a vehicle for community organizations and a corporation to recognize and formalize their respective roles within a locality.

Typically, the Good Neighbor Agreements arise from contentious permitting and land use disputes that place a company and community at odds. These instruments have been used to best effect in reaching agreements with petroleum refineries, chemical processing plants, and mining operations. Although there have been some striking successes, Good Neighbor Agreements are far from routine as numerous communities have unsuccessfully sought such agreements with corporations. Though several agreements have arisen following industrial accidents, others are negotiated before such a crisis has occurred or in response to chronic issues such as pollution or job concerns. In some instances, the emphasis is on environmental concerns, while in others it is on employment and economic concerns.

As conceived by Lewis and his Good Neighbor Project, these agreements specifically promote sustainability by linking environmental and economic concerns.[92] The Good Neighbor Project defines "sustainable" industry as having operations that are "clean, stable, and fair." In this context, "fairness" means that "human health, environment, labor resources, and the capital resources and materials within local communities [are] treated in a manner to ensure their continued viability for the long term."[93] The philosophy common to all Good Neighbor Agreements is the industry's and community organization's mutual acknowledgement of the need to build relationships responsive to community and industry needs.

Most firms are more likely to engage in Good Neighbor negotiations during periods critical to operations, such as during contract negotiations, at times of license renewal, after an accident or an emergency condition, or under the specter of additional regulation or threatened product liability suits.[94] Good Neighbor Agreements can be difficult to secure when the firm is not subject to collective bargaining agreements, permit violations, or to negative publicity.[95] Indeed, Lewis notes that "after 10 years of grass-roots experimentation with this strategy, it is apparent that no corporation has signed a binding agreement unless the community or work force had established a bottom-line reason why the management needed to do so-for example, because it could alleviate some costs of delay brought on by community resistance to specific permits."[96] Some companies, such as Unocal (discussed below), have also interpreted certain agreed-upon obligations in the narrowest possible manner and have delayed implementation of other clauses. Lewis concedes that even a binding agreement does not necessarily mean that the firm will in reality be a "good neighbor." Informed by such experiences, he suggests that a "corporate-community compact" may be a more appropriate and neutral term for describing these agreements.[97]

Perhaps the best-known Good Neighbor Agreement is the highly publicized Unocal Agreement in Contra Costa County, California. In September 1994, residents of the California towns of Crockett and Rodeo were inundated by two separate chemical releases due to leaks from a Unocal facility in Rodeo. Unocal was initially unresponsive to community concerns. As demands for action grew, there were several public meetings and strat-

[90] Lewis & Henkels, *supra* note 89, at 147.
[91] Heiman, *supra* note 89, at 636-37.
[92] *Id.*, at 636 ("In its pursuit of economic and social, as well as ecological, sustainability, the Good Neighbor Project aims then to enlarge the community of 'stakeholders' having a direct role in industrial decision making to include plant workers, local residents, consumers and spokespersons for environment.").
[93] *Id.*
[94] *Id.* at 637.
[95] *Id.* at 641.
[96] Lewis & Henkels, *supra* note 89, at 147.
[97] *Id.*

egy sessions by community leaders, environmental groups, and labor unions. Ultimately, Unocal signed a Good Neighbor Agreement in order to receive land use approvals that were a precondition to continued operations. Unocal signed a legally binding agreement to upgrade the plant with pollution control equipment, provide for job training and security, guarantee independent community and worker audit access, and commit to toxic use reduction through reformulation of its gasoline production process. The Unocal agreement was unprecedented in scope. It also represented a new trend in the formation of coalitions consisting of both economically and environmentally affected populations, i.e., workers and plant neighbors, who are prepared to make joint demands in both arenas.[98]

Taken in the most positive light, "these agreements have led to the community and industry working together and have served as a model for those who live near chemical plants across the country."[99] But the Good Neighbor framework is not always presented in a neighborly manner. Some proponents talk of browbeating a company into an agreement under threat of revoking its charter,[100] and a recent press report described a Good Neighbor process as placing "pressure on a company" through a "strategy to hold the permit hostage through legal challenges."[101] In one extreme example, the end result of a Good Neighbor process with Exxon in Baytown, Texas was a defamation lawsuit.[102] While these are not very neighborly approaches, these sentiments and experiences reflect the powerlessness felt by some residents neighboring facilities. This lack of power leads them to seek whatever leverage they can. In light of this dynamic, Lewis's corporate-community compact might be a better analogy than a good neighbor agreement.

