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The Private Sector's Contribution to Water Management: Re-Examining Corporate Purposes and Company Roles

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ABSTRACT: Corporate water policies are evolving and practices developing, raising issues of what are appropriate private-sector roles in water management. Leaders of multinational companies have pledged to increase water use efficiencies in company plants/premises and down supply chains, while promoting partnerships in water management with a range of actors, public and private, including local communities.

A set of questions is, here, posed for consideration by governments and communities, on the extent, limits and implications of private-sector involvement, particularly in contexts of water scarcity. While water specialists are accustomed to analysis of mandates of public institutions, many are much less familiar with the internal workings of corporations. Companies are legal and social constructs, operating within frameworks of company law and codes of stock exchanges. These set the normative parameters of what each company is for, and for whom, and help explain the underlying motivations and priorities of each. To illustrate corporate purposes and degrees of responsiveness to different stakeholders, example company models are cited.

Company statements mixing commercial and philanthropic messages risk confusing company roles. Corporate actions need to match companies' internal characteristics to 'do what it says on the *inside* of the corporate tin'.

Partnerships can, potentially, offer an alternative normative framework for achieving sustainable and inclusive growth.

KEYWORDS: Corporate purposes, company laws, water scarcities, stakeholders, partnerships

INTRODUCTION

Companies in sectors making significant use of water are informing themselves about the challenges of water management and reviewing their vulnerability to interruptions in water supply in contexts of water scarcity. They are starting to draw up corporate strategies to address 'water risks', including those arising due to "out-of-date or poorly enforced public policy" and "weak management institutions" in many countries (UN, 2010).

In the Communiqué issued in June 2012 by 40 business leaders under the aegis of the UN Global Compact, heads of governments were urged to take "decisive action" to strengthen the "enabling environment" for water resources management (UN, 2012a). The 40 chief executive officers (CEOs) lead large multinational companies including high-profile brands, mostly based in the 'North', but with operations in many developing countries – in the drinks/beverages, brewing, foods, clothing, pharmaceutical, chemical, mining, petroleum and other sectors.

The CEOs pledged to "expand and deepen their own efforts" in support. Already – noted the Communiqué – companies endorsing the CEO Water Mandate under the Compact are taking action, of three types: first, "setting targets on water efficiency … in our factories and operations"; secondly, "working with suppliers to improve their water practices"; and, thirdly, "partnering" – partnerships with a range of different actors, public and private – "on water-related projects and solutions" including with local stakeholders: "those living in the communities where we operate" (UN, 2012a).

The CEO Water Mandate has called for "shared action" by business, government and civil society, in the face of "shared risk" (UN, 2010). In the words of the World Economic Forum (WEF), "several governments facing severe water challenges have been engaging in more substantive public-private dialogue on water security and water management reform... This is a significant development. We could now be on the cusp of developing *new normative approaches* to water management" (WEF, 2011: emphasis added).

Governments need to consider their response to the explicit invitation in the June 2012 Communiqué, together with its implicit challenge that public-sector water institutions are, in many cases, failing in their duties as custodians of water governance. Ministers and their advisers need to ask themselves whether the advantages of partnering with the private sector outweigh any disadvantages and, if so, how.

The present article offers a set of questions to be posed by representatives of government – central and local – with responsibilities relating to water, as well as by representatives of communities living and/or working in areas where companies are operating, about the extent, limits and implications of private-sector involvement as users and, potentially, managers of water.

An analysis of how companies are designed and constructed – their internal characteristics (Muchlinski, 2007), as defined in company laws and constitutions – helps explain how they behave and what they do. Most water specialists are much more accustomed to analyses of the mandates of public institutions, but companies are leading 'institutions' of the private sector, and their underlying motivations and priorities need to be understood.

This article focuses on large multinational companies (MNCs) because: "individually, they have the scale, capacity, and resources and, arguably, stronger incentives to make a bigger impact (positive or negative) on water resource management than do individual small businesses" (ODI et al., 2012). The presence of MNCs in developing countries not only brings economic activity and jobs but also creates demands on natural resources, including water. That is an especially important issue in areas where there are significant limits and constraints on water resources – where there exist water *scarcities* (Mehta, 2010) – see box 1.

Engagement by companies including MNCs on water now reaches well beyond urban water provision, which dominated debate in the 1980s and 1990s. Rather than private-sector water *providers* of water supply services, the focus of attention has moved on to water *use* and *management* by private-sector companies.

The particular focus here is on *voluntary* actions being taken by companies, both unilaterally and in collaboration with government and other stakeholders – as compared with actions that are led by government policy and/or imposed by regulation.[1] A prominent example of policy/regulation, noted in box 1, is that applying to companies in relation to water supply services.

The interest here is in private and public sector roles in water management for economic growth which is environmentally sustainable and socially inclusive. That, notes the World Bank, must be the aim for managers of all natural resources, to eliminate "market, policy and institutional failures" (World Bank, 2012).

Threats to the 'sustainability' of water resources posed by climate change and increasing demand in the medium to long-term are such that 'business-as-usual' is likely to involve too high an environmental

[1] Within the parameters set by company law, as discussed below.

cost. To contribute to strategies for sustainable water management, companies and other actors need to take account of the long term. For companies to contribute to 'inclusive' growth entails them being responsive to the demands of stakeholders beyond just their own shareholders and their lenders/creditors, and employees, clients/customers and suppliers – as discussed below.

The questions posed here are as follows:

- With what kind of company – applying the legal lens – are governments dealing? How far does a given legal form of company, according to applicable company law and the company's constitution, serve sustainable and inclusive growth – in particular, where in the hierarchy of a company's stakeholder priorities do local communities come?
- What is the company aiming to achieve in terms of improving efficiencies in water use in (a) its own plants/premises, and (b) its supply chains?
- What about the company's activities in water management beyond the 'factory gate' in the catchment/basin? What is it doing, and how is it proposing to engage with government and other water users?
- How are the 'partnerships' which companies are offering to government and local communities to be viewed, and to evolve?
- What steps should governments, and representatives of local communities, take in this context of increasing interest and involvement of MNCs in water use/management in developing countries?

These questions are answered below in separate (sub)sections, providing the structure of the paper. These answers are based on the preliminary study carried out by the authors. This study comprised a review of policy proposals of international organisations, e.g. of the UN Global Compact, including the June 2012 Communiqué by business leaders under its aegis, a documentary study of reports, publications and statements via the media/internet of companies in significant water-using sectors and key informant interviews with company representatives. Sectors were chosen that are illustrative of private-sector interests in, and approaches to, water, namely drinks/beverages, relying on reliable supplies of high-quality water, travel/tourism, which guide visitors to holiday destinations, including water-scarce locations in developing countries, and energy involving large investments with potentially major impacts on water environments and livelihoods (Newborne, 2012).[2] The study also included an analysis of the information collected as above against basic principles of company and commercial law, and academic literature on the purpose of corporations.

As will be seen, a tension arises between corporate purposes as defined in company laws and constitutions and the proposed new normative paradigm referred to above.

[2] Mining was also considered in the ERD background paper, as well as agriculture, the latter in two respects: through the 'lens' of large-scale land acquisitions, a development in some countries which serves to illustrate, starkly, one possible direction of private-sector engagement; also, in the (incipient) efforts of companies to assess embedded water use in agricultural products (Newborne, 2012).

Box 1. Definitions.

Scarcities. By its nature, water is fundamentally a local issue: the circumstances in each catchment vary in the availability of, and conditions of access to, water resources, as well as the configuration of water users/demands. When considering limits and constraints on water resources, it is useful to think in terms of scarcities (plural) as being experienced in local or district contexts, with disaggregated information on local circumstances (both physical and socioeconomic), as opposed to scarcity as a generalised concept based on aggregate figures on physical water/resource availability at the national level, without taking account of access issues, which include cultural and institutional/political factors (Mehta, 2010).

Water use refers here to water use by companies within their premises (factory/plant) and also the water embedded in the products and services in supply chains (including the farm).

Water management is employed here to describe the steps that *companies* are taking to engage in water issues beyond their own premises and outside their supply chains.

Water resources management (WRM) refers to the overseeing by public water authorities of use and management of all surface waters and groundwater. A key issue for water resources managers is whether or not water uses are compatible, i.e. to what extent, and in which circumstances (according to which spatial or temporal configurations), the activities of storage, abstraction/extraction or diversion of water resources from a given source are reconcilable with another proposed storage, abstraction/extraction or diversion activity. 'WRM' includes setting the policy and institutional framework for how rights to abstract/extract or divert water resources are determined and reconciled, or mediated where competing claims cannot be satisfied in full, due to physical resource limits.

Voluntary vs involuntary. An example of a requirement imposed on private-sector companies involuntarily is that applied to companies providing water supply services. In many jurisdictions, whether in the European Union (EU) countries or in certain developing countries (Herrington, 2003), those companies are required to have regard, in running their operations, to certain social as well as purely commercial objectives, e.g. through social tariffs, due to the public as well as private good characteristics of water supply. These social requirements are framed in public policy and enforced by regulation. In that context, the private sector's obligations around e.g. inclusiveness are not voluntary, but prescribed.