Still, good neighbor agreements remain viable for corporate entities to engage stakeholder groups in constructive dialogue with positive outcomes. The Unocal Agreement is still in place, fully funded, and maintained through a successor corporate organization. A recent agreement with the Stillwater Mining Company in East Boulder, Montana seems to have met the expectations of all participants.[103] In addition, a 1994 agreement with Tosco in Contra Costa County, California continues to evolve with a recent proposal to post monitoring results on the internet.[104]

E. Sustainable Community Initiatives

The sustainable communities movement has been described as a "quiet transformation" taking place in the U.S. and around the world, as citizens and local governments explore new ways to plan and act about their fu-

[98] The breadth of issues that the community required Unocal to address is testament to the effectiveness of such coalitions. Unocal agreed to provide millions of dollars to Rodeo and Crockett for a health clinic, parks, schools, vocational programs, and road improvements. It also mandated improved community oversight of operations at the refinery, enhanced community warning systems, and a better system for monitoring air pollution. Erin Hallissy, *Unocal Reaches Settlement in Pollution Case; "Good Neighbor" Pact is with Rodeo, Crockett*, San Francisco Chronicle, Dec. 21, 1994, at A15.

[99] Danny Perez, *A Star Returns*, Houston Chronicle, Dec. 27, 2001, at 1.

[100] Heiman, *supra* note 89, at 637.

[101] Karen Masterson, *Enough Is Enough, Already; Texas Refiners in Senate Spotlight*, Houston Chronicle, July 14, 2002, at A1.

[102] Ron Nissimov, *Exxon Attorney Denies Any Effort to Discredit, Libel Environmentalist*, Houston Chronicle, Apr. 14, 1998, at 22 (In this instance, Exxon did not complete a Good Neighbor Agreement because the level of trust between company and community negotiators had severely deteriorated).

[103] In May 2000, Stillwater Mining entered into a Good Neighbor Agreement on a collaborative basis with the Northern Plains Resource Council, the Cottonwood Resource Council, and the Stillwater Protective Association to address social and environmental issues related to its operations. A committee that includes the councils and Stillwater Mining will review technical and environmental issues to assure that community interests are considered in the company's decisionmaking process. *Mine Development Eased by Planning*, The Billings Gazette, Oct. 27, 2000, at A1; *See also Mining Exec: Industry Future Depends on Public Acceptance*, Associated Press State & Local Newswire, Nov. 15, 1999. Chris Allen, Stillwater Mining's Vice President for Environmental and Government Affairs, was enthusiastic that it "was absolutely the right thing for Stillwater Mining to do at this time … Our neighbors have learned that when we say we will do something, we do it. There is a cost involved, but it is definitely better than litigation." Quoted in Lane White, *Planning and Hard Work Drive Stillwater Mining's Growth*, Engineering & Mining Journal, June 2001. One NGO representative involved in the process acknowledged the agreement was "unprecedented as far as getting two traditional adversaries to hammer out something that went beyond what regulatory agencies required." *Mine Development Eased by Planning*, The Billings Gazette, Oct. 27, 2000, at A1. The agreement addressed various environmental mitigation efforts and will allow independent testing of water discharge. It will include citizen members on two committees to review environmental issues and new technology that might lessen tailings, the waste rock from milling concentrate. *Mine Development Eased By Planning*, The Billings Gazette, Oct. 27, 2000, at A1.

[104] A Good Neighbor Agreement with Tosco grew out of a toxic chemical release at the refinery over a 16-day period in 1994. The release sickened more than 1,000 people in downwind communities, primarily Tormey and Crockett, California. A new proposal would have real-time air pollution data gathered at the Tosco Rodeo refinery fenceline posted on the internet under a plan devised by two environmental groups working with county, state, and federal officials. The web posting would enable the public and agencies to obtain readings of air pollutants at five-minute intervals, 24 hours a day, seven days a week. Tom Lochner, *Project Would Put Toxin Levels on the Internet*, Contra Costa Times, Apr. 10, 2001, at A6 .

ture.[105] A sustainable community does not describe any one type of neighborhood, town, city, or region since environmental and socio-economic conditions vary dramatically from community to community, but most sustainable community activities do share certain core concepts and principles. The emerging ideal is a dynamic balance between social well-being, economic opportunity, and environmental quality. A sustainable community seeks a better quality of life for its citizens while embracing environmental stewardship by minimizing waste, preventing pollution, promoting efficiency, and developing local resources to invigorate the local economy.[106] In a sustainable community, a rich civic life and shared information encourage collaborative decisionmaking through stakeholder engagement.

Internationally, sustainable community initiatives are often referred to as "Local Agenda 21" initiatives, recognizing that Agenda 21, produced at the Rio Earth Summit, called for local action to address sustainability concerns.[107] A number of sustainable community umbrella organizations are global in scope. These include the International Council for Local Environmental Initiatives (ICLEI), the Stockholm Partnership for Sustainable Cities, and the Bremen Initiative.[108] One of the more interesting community-based initiatives to date is that launched by H.P. Bulmer in Herefordshire, United Kingdom (discussed below).

In the United States, the U.S. Conference of Mayors and the National Association of Counties have created The Center for Sustainable Communities, a joint venture that is intended to provide a forum for cities and counties to develop long-term policies and programs leading to economic enhancement, environmental stewardship, and social well-being—the three pillars of sustainable communities.[109] Some of the best known Sustainable Community initiatives in the U.S. include Sustainable Chattanooga, Livable San Diego, Sustainable Seattle, and the Burlington (Vermont) Legacy Project.[110] There have been several sustainable community initiatives noteworthy for their strong collaboration between corporate and stakeholder interests, but of special interest are Sustainable Racine (Wisconsin), which has been enthusiastically supported by the SC Johnson company, and the PRISM project, which benefited from the active involvement of General Motors.

1. Sustainable Racine

Sustainable Racine is one of the higher profile sustainable community efforts in the United States. SC Johnson, as the leading hometown business, was instrumental in bringing the initiative to life.[111] Sustainable Racine is a nonprofit, nonpartisan civic organization formed in 1996 to create a unified vision of the area's future, to decide what resources to marshal to make that happen, and to promote problem solving and partnership among community groups to achieve the goals.[112] The SC Johnson commitment to Sustainable Racine started at the top—Samuel Johnson, the third-generation family CEO, participated on the steering committee along with two other senior SC Johnson officials. Johnson's eldest daughter, the company's vice president for worldwide consumer products marketing, actively joined the Sustainable Racine leadership.[113] Other SC Johnson senior staff, including its manager of community relations, played key roles in the various implementing committees. SC Johnson helped launch Sustainable Racine by providing a $1.5 million grant to support its first three years.[114]

The vision of Sustainable Racine, like many similar sustainability initiatives, echoes the Brundtland Commission definition of sustainability: "meeting the needs of today as it involves our neighborhoods, our schools,

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[105] For an excellent overview and compilation of resources regarding sustainable communities, see MARK ROSELAND, TOWARD SUSTAINABLE COMMUNITIES: RESOURCES FOR CITIZENS AND THEIR GOVERNMENTS (1998). *See also* President's Council on Sustainable Development, People, Places and Markets: Comprehensive Strategies for Building Sustainable Communities. (Workshop proceedings) June 28-30, 1998. Warrenton, VA. There are a number of extremely useful websites dedicated to sustainable community information and resources, including Network for Sustainable Communities (www.sustainable.org) and the website for EcoIQ, a quarterly sustainable community magazine (www.EcoIQ.com/magazine/).

[106] *See* ROSELAND, *supra* note 105, at 14.

[107] For a more international perspective on Local Agenda 21 initiatives, see SUSAN BUCKINGHAM-HATFIELD AND SUSAN PERCY EDS., CONSTRUCTING LOCAL ENVIRONMENTAL AGENDAS: PEOPLE, PLACES AND PARTICIPATION (1999).

[108] International sustainable community or sustainable cities activities are addressed in detail on several websites. These include: The International Council for Local Environmental Initiatives (ICLEI) website www.iclei.org, The Bremen Initiative website www.bremen-initiative.de, and The Stockholm Partnerships for Sustainable Cities website www.partnerships.stockholm.se.

[109] www.mayors.org/USCM/sustainable/; THE JOINT CENTER FOR SUSTAINABLE COMMUNITIES, LOCAL TOOLS FOR SMART GROWTH: PRACTICAL STRATEGIES AND TECHNIQUES TO IMPROVE OUR COMMUNITIES (2000).

[110] www.chattanooga.net/sustain/ (Sustainable Chattanooga); genesis.sannet.gov/infospc/templates/esd/index.jsp (Livable San Diego); www.sustainableseattle.org (Sustainable Seattle); www.iscvt.org (Burlington Legacy).

[111] Sustainable Racine website, *available at* www.sustainable-racine.com/ (last visited Aug. 4, 2002); Sustainable Racine Vision Council, *Towards a Vision: Decide Our Tomorrow's Today*, Apr. 1998.

[112] Robert Mullins, *Feel-good for Racine*, BUSINESS JOURNAL-MILWAUKEE, July 3, 1998, at 3.

[113] Geeta Sharma-Jensen, *S.C. Johnson Executive's Sense of Business Is in Her Bloodline*, MILWAUKEE J. SENTINEL, Jan. 11, 1999, at B1.

[114] David Cole, *Community and Government Are Partners in Sustainable Racine; Revitalizing Neighborhoods and Changing Attitudes Among Organization's Goals*, MILWAUKEE J. SENTINEL, Dec. 6, 1998, at 4.

businesses, young people and our quality of life in such a way that future generations will be able to carry on the effort to meet their own needs."[115] Sustainable Racine operates on a few simple principles:

- Cooperative efforts are the key to sustainable progress to assure we own a common vision, work together to break down barriers, and share and accept responsibility for making it happen.
- Education is critically important to a community's sustainability.
- The process of sustainability will never end, and benefits will be realized along the way.