Subsidiary and associate/affiliate companies. A 'subsidiary' is a company whose parent is a majority shareholder. In the case of a 'wholly owned' subsidiary, the parent company owns 100% of the subsidiary; in a 'partially owned' subsidiary, the parent owns 50% or more. The terms 'associate' and 'affiliate' are commonly employed synonymously to describe a company whose parent company possesses a minority stake in the ownership of the company.

But, first, a prior issue needs to be addressed relating to the role of government.

THE ROLE OF GOVERNMENT IN WATER RESOURCES MANAGEMENT

Question 1. Why is it appropriate for government to lead this questioning?

Whatever the current capacity gaps in developing countries, responsibility resides with governments for *setting* and *overseeing* the legislative and policy frameworks within which national systems of water resources management function (see box 1), across catchments and river basins within national territories. The core of that public role is water allocation between different, often competing, uses – the expectation of citizens (or, in some countries, their aspiration) is that the state, or equivalent public authority, will act as arbiter in issues of appropriate allocation of public goods. To date, at least, this has contrasted with the role of the private sector: what business executives typically mean by the term '*water management*' – see box 1.

Given that public institutions are expected to maintain an arbitral role, they need to consider carefully where and how to accept corporations' invitation to collaborate, along the spectrum from use in company premises, to supply chains, to management at catchment/basin level. As noted above, that includes public-sector water managers understanding better the legal and constitutional workings of corporations.

COMPANIES AS LEGAL AND SOCIAL CONSTRUCTS

Question 2. With what kind of company – applying the legal lens – are governments dealing? How far does a given legal form of company, according to applicable company law and the company's constitution, serve sustainable and inclusive growth – in particular, where in the hierarchy of a company's stakeholder priorities do local communities come?

"Companies are not creatures of nature" (Charkham and Ploix, 2005). Companies have, as lawyers say, legal 'personality', but, unlike flesh and blood persons, corporate entities come about "because special laws are introduced" (Charkham and Ploix, 2005). Company laws and company constitutions (written within the framework of those laws) determine how the corporate entity in question is configured and governed: what it is for, what it sets out to do, for whom, including how it manages its internal and external relationships. Where the stock/shares of a company are publicly traded, on a stock market, the rules of that stock market will also apply.

Set out below are some brief definitions of corporate purposes and outline notes on company models, applying to commercial, for-profit companies, from four countries: US, UK, France and Germany. The models illustrate differences in approach, each reflecting national culture and tradition.[3]

CEOs of companies based in these four jurisdictions were among those who subscribed to the June 2012 Communiqué, and these cases from Northern countries are material to the consideration of water management in developing countries insofar as how MNCs behave in these developing countries tend to be influenced by the company models of the countries of origin. That applies especially to MNCs with traditional hierarchical, 'pyramid' structures of wholly owned or partially owned subsidiary companies (see box 1) incorporated in the host countries. The questions posed in this section will also apply to flatter 'heterarchical' MNC group structures (Muchlinski, 2007) comprising more associated or affiliated companies (see box 1) with typically a relatively greater autonomy of decision making and/or with companies linked by contractual arrangements as a complement or alternative to shareholdings.

The key issue, for present purposes, is how far each company model is responsive to local communities located in the vicinity of company operations, as compared with investor interests – shareholders and lenders (banks and financial creditors of the company under loan contracts or 'bonds') – and other stakeholder interests: employees of the company, and its suppliers, as well as customers/consumers of its services/products.

US

As for company laws (plural) in the US (statutes on company law vary state by state), only one state law, that is in Connecticut, *requires* company directors to consider non-shareholder stakeholder interests including "community and societal considerations" (Choudhury, 2009). The jurisdiction of choice for more than half of US publicly-traded companies (Cahn and Donald, 2010) is Delaware State (a company

[3] As noted above, the focus of discussion here is large companies – those managed by a centralised board or boards of directors, as opposed to companies where the shareholders manage the company themselves (e.g. in small, family-based businesses).

can have its principal business office in one state and be legally incorporated in another). Choudhury provides a useful survey of the debate in the US relating to the 'purpose of the corporation'. The question of whether the purpose of US-based companies is to serve the interests of shareholders to the exclusion of other interests "remains unsettled" (Choudhury, 2009). The American Law Institute (cited by Choudhury) noted in 1992 (after three important court judgments in the 1980s) that the present law "cannot be stated with precision because case law is evolving and not entirely harmonious" (American Law Institute, 1992). Meanwhile, the corporate code in Delaware is "less receptive to stakeholder interests than many other corporate statutes", although it does not impose on company directors and officers an express obligation to *maximise* shareholder wealth (Harper Ho, 2010).