The Sustainable Racine initiative relies on maximizing stakeholder input. The launch of the initiative was a model of community outreach and participation. In January 1998, the Sustainable Racine visioning process began. No fewer than 3,000 people participated in this visioning process when Racine area residents met at 23 different sites throughout Racine and the towns of Sturtevant, Caledonia, and Mt. Pleasant. The input from these forums, including from those who participated via cable television, began laying the foundation for a vision and goals of what Greater Racine needed to do to become a sustainable community. A Sustainable Racine Vision Council, comprised of nearly 150 Greater Racine area residents, developed 80 goals grouped into ten categories dealing with issues such as improving education, ensuring smart growth, improving downtown, and improving neighborhoods. The process then sought to find common ground among competing interests and groups in the community in an ongoing manner. It also sought to "maintain a kind of citizen voice and leadership support for a set of goals over a long period of time."[116]

Sustainable Racine remains a vibrant initiative. It sponsors an annual Make a Difference Day, with the 2000 installment drawing over 11,000 local participants.[117] One follow-on activity has focused on the development of indicators of sustainability relevant to Racine. A multi-stakeholder process was established to evaluate the indicators developed by the working groups over a three-year period concluding in 2003. Another follow-on activity launched in 2000 was called Preparing for Diversity, which uses small group study circles to address the social component of sustainability. The program has proven to be an effective means to address racism and improve social equity throughout Greater Racine.

[115] *Id. See also* Sustainable Racine website, *available at* www.sustainable-racine.com (last visited Aug. 4, 2002); Sustainable Racine Vision Council, Towards a Vision: Decide Our Tomorrow's Today, Apr. 1998.

[116] Mullins, *supra* note 112, at 3.

[117] *Racine Sets a Day for Building a Better City*, MILWAUKEE J. SENTINEL, Oct. 22, 2000, at 4.

2. PRISM

The Partnership for Regulatory Innovation and Sustainable Manufacturing (PRISM) brought together a range of business, community, environmental, and regulatory entities to develop a model process for a community-based alternative regulatory system (ARS).[118] The key components of an ARS agreement are: developing a public involvement plan, establishing environmental performance obligations, making innovative environmental management systems commitments, and establishing accountability mechanisms. The ARS uses innovative regulatory approaches to achieve increased operational flexibility and improvements in environmental performance with accountability that functions through better information, increased participation in decisionmaking, and transparency of results.

The model represented a consensus of environmental, business, community, and government leaders to advance the principles of better environmental performance, increased operational flexibility, and enhanced public involvement. General Motors played a leading role in this activity, which was largely based on the results of the President's Council for Sustainable Development's Auto Team.[119] The PRISM effort produced a multi-stakeholder consensus report that contained an alternate regulatory system that integrated life cycle pollution prevention into core business functions, specific environmental performance standards and accountability structures, and an implementation proposal.[120]

Stakeholder engagement was a central theme for the the PRISM project. The participants concluded that for an ARS to succeed "[i]nvolvement must begin at the outset and continue through the process of ARS development and implementation," and they specifically acknowledged that "this involvement will enable more site specific concerns to be addressed."[121] The PRISM dialogue built on previous efforts "by resolving many substantive and procedural issues that lie beneath the jointly shared concepts for improving the current environmental protection system. The PRISM participants concluded that, "to successfully implement the ARS, stakeholders need to transcend traditional roles in order to make the system work better for all."[122]

[118] Along with GM, the PRISM project brought together Dayton Power & Light, Citizens Policy Center, Ecology Center of Ann Arbor, Edgemont Neighborhood Coalition, Environmental Defense Fund, Michigan Department of Environmental Quality, Ohio Environmental Protection Agency, and the US Environmental Protection Agency.

[119] The PRISM partners sought to integrate pollution prevention and product stewardship into core business practices and flexible regulatory approaches.

[120] PRISM report at 6-7. The PRISM report is available at www.alt-path/prism/index.htm (last visited Aug. 4, 2002).

[121] *Id.*, Executive Summary, at 1.

[122] *Id.* at 3 (emphasis added).

Dayton, Ohio was considered as a possible pilot community for the implementation of PRISM, but the participants were unable to maintain sufficient critical mass for a follow-up phase. GM concedes that PRISM was ahead of its time, and remains open to the possibility of reviving an implementation activity. [123] Nonetheless, the results of the PRISM dialogue constitute a sophisticated template for constructing a multi-stakeholder sustainable community program.