UK

Section 172 of the UK 2006 Companies Act, which came into force on 1 October 2007, is a concise expression of the 'enlightened shareholder value' approach. Paragraph 1 (see the Box on page 17 of the ERD background paper which is reproduced in the Annex to the present article) states that (emphasis added):

> A director of a company must act in the way he considers, in good faith, would be most likely to promote the *success* of the company[4] for the benefit of its members [i.e. shareholders] as a whole, and in doing so [*he must*] have regard to… [other matters as listed (six factors in all – see the Annex) including] … the likely consequences of any decision in the long term… [and] the impact of the company's operations on the community and the environment.

The question arises as to what is signified by 'have regard to' in Section 172 (Keay, 2007).

Davies (2010) comments: "[t]his formulation constitutes 'enlightened' shareholder value rather than a stakeholder approach, because non-shareholder interests are required to be taken into account only insofar as they have an impact on the directors' goal of achieving business success for the benefit of the members (shareholders)". The directors "are not required to 'balance' the interests of shareholders and other stakeholders so as, for example, to maximize the joint utility of all the stakeholders where this would involve a diminution in shareholder utility" (Davies, 2010). The international law firm, CMS Cameron McKenna, argues similarly that: "where factors conflict with each other, or with what the directors consider to be the promotion of the company's success, it is legitimate to discount a particular factor or give it less weight – as long as it has been thought about, if it is relevant, with whatever attention is due and feasible in the particular circumstances" (CMS Cameron McKenna, 2007).

The duty on company directors as set out in Section 172 leaves third parties, including local communities, with an uncertainty. While they can, in principle, be reassured that directors of UK-based companies are required to *think about* the broad range of six prescribed matters, in practice they cannot, in any given case, be sure what weight directors will give to local community and environmental interests without, that is, clear and tangible evidence of the directors' intentions (see in relation to 'partnerships' under Question 5 below).

One perspective on the relative weights which may, in UK directors' minds, be accorded to the various stakeholder interests is that in the practitioner's Guide for Directors of UK Listed Companies produced by an international law firm (Freshfields Bruckhaus Deringer, 2011). Among the topics discussed in the 100 pages of this Guide, issues relating to 'community' and 'environment' are raised, but they occupy little space (discussed in four sections, mentioned on only nine pages in all).

[4] The previous rule, before the 2006 Act, referred to the '*interests*' of the company.

France

According to the French model (see the Annex) company managers are guided by the 'corporate interest', i.e. furtherance of the company's 'prosperity and continuity' in which shareholders, employees, creditors, suppliers and clients/customers have a common interest (MEDEF/AFEP, 2002). The question that arises is: what of other stakeholders' interests?

Germany

German corporate traditions and practices are different. Companies are seen "not just as profit-making enterprises, but as social agents that contribute to the greater good" (Gardner, 2010). Under the German model (see the Annex) company goals include delivering goods and services required by 'the community', in line with the duty to take account of the 'public good', in matters of property. Under this model, company goals go further than the other three models. The question that arises is: how far, according to German law/practice, do company duties and attentions extend? For example, to which communities, where?

Implications in practice

So, in response to the question of where, in the hierarchy of company stakeholders, local communities come, the first answer is: it depends on where and how the company is constituted.[5]

What is certain is that these company laws (and applicable stock market codes) are *existing* normative frameworks or 'normative approaches', recalling the term in WEF, 2011, applying to private-sector institutions.

In the face of the varied nationally-based formulations of corporate purposes, the Global Corporate Governance Forum (UN, 2009) has argued for common standards: "a well-governed company takes a longer-term view that integrates environmental and social responsibilities in analyzing risks, discovering opportunities and allocating capital in the best interests of shareowners" (Georg Kell, Executive Director of the UN Global Compact, cited in UN, 2009).

Until/unless such common standards are introduced, governments need to take account of the diversity of company forms and corporate purposes, including those based in countries other than the four cases above, for example, the signatories to the June 2012 Communiqué additionally included the CEOs of Brazilian, Indian, Chinese and South African companies. In particular, governments need to inform themselves of how each MNC, with whom they are proposing to collaborate, intends (in a given context) to place each category of stakeholder in its hierarchy of priorities, as interpreted by the directors/managers acting on its behalf.

This distinguishing of different categories of stakeholder is important. The Corporate Water Disclosure Guidelines (UN, 2012b), designed to support improvements in company reporting on water-related matters, propose, as shown in the figure on page 29, that companies assess and report on material/relevant water topics according to the degree to which they are of '*Significance to stakeholders*' (vertical axis) and of '*Significance to the company*' (horizontal axis). Rather than grouping them under one heading in this way,[6] disaggregating stakeholders would provide a more telling picture for third parties such as public water managers, to avoid the impression that each stakeholder category

[5] In the US and the UK (much less so in Germany, for example), company laws set out *optional* (or 'default') terms that founders/shareholders of companies may, according to their preferences, include, or exclude, from company constitutions (also modifying or supplementing those terms as they wish). The result in those jurisdictions is an even greater diversity in how company constitutions are formulated (and, thereby, corporate governance configured). In contrast, stock exchange codes tend to impose a layer of *mandatory* rules.