> The alternative regulatory system detailed in this document provides a roadmap for state and federal governments engaged in regulatory reinvention; an opportunity for forward thinking companies to gain operational flexibility while becoming more efficient, environmentally protective, and responsive to community needs; and a means for the public to engage in meaningful dialogues with governments and companies regarding environmental performance.[124]

The PRISM ARS model builds upon the strengths of stakeholders by involving them in a collaborative consensus-building process that ensures that their individual interests and values are considered in the environmental decisionmaking process.

3. Bulmers

To widespread acclaim within the United Kingdom, the HP Bulmer Company (Bulmers) is putting its business through probably the most searching self-examination using sustainability principles ever embarked upon by a major British corporation. Bulmers is in the process of creating a model approach for a sustainable community effort.[125] Bulmers is a major producer of alcoholic beverages and is best known for its cider products.[126] The company is vested in the community, as the Bulmer family owns 51percent of the company and has an enduring interest in the vitality of Herfordshire's farming community. Established in 1889, the company itself has deep roots in Herefordshire, with the local growers supplying its main raw materials for over a century.

The overall goal of Bulmers' sustainability initiative is to create a replicable regional model for sustainable land use in Herefordshire.[127] Bulmers now views sustainability as both an opportunity and an imperative.[128] Bulmers' director of sustainability noted that: "Sustainability for us is not an add-on, as it has for some companies who are doing all the stuff with stakeholders because they've got themselves in a corner and have no option …We don't see it as an added cost, but as an opportunity—and in every area we've looked there is a case."[129]

Bulmers' sustainability team must now demonstrate that the social aspects of sustainability can increase marketing efficiencies and boost profits significantly.[130] Bulmers has commissioned the UK-based Forum for the Future to develop a green accounts procedure for the company. Its environmental and community objectives are all aimed at "making sustainability a defining feature of Bulmers and a core source of competitive advantage by 2003."[131] The community-level process has been unusually open and inclusive, involving employees, community representatives, and the local college. Bulmers has invited some of the top names in corporate sustainability to participate, and, among others, the Rocky Mountain Institute staged a charrette to kick off the initiative. An astounding range of ideas have been generated from these initial dialogues.[132] Engaging stakeholders in this agenda would mark another breakthrough in sustainable business practices.[133]

IV. RESEARCH TRENDS AND THE STAKEHOLDER CONVERGENCE

Business leaders and management theorists are increasingly aware of the need to place environmental or

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[123] Personal communication with Chris Bates, General Motors' lead for PRISM (July 9, 2002).

[124] PRISM Project Team transmittal letter (Sept. 1998).

[125] Through the Bulmer Foundation, the company has established a center at Holme Lacy College in Herefordshire with the intent of establishing it as Europe's leading educational center for sustainable agriculture and land management. The overall aim is to "make sustainable ways of living and working possible in conjunction with a fundamental shift in our human understanding and values." For further details, see Kenneth Bowe, *College Takes Route to Sustainable Farming and Land Management* and *Exploring What It Can Mean for Business*, FARMERS GUARDIAN, June 1, 2001, at 32, and Kenneth Bowe, *Seeking a Sustainable System*, FARMERS GUARDIAN, Mar. 1, 2002, at 26.

[126] Bulmers has been doing well in the United Kingdom, controlling 60% of the cider market. Bulmers also has exclusive UK rights for several international lagers. *Cider with Sustainability* and *HP Bulmer: Ferment of Sustainability Ideas, in* ENDS REPORT 17 (Jan. 2002) [hereinafter ENDS REPORT]; *see also Bulmer Holdings PLC—Final Results*, REGULATORY NEWS SERVICE, July 9, 2001.

[127] ENDS REPORT, *supra* note 126, at 18.

[128] *Id.* at 2.

[129] *Id.* at 17.

[130] *Id.* at 20.

[131] *Id.* at 17.

[132] Bulmers has generated a rich stream of ideas for greening its operations from the farm and process plant to packaging and logistics—and for enhancing its role in the local community. The RMI charrette suggested that Bulmers will need a wide-ranging rethink of its relationship with the rural community if it is to realize the goal of helping the county to become a sustainability model. Two themes were developed at the charrette: to increase local procurement of raw materials to provide greater long-term security of income to the county's farmers and to promote sustainable orcharding. *Id.* at 19-20. *See also* Department for the Environment, Food and Rural Affairs (UK), Organic Scheme Protects Old Orchards and Landscape, Sept. 25, 2001 (press release re: Bulmers' program).

[133] ENDS REPORT, *supra* note 126, at 20.

sustainable development considerations in a strategic business context. The inclusion of sustainability issues in corporate mission and values statements are becoming commonplace, and there is a parallel increase in measuring, reporting, and communicating to the public on such issues in real time.[134]

Given the emerging nature of the environment as a strategic issue, conceptual linkages between strategic management and the environment are still in their infancy. Several studies explore the link between environmental management and the firm's profitability, primarily stressing the market gains and cost savings resulting from environmental management.[135] However, not all companies understand that establishing positive relationships with stakeholders makes good business, as well as ethical, sense. By examining the levels of corporate response to stakeholders, it may be possible to better understand the business and societal values added by certain kinds of stakeholder relationships.[136]

A. Measuring the Business Value of Stakeholder Relationships

A three-tier model for corporate social responsibility provides a model for understanding the nature of a firm's stakeholder relationships. The three aspects include: social obligation (a response to legal and market constraints), social responsibility (congruent with societal norms), and social responsiveness (adaptive, anticipatory, and preventive). The second tier requires that a company move beyond compliance to recognize and internalize societal expectations, while the third tier requires that a company develop the competence to navigate uncertainty, maximize opportunity, and engage effectively with external stakeholders on issues and concerns.[137] According to Svendsen et al., increased attention to the link between positive stakeholder relationships and competitive advantage has been manifested in at least four areas:

- Failure to establish and nurture stakeholder relationships creates shareholder risk.
- Strong relationships with and between employees, and with supply chain and business alliance partners are a prerequisite for innovation.
- A dense network of relationships provides resources and information necessary for the development of new markets and opportunities.
- Relationships are the source of a good reputation and enhanced brand value, both of which create a myriad of business benefits.[138]

Some of the latest thinking about measuring the business value of stakeholder relations and public participation derives from the concept of social capital. It has only been in the past several years that researchers have turned their attention to studying social capital within organizations and specifically within business organizations. Svendsen et al. propose to measure relationship quality using the concept of social capital. In this context,

> [s]ocial capital consists of the stock of active connections among people: the trust, mutual understanding, and shared values and behaviors that bind the members of human networks and communities and make cooperative action possible … Social capital that appear to be especially relevant to the study of business value of relationships with different types of stakeholders inside and outside the firm.[139]

Thus, a firm ought to carefully select strategies and processes that reflect and support its web of stakeholder relationships. In other words, once a company has articulated its corporate strategy and goals, it can seek to identify those stakeholders with the greatest capacity to influence the achievement of those goals.[140]

Similarly, stakeholder integration may be viewed as a corporate capability or resource arising as a result of product stewardship which requires the integration of perspectives of key external stakeholders, such as environmental groups, community leaders, the media, and regulators into product design and development.[141] This resource-based view of the firm emphasizes the key role of strategic management in adapting, integrating, and reconfiguring internal and external skills, resources, and functional competencies. Firms develop a network profile or portfolio of ties to specific partners for certain activities. These relations then serve as both a resource and a signal to markets of the quality of the firm's activi-

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[134] Carl Frankel, In Earth's Company (1998); Elkington, *supra* note 7. *See also* David Wheeler & John Elkington, *The End of the Corporate Environmental Report? Or the Advent of Cybernetic Sustainability Reporting*, 10 Bus. Strategy & the Env't. 1-14 (2000); Stuart Hart & M.B. Millstein, *Global Sustainability and the Creative Destruction of Industries*, 41 Sloan Mgmt. Rev. 22-33; Andrew Hoffman, Competitive Environmental Strategy: A Guide to the Changing Business Landscape (2000).

[135] Michael Porter & Claes van der Linde, *Green and Competitive: Ending the Stalemate*, 73 Harv. Bus. Rev. 120-23 (1995); Forrest Reinhardt, *Environmental Product Differentiation: Implications for Corporate Strategy*, 40 Cal. Mgmt. Rev. 43-73 (1998).

[136] Ann Svendsen et al., Measuring the Business Value of Stakeholder Relationships (2001).

[137] *Id.* at 7 (reinterpreting Sethi's three-tier model).

[138] *Id.* at 9.

[139] *Id.* at 23.

[140] *Id.*

[141] Stuart Hart, *A Natural Resource-Based View of the Firm*. 20 Acad. of Mgmt. Rev. 986-1014 (1995).

ties and products. For example, in establishing an environmental management system, an organization can build trust and add value to its EMS if external stakeholders are actively involved in the design and implementation.[142]

B. Multidisciplinary Contributions to the Emerging Stakeholder Convergence

Many other disciplines are contributing to the understanding of stakeholder dynamics, its potential impact on business and industry, and ultimately on governance and institutions. In practice, though, there have been few interdisciplinary connections.[143] Still, at least one scholar sees important collaborative networks forming:

> [N]ew forms of green expertise can be seen as a convergence of interests between environmental organizations, governmental agencies and business firms. The shifts in orientation have manifested themselves both on the discursive level, where new principles of environmental science, technology and management are being formulated, as well as on a practical level, where networks of innovators are serving to link universities, business, and government in new configurations. In between, at an intermediary level, policymakers seek to design appropriate programs and policy measures to move science and technology in more strategically "ecological" directions.[144]