[6] At least in the figure – table 3 below the figure allows, it seems, for some account to be taken of specific and distinct stakeholder interests against listed material water topics.

has equivalent power/influence. A comment of Davies 2010[7] raises the issue of how useful it is to place 'Stakeholders' and the 'Company' on different axes and thereby 'plot' (UN, 2012b) materiality/relevance to the one as against the other:

> …conferring legal personality on the company sometimes leads people to treat the company as if it were a natural legal person rather than the artificial one that it is, and to attribute to it 'interests' which it cannot possibly have. So, whilst it is almost impossible to avoid talking at some point about 'the interests of the company', one needs to remember that this is really a short-hand for one or more of the groups of natural persons who have legal relations with the company and who certainly can have interests (Davies, 2010).

In other words, it would be more useful to carry out a series of plotting exercises with different categories of stakeholder appearing across from each other on the vertical/horizontal axes, for example, investors as compared with local communities. Typically, for large companies (especially those whose shares are publicly traded) investor interests are key drivers[8] e.g. ensuring the regular payment of interest payments on loans, and profit-returns in the form of dividends to shareholders. On that basis, until company directors/managers supply information/evidence to the contrary, it will be safer for governments and civil society representatives to start from the position that members of local communities will come *lower* down in the 'pecking order' of stakeholders. The shareholders will, typically, live elsewhere than in that locality – in the case of an MNC, generally in a wide geographical spread.

PRIVATE-SECTOR ROLES – IN WATER USE

Question 3(a). What is the company aiming to achieve in terms of improving efficiencies in water use in its own plants/premises?

An example of the private sector exercising its "solutions-finding strengths" (UN, 2010) is in leading innovation for reducing volumes of water use (and for water recycling/reuse), refining existing methods and exploring new 'water-tech' opportunities (as reviewed by Sarni, 2011).

Coca-Cola is an example of a company leading innovation in water use in the drinks/beverages sector. Operating in more than 200 countries, and through some 300 bottling partners, it has set a target to improve water-use efficiency in its plants by 20% by 2012 against a 2004 baseline. Efficiency is defined in terms of a 'water-use ratio', i.e. the volume of water used (within a bottling plant) to make one litre of beverage. The company has said that, by 2010, it had achieved 6 years of consecutive reduction in the water-use ratio, with a 16% improvement on the 2004 baseline (The Coca-Cola Company, 2012).

Efforts to evaluate and reduce water use in hotels and other tourism outlets are comparatively less advanced, despite the efforts of progressive international tourism companies, supported by industry organisations such as the Travel Foundation and ABTA/The Travel Association (e.g. through the Travelife Sustainability System; source: Travelife Ltd website). Kuoni is actively encouraging monitoring of water use by selected partner hotels in Egypt and Kenya by providing a 50% subsidy for the installation of a water meter (Kuoni, 2010). TUI, another major travel company, has produced a well presented set of guidelines for the installation of water-saving cisterns and other bathroom fittings, as well as recycling of grey water to irrigate lawns (TUI Travel PLC, 2011). While technologies for water-saving and treatment devices by hotels are increasingly available, many hotels do not currently

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[7] From an English law perspective; cf. the French position, which may be seen by French lawyers as different.

[8] As noted in Confino, 2012 reporting on statements by the CEO of Unilever, the degree of interest of company shareholders (as individual investors, or groups of investors) in issues relating to environmental sustainability and social inclusion will be a significant factor in determining the direction of the shareholder 'driver', e.g. how far they are mindful of the consequences of company decisions in the long term, as compared with the company's short-term financial performance.

measure their water use, with their owners/operators largely uninformed of its extent (source: key informant interviews with international travel associations).

As for water use in the energy sector, a major European power company (which chose to remain anonymous), with a diverse portfolio of different types of energy generation (e.g. coal, hydropower, nuclear), provides an example. Power companies site their plants near rivers and lakes (or coastal regions) in order to facilitate access to large volumes of water e.g. cooling. The company has a project to reduce water use in order to be more efficient, in turn reducing the volumes of water abstracted, although the current level of water charges makes water an ancilliary cost. The siting of power plants in relation to water is, however, a critical strategic issue.