The three areas of cutting-edge inquiry described below seem especially significant for the emerging stakeholder convergence. These are all promising lines of interdisciplinary research. Ultimately, a better understanding of stakeholder engagement will develop from these perspectives—to the benefit of businesses, regulators, and the public at large.[145]

1. The Reputation Commons and Stakeholder Sanctions

In studying industry self-regulation, King et al. are interested in the dynamics of a reputation commons problem, where stakeholders can impose sanctions, and stakeholders do not differentiate among firms in an industry sector. "Unlike a physical resource that must be subdivided by physical barriers, a common pool resource such as a reputation commons must be subdivided by information. To privatize the resource, managers must help stakeholders to differentiate among firms in the industry."[146] Therefore, the King et al. study analyzes when members of an industry will share a collective reputation and describes the individual and collective strategies that might be used to privatize this collective reputation. They posit that the addition of a strategic actor—the stakeholder—to the traditional common pool resource problem changes the set of potential for success of self-regulation. This line of research, especially important in the emerging information age, ties issues of information costs to questions and access to information. Further inquiry may suggest optimal conditions for successful self-regulation.

2. Corporate Responsibility v. Stakeholder Responsibility

As a complement to corporate responsibility, some researchers have suggested the need to consider the parameters of stakeholder responsibility. For example, according to Windsor, "Stakeholders voluntarily making demands…thereby bear some responsibility, which is otherwise ill-defined in general and definable only by reference to specific circumstances, and only for unintended negative consequences."[147] This line of thought offers key lessons for managers in that stakeholder responsibilities often involve moral and citizenship duties requiring collective action, for which business leadership may be crucial. In brief, Windsor claims that mutual and joint responsibilities of stakeholders fall into four general categories: with the firm, among stakeholders themselves, common pool resources (especially the environment), and the commonwealth. Stakeholder responsibilities toward the firm, therefore, will require that managers first conduct themselves morally, and existing notions of corporate responsibility and citizenship do not always support that pattern of conduct.[148]

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[142] *See* Magali Delmas, *Stakeholders and Competitive Advantage: The Case of ISO 14001*, 10(3) Production & Operations Mgmt. 343-58 (2001) (citing J. Barney, *Firm Resources and Sustained Competitive Advantage*, 17 J. Mgmt. 99-120 (1991); Margaret Peteraf, *The Cornerstones of Competitive Advantage: A Resource-Based View*, 14 Strategic Mgmt. J. 179-93 (1993)).

[143] Andrew Jamison, *On the Ambiguities of Greening*, 13 Innovation 249, 252 (2000).

[144] *Id.* at 254.

[145] *Id.* at 250.

[146] Andrew King, Michael Lenox & Michael Barnett, *Strategic Responses to the Reputation Commons Problem*, *forthcoming in* Hoffman & Vantresca eds., Organizations, Policy, and the Natural Environment: Institutional and Strategic Perspectives (Unpublished April 2000 manuscript on file with author). *See also* Andrew King & Michael Lenox, *Industry Self-Regulation Without Sanctions: The Chemical Industry's Responsible Care Program*, 43(4) Acad. Mgmt. J. (2000).

[147] Duane Windsor, *Stakeholder Responsibilities: Lessons for Managers*, J. Corp. Citizenship 19-35 (Summer 2002).

[148] Windsor, *supra* note 147, at 22-23. ("It is necessary to address stakeholder responsibilities concretely, by type of stakeholder and within specific circumstances. Otherwise, one cannot answer the vital question: do customers, employees, and suppliers, for instance, have responsibilities to the firm, beyond any established by law or by contract; or to other stakeholders, beyond any established by general moral and citizenship responsibilities?").

3. From Interest Representation to Collaborative Governance

Freeman proposes a model of collaborative governance as an alternative to the model of interest representation, arguing that the assumptions that inform interest representation limit its explanatory capacity and normative appeal.[149] In academic legal circles, Freeman's work is on the leading edge of the convergence of issues relating to environmental decisionmaking, sustainability policy, and stakeholder dynamics. Freeman has investigated regulatory negotiation and EPA's Project XL, finding that both embody elements of a collaborative model but concluding that despite their promise these experiments fall short of the collaborative ideal. Freeman argues that, "While collaboration may require greater deference to agency decision-making at a minimum, … the pursuit of collaboration requires a willingness to transcend traditional debates about agency discretion and to experiment with nontraditional forms of accountability." [150]

Collaborative governance requires problem solving, broad participation, provisional solutions, the sharing of regulatory responsibility across the public-private divide, and a flexible, engaged agency. Freeman concludes that that most common objection to such "cooperative," "co-regulatory," or "reflexive" processes is that they undermine legitimacy by reducing accountability and delegating public responsibilities to private parties. She explains that the typical response to such concern, which is to constrain agency discretion, frustrates the collaborative impulse needed to develop models for enhanced stakeholder engagement and collaborative governance.[151]