The question arises as to the *impact* of reductions in unit water use. The extent to which increased use efficiencies help reduce pressure on water resources and contribute to alleviation of water scarcities depends on how the water saved by efficiencies is reallocated. For example, PepsiCo, which won an award at the World Water Week in Stockholm in August 2012 for improvements in water (use) efficiencies (20% per unit of production four years ahead of its 2015 goal), announced, the next day, its plans for growth in Africa (Kaye, 2012). Asked whether the company can take that experience and prosper in water-stressed Africa, the head of the company's regional operations said that "the trick is to find the right approach and business model … to build scale and thrive in this market of one billion people". The company, he said, will "operate responsibly" and "maintain sustainable development" (Kaye, 2012). The corollary, however, of the company's ambition for growth is presumably that its overall use of water will increase, despite *unit* water use efficiencies.

Question 3(b). What is the company aiming to achieve in terms of improving efficiencies in water use in its supply chains?

As for achieving efficiencies in water resource use along supply chains, companies are much less advanced. Sarni (2011) observes that "most companies have less understanding of water use … within the supply chain than of direct water use".

While the focus of Coca-Cola's water-use target above relates to bottling partners' plants, the company has also commissioned studies to assess water use in the wider supply chain, using the water foot-printing methodology (Hoekstra et al., 2011). It has, for example, studied water used in production of beet sugar supplied to company bottling plants in Europe and for its brand of orange juice sold in North America. These studies showed that the farm, not the factory, represented the largest part of the product water footprint (in the case of the orange juice, as much as 99%). The company's efforts to reduce water use in the growing and processing of the products to make its beverages are, it says, to be conducted via trade and other industry associations, rather than by the company engaging with individual farmers, due to the length of the supply chain (source: key informant interview). Coca-Cola has also attempted to quantify the impacts of its water footprint, relative to the specific geographic locales of the various supply chain-links, arguing that the "key question is not how big is our water footprint, but what is its impact"? (Coca-Cola Europe, 2011). The company is not (as yet, at least) setting specific targets for its supply chain.

There are certainly good business reasons for companies to determine where water-related risks lie in supply chains (McBarnett and Kurkchiyan, 2007). For many MNCs, however, these chains may be long and complex. The question arises whether companies are focusing on the more easily influenced, but ultimately less volumetrically significant, issue of efficient water use in their plants. If companies are to demonstrate they are committed to sustainability, they need to carry out systematic water foot-printing and work down production chains.

For that, MNCs can, individually, exert direct influence on their suppliers, using the contractual leverage of the supply chain. Contracts are private law instruments, the nuts and bolts of commerce (Newborne and Mason, 2012), part of normal commercial operations conducted by the private sector within frameworks of commercial law. That can be supplemented with action through trade and industry associations, collaboratively.

PRIVATE-SECTOR ROLES – IN WATER MANAGEMENT

Question 4. What about the company's activities in water management beyond the 'factory gate' in the catchment/basin? What is it doing, and how is it proposing to engage with government and other water users?

As a company extends its engagement on water, beyond its plant/premises and supply chain to the wider catchment or basin in which it operates, its directors/managers have correspondingly less leverage over the other water stakeholders, compared to what they can exert over its operating plants and suppliers through the chain of command and contracts. By way of response, corporations are deploying several instruments, which are different from conventional lobbying, in which the need for transparency and accountability is no less great.

The instruments are being deployed not only by individual corporations, but also by groupings of companies, notably within the 2030 Water Resources Group, a "public-private-expert-civil society platform" which includes many MNCs, together with a number of aid agencies, one international NGO, the World Wide Fund For Nature (WWF), and partner governments in countries including Mexico, India and China (Water Resources Group 2030, 2012).

Interpreting the aims of the 2030 Water Resources Group, it is arguably looking to play a part in water *resources* management at the basin scale. According to the definitions employed in the present articles (see box 1), this is the role habitually carried out by public water managers alone, and contrasts with the more focused actions of individual corporations at smaller hydrological scales such as catchments. The aims and actions of the 2030 Water Resources Group appear, therefore, to imply the belief of its leaders/members that acting as arbiter on issues of water resources allocation, at the basin scale, is no longer the preserve of public water authorities alone.

The instruments being used include the following:

Information-sharing. In many catchments in developing countries, data availability and quality are a severe constraint on water management, with implications for policy and planning at national level (WWAP, 2012). Individual corporations may be in a position to share data which would otherwise be proprietary. Coca-Cola, for example, has made data available to the World Resources Institute, in modified form via its 'Aqueduct' water risk tool (Jenkinson, 2011). A platform of the 2030 Water Resources Group's engagement on basin to nation-scale water management is 'analysis', building on early work commissioned from McKinsey and Company, projecting supply-demand gaps for different countries, and constructing a marginal cost-curve for different efficiency and productivity measures to meet that gap (Addams et al., 2009). This analysis is provided to governments, with the aim of supporting "better decision making" (Jenkinson, 2011). Actors should, however, be aware that all presentation of data involves some degree of *shaping*, especially where that presentation requires an intermediary stage of analysis. Provision of hard data may be a means to achieve softer forms of influence.