V. TOWARD A VIRTUOUS CIRCLE

In the recent UNEP Sector Report for Finance and Insurance, Carlos Joly of Storebrand articulated a vision of a thematically and institutionally interconnected playing field:

> The concept of fiduciary responsibility is in the process of being expanded to include the broader social and environmental interests of the owners of pension and life insurance funds. There is a growing realization that there be no systematic conflict between profitability and environmentalism… *In short, in the United States and Europe we are beginning to see the outlines of what could become a virtuous circle, connecting public concerns, environmental legislation, corporate environmentalism, and financial markets.*[152]

UNEP's own assessment noted that while many of the industry organizations and associations were able to report on progress, many are not currently constituted to make specific global commitments on behalf of their industry. UNEP suggested a similar paradigm shift: "a new kind of governance that could evolve in the 21st century with the involvement of stakeholders."[153] Increasingly, business and industry will see their "social license to operate" contested if there is a failure to recognize that the new opportunities of globalization carry new global responsibilities, including the obligation to help meet social needs that cannot be met by the market alone.

The WBCSD has concluded that sustainable development is just too big for companies to handle individually, regardless of their size. The WBCSD's set of sector-level projects, led by member companies, look at sustainability performance and challenges for the whole value chain of an industry sector.[154] To ensure that proposals developed are not industry solutions only, WBCSD projects extend beyond industry members to "harness independent research, stakeholder consultations and partnerships [to address] how a particular industry can contribute to sustainable development."[155] Stigson describes the projects as "based on the participatory concept, bringing together stakeholders with widely differing views, and seeking to build partnerships between industry, government and other institutions to identify ways forward."[156]

There is evidence that the private sector understands the opportunity presented by the new playing field. For example, the UNEP Chemicals sector report acknowledges that stakeholder concerns are "irrefutable facts" and "part of the framework conditions—just like laws and tax regulations." The Chemicals sector report accepts the need for an increase in the participation of the stakeholders and shared responsibilities:

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[149] Freeman, *supra* note 28, at 30.

[150] *Id.* at 2.

[151] *Id.*

[152] Carlos Joly, *Mainstreaming Best Practice: the Potential of Voluntary Initiatives and Creative Regulation*, *in* FINANCE AND INSURANCE SECTOR REPORT, *supra* note 45, at 25-26 (emphasis added).

[153] www.uneptie.org/outreach/wssd/global/pub_global.htm (last visited July 26, 2002).

[154] Bjorn Stigson, president WBCSD, quoted in *Companies Can Leverage Abilities to Promote Sustainable Development*, in GreenBiz.com (electronic newsletter) [hereinafter Stigson Comments], *available at* www.greenbiz.com/news/news_third.cfm?NewsID=20826 (last visited Aug. 4, 2002).

[155] According to Stigson, the ultimate purpose is to change industry practices and policies to make them more sustainable. The six WBCSD sector projects are: forestry; sustainable mobility, cement sustainability initiative, mining, minerals and sustainable development, electrical utilities, financial sector.

[156] Stigson Comments, *supra* note 154.

> The more companies and federations accept their responsibility in society and are willing to do necessary things through voluntary initiatives and agreements, the more they must accept the need for stakeholder involvement in open and transparent monitoring processes. Stakeholders can help the chemical industry by looking at things from a different perspective and with a different expertise. But participation of course also means taking on responsibility. Being part of a monitoring process is no longer a totally detached activity. Mutual respect and consensus-driven communication processes have to be the basis for common definitions of problems and approaches to solutions.[157]

On the eve of the World Summit, governments need to reflect on a different problem: Are the traditional institutions and instruments still suited to resolving the problems in the emerging global community? While business and NGOs have transformed their modes of operation, governments have not. Now is the time to develop a dialogue to consider institutions of international governance that are needed to match the commercial and civil institutions rapidly emerging at the global level.[158]

While expectations are high for the WSSD—perhaps unrealistically so— the potential for breakthroughs at several levels is real. For example, the Type II agreements may open some eyes—in business, in government, and among participating NGOs—to new possibilities of partnership and stakeholder engagement. The theme of good governance, which has resounded so strongly through the Preparatory Committee meetings, should provide a platform for the governmental public participation and private sector stakeholder engagement issues (which we can now recognize as two sides of the same coin) well past the WSSD. It is almost irrelevant whether the Summit is ultimately viewed as a substantive or political success, because it is clear that it will stand as a reference point marking the era of "stakeholder convergence."

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[157] CHEMICALS SECTOR REPORT, *supra* note 44, at 73.

[158] Simon Upton, *Some Reflections on the Eve of the Johannesburg Summit*, STAKEHOLDER-FORUM, Aug. 2002, at 4-5.