Convening stakeholders. The CEO Water Mandate's guide to 'collective action' around water management envisages different levels of engagement, most of which involve some convening role, up to an 'integrative' level where "interested parties are typically formally convened (e.g. exist as a formal partnership governed by a memorandum of understanding)" (UN, 2012c). "Convening a diverse set of stakeholders in the broader water sector around an extensive fact base" is also a pillar of the 2030 Water Resources Group's approach (Addams et al., 2009). The questions then arising are as follows: which parties are invited and come to be present in the room, and which are not? What objectives do those convened stakeholders have individually (and collectively), and what is the balance of power between them? These concerns apply whether or not private-sector companies play a role, but they intensify where MNCs are involved, given that they have significant water needs and, potentially, significant leverage over government, for example through tax or employment contributions to the economy (Water Futures Partnership, 2012).

Engagement with communities. As noted, the third of the three commitments made by the 40 business leaders in the June 2012 Communiqué is 'partnering' with a range of stakeholders, including "those living in the communities where we operate" (UN, 2012a). Community-level engagement is also emphasised by individual companies such as SABMiller and Coca-Cola (Water Futures Partnership, 2012; The Coca-Cola Company, 2012). In companies' presentation of these engagements, messages are often mixed between those relating to community-level interventions, largely performed for charitable purposes and reputational benefit, and those relating to activities targeted at tackling specific 'water risks' in the basins where business operations are sited. Coca-Cola maintains there is a close link between, on the one hand, its 'source water protection', which obliges all bottling plants to assess and address the risks they incur, and create, in the catchments where they operate and, on the other hand, its Community Water Partnership projects, generally charitable projects designed to contribute to the company's goal to 'replenish', or offset, the water used in its finished beverages through e.g. watershed protection or community water supply (The Coca-Cola Company, 2012). But exactly how far the initiatives overlap is not clear. Incentives and interests of corporations will be very different in those catchments where they have a business operation. The distinction, therefore, between charitable and business motives and interventions needs to be made clearly where water management is concerned, even at local watershed scale.

PARTNERSHIPS ENTERED INTO BY COMPANIES

Question 5. How are the 'partnerships' which companies are offering to government and local communities to be viewed, and to evolve?

The above company partnerships with local communities for charitable purposes are commonly entered into by the philanthropic arms of companies/groups, either by not-for-profit companies or charitable/philanthropic foundations, different entities from the commercial, for-profit companies discussed above (under Question 2). Established as special legal vehicles attached to the main commercial company or group, they commonly bear the company's name, alongside other words in the title, e.g. 'Foundation'.

The funds allotted to those local charitable projects are, typically, modest compared with the resources applied to MNCs' mainstream financial investments, e.g. for construction and operation of the company's plant/premises or those of its business partners. The question arises why companies do not offer partnerships to local communities in the manner they do in commercial contexts. The way companies engage in business partnerships is by drawing up 'partnership' or 'joint venture' agreements (the contractual method) or establishing joint venture/joint stock companies (the 'incorporation' method, i.e. creation of a special company for the purposes of the venture). Under each of these arrangements, typically, financial resources are pooled (up to specified amounts), skills complemented and profit-shares determined (as well as risks allocated). This is how the private sector commonly mobilises 'shared action' (UN, 2010 cited above) in commercial models of partnerships.

If companies genuinely wish to demonstrate engagement in water management with wider benefits for local communities in terms of inclusiveness and sustainability, at a level of engagement above modest charitable donations, they will surely need to make up what amounts to a 'partnership gap'.

In the water management context, 'inclusiveness' entails looking beyond just opportunities for local people to obtain employment and supply/services contracts as a result of the presence of an MNC in a developing country (though these can represent tangible benefits for some) to include additionally the opportunity for local people to have a stake in how local water resources are used and managed including the water source(s) on which the MNC in question (or its associated/affiliated/contracted company present in the locality) is itself drawing. That stake will need to include a voice in decision making and the possibility of acquiring a share in the benefits from, and risks of, the water-related development led by the MNC, through an equity holding. This is a key direction in which partnerships between companies and communities can surely evolve in future. Partnerships can be designed so as to offer such a stake, i.e. they are an example of a legal form or 'normative approach', as per WEF, 2011, suitable for serving sustainable and inclusive growth, public and private goals in combination.

CONCLUSIONS

Question 6. What steps should governments, and representatives of local communities, take in this context of increasing interest and involvement of MNCs in water use/management in developing countries?

In light of the above, each government should take steps to do the following:

- Monitor progress achieved by companies in reduction of water use in their own plants/premises and in their supply chains, against quantified targets, communicated clearly in company reports.
- Learn more about each MNC with which it is contemplating a collaboration in water management in catchments/basins (beyond company’s plants/premises and supply chains), including asking company representatives to expound/explain in full how proposed information sharing/shaping, convening and community-engagement roles fit with the company’s internal characteristics (as framed in applicable company law and set out in the company’s constitution): corporate actions need to match 'what it says on the corporate tin', or rather, in this case, on the inside of the tin.
- Review existing partnerships in water management between itself and companies, and companies and local communities, to see how they are expressed on paper (to the extent they are), and how they are operating in practice: governments’ and communities’ water risks will not, in many respects, be the same as company water risks and need to be separately and independently assessed.
- Ensure that the process (transparency and accountability) and outputs of multi-stakeholder or 'dialogue' platforms are not such as to by-pass the government’s arbitral role.
- Act, energetically, to strengthen public water resources management capacity, in line with the invitation of the 40 CEOs in the June 2012 Communiqué; the interest of private sector companies is in a "well-operated system" (UN, 2010) led by government.

As for local communities living/working near where MNCs are operating, rather than waiting to see whether company managers/directors decide whether the 'success' of the company or the 'corporate interest' (at/in a given time or case) includes having regard to their community and their local environment, they should, with the support of government and/or non-governmental organisations, aim to negotiate partnership agreements with the company in question in terms which make that inclusion clear. As partners of the company, the local communities will be looking for a profit/equity share in the business venture, just as in commercial models of partnership.

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ANNEX: COMPANY PURPOSES, 'CORPORATE INTEREST' AND DIRECTORS' DUTIES: THREE EU EXAMPLES

(based on extracts from laws and codes, and reports of committees considering law reform)

UK

Section 172 of the 2006 Companies Act on "The duty to promote the success of the company" (which came into force on 1 October 2007):

(1) "A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members [i.e. shareholders] as a whole, and in doing so have regard (amongst other matters) to:

(a) the likely consequences of any decision in the long term,

(b) the interests of the company's employees,

(c) the need to foster the company's business relationships with suppliers, customers and others,

(d) the impact of the company's operations on the community and the environment,

(e) the desirability of the company maintaining a reputation for high standards of business conduct, and

(f) the need to act fairly as between members of the company. …

(2) "The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company".

UK Corporate Governance Code, setting out principles for listed companies:

"Every company should be headed by an effective board which is collectively responsible for the long-term success of the company. … The board is responsible for determining the nature and extent of the significant risks it is willing to take in achieving its strategic objectives. The board should maintain sound risk management and internal control systems".

France

The 'corporate interest' guides corporate management. "Corporate interest, which cannot be confused with that of shareholders or directors of the company, cannot be reduced to the various interests just analysed. Nor is it simply their sum. Both an economic reality and a social reality, situated at a crossroads, the company is a forum for a multitude of interests. To simply lump these interests together does not enable us to define the interest of the company as a whole" (Paris Appeal Court in leading judgment of 22 May 1965).

The corporate interest is distinct from the particular interests of its shareholders, employees, creditors, suppliers and clients, although it reflects their common interest which is to "ensure the prosperity and continuity of the company" (extract from the 2002 Bouton Report: *For a better governance of quoted companies,* MEDEF/AFEP, 2002).

Source : Charkham and Ploix, 2005, translated from the French.

Germany

The goal of companies is to deliver to the community the goods and services it needs on a continuing basis, as underlined by Article 14(2) of the Basic Law: "Property imposes duties [and its] use shall also serve the public good".

Tasks and responsibilities of the corporate boards and cooperation between them, as per the German Corporate Governance Code, for listed companies (May 2003 version):

"3.1 The Management Board and Supervisory Board cooperate closely to the benefit of the enterprise. …

4.1.1 The Management Board is responsible for independently managing the enterprise. In doing so, it is obliged to act in the enterprise's best interest and undertakes to increase the sustainable value of the enterprise.

4.1.2 The Management Board develops the enterprise's strategy, coordinates it with the Supervisory Board and ensures its implementation. … 4.1.4 The Management Board ensures appropriate risk management and risk controlling in the enterprise. … 5.1.1 The task of the Supervisory Board is to advise regularly and supervise the Management Board in the management of the enterprise".

Sources: Charkham and Ploix, 2005; UK Companies Act, 2006 and UK Corporate Governance Code (taking effect from June 2010); Freshfields Bruckhaus Deringer, 2011.