



**University of Cape Town**

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**Department of Commercial Law**

**Master of Laws in Commercial Law**

**IMPLEMENTING THE UN GLOBAL COMPACT: ROLE OF THE LAW OF CONTRACT  
IN PROMOTING SUSTAINABILITY IN INTERNATIONAL SUPPLY CHAINS**

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**Word Count: 21953**

**September 2017**

Research Dissertation Submitted for the Approval of Senate in fulfillment of part of the requirements for the Masters of Law in Commercial Law in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

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**Dedication**

This dissertation is dedicated to my family for all of their continued love and support. First and foremost to my lovely parents, Berita and Bernard Mboya Kakw'u, for all their years of love and encouragement. It is because of your sacrifice, hard work, guidance and determination that I am who I am today.

To my siblings Augustus, Onesmus and Purity for their constant support and love.

## **Acknowledgements**

My first words of gratitude are to the Almighty God for blessing me with this opportunity of studying my Master's Degree.

I am heavily indebted to the Mandela Rhodes Foundation for their financial support under the 2017 cohort of scholars. Without it, doing an LLM would have remained just a dream.

I also thank my supervisor Dr. Jacqueline Yeats for her advice, comments and guidance throughout the period of this research. Thank you.

A big thank you to the #UpperDurban team (Takalani, Tumelo and Obert), the rest of the 2017 cohort of the Mandela Rhodes Scholarship, and #TeamUCT (Arthur, Jovenal, Moses, Simon, Mutava, Ghati, Sara, Collins, Sandra, Jimmy, Angellah and Mathini) for their support and most importantly, providing a home away from home.

Special thanks to my colleague and friend Arthur Kung'u for reviewing and commenting on the draft version of this dissertation.

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**Acronyms and Abbreviations**

COP	-	Communication on Progress
CSR	-	Corporate Social Responsibility
ESG	-	Environmental, Social and Governance
EU	-	European Union
ILO	-	International Labour Organization
NGOs	-	Non-Governmental Organisations
SRI	-	Socially Responsible Investing
UDHR	-	Universal Declaration of Human rights
UK	-	United Kingdom
UN	-	United Nations
US	-	United States of America

## **Abstract**

This paper examines the need for multinational corporations to adopt and fully implement the UN Global Compact principles in their operations by influencing sustainability down their international supply chains. This analysis is premised on the various theories supporting the adoption of sustainable business practices by businesses in terms of labour, human rights, environmental responsibility and anti-corruption. The objective of the analysis is to propose the applicable law of contract tools that the multinational corporations can use to implement its sustainability commitments down its international supply chains.

The paper elucidates that there is an urgent compulsion to address sustainability issues of supply chain partners. This compulsion is scrutinized against the backdrop of contemporary development of sophisticated and integrated global value chains and the development of modern-day corporate governance theories like the enlightened shareholder value and stakeholder-inclusivity approaches. Since the supply chain partners of these multinational corporations are distinct entities operating independently and only dealing with the multinational corporations through contractual instruments, the paper proposes that sustainability can be influenced down the supply chains through the very same contractual instruments. In this, the paper proposes and appraises conditions precedent and express contractual terms as the law of contract tools that can best be utilized by multinational corporations in influencing supply chain sustainability. The paper concludes that the use of these tools will guarantee the implementation of sustainability commitments, as based on the UN Global Compact, in international supply chains.

## Chapter One

### 1. Introduction

#### 1.1 Background

The United Nations Global Compact is an international voluntary initiative launched by the United Nations (UN) for the purpose of promoting corporate citizenship.<sup>1</sup> It encompasses ten principles (hence a 'compact' of shared principles) which require businesses, governments and non-governmental organizations to align their strategies and operations with basic principles in four key areas: human rights, labour, environment and anti-corruption.<sup>2</sup> Further, it encourages businesses to take actions that advance societal goals as per the different and often specific contexts of the societies that each business operates in.<sup>3</sup>

The UN Global Compact provides norms for corporate behaviour to guide business practices that are considered sustainable in terms of human rights, labour, the environment, and anti-corruption – but does not have any monitoring or enforcement mechanisms.<sup>4</sup> As a voluntary initiative that provides a set of ten non-prescriptive principles<sup>5</sup> that do not have any monitoring, evaluation or enforcement mechanisms, it targets multinational corporations that have strong corporate social responsibility (CSR) commitments and provides them with baseline practices.<sup>6</sup> It is also a tool for multinational corporations to demonstrate, through the annual progress reports,<sup>7</sup> their commitment to advance the broader UN development goals.<sup>8</sup>

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<sup>1</sup> The UN Global Compact was launched at the UN Headquarters in New York on 26 July 2000 by the former UN Secretary-General Kofi Annan. See <https://www.unglobalcompact.org/about> (accessed April 6, 2017).

<sup>2</sup> The UN Global Compact, What is GC, <https://www.unglobalcompact.org/what-is-gc> (accessed April 6, 2017).

<sup>3</sup> Williams, 'The UN Global Compact' (2004) *Business Ethics Quarterly*, 14, 4, at 757.

<sup>4</sup> Gonzalez-Perez & Leonard, *The UN Global Compact* (2015) 31.

<sup>5</sup> The ten principles are discussed in detail in chapter 2. They are available at <https://www.unglobalcompact.org/what-is-gc/mission/principles> (accessed April 6, 2017).

<sup>6</sup> SAGE SAGE *Brief Guide to Corporate Social Responsibility* (2012) 35.

<sup>7</sup> To see the requirement for the Communication of Progress (COP), see <https://www.unglobalcompact.org/participation/report/cop> (accessed April 6, 2017).

<sup>8</sup> Leonard & Gonzalez-Perez *Beyond the UN Global Compact: Institutions and Regulations* (2015) 12.

Because of its voluntary nature, the question whether or not the UN Global Compact is in tandem with economic objectives of multinational corporations is subject to debate.<sup>9</sup> However, despite these concerns, it is significant to note that there are currently over 9000 companies and 4000 non-business entities from over 100 countries who have signed in already.<sup>10</sup> The fact that this is a relatively big number of multinational corporations drawn from across the globe who have voluntarily signed in to an initiative that requires them to continuously promote sustainability and annually disclose their performance on the ten principles, which is made public, shows that indeed, the initiative is possibly in tandem with the economic objectives of multinational corporations.

The UN Global Compact draws its principles heavily from the concept of CSR in businesses.<sup>11</sup> Since the ten UN Global Compact principles are based profoundly on the CSR obligations of multinational corporations – which is a concept that has attracted a huge scholarly debate and attention<sup>12</sup> – there are notable scholarly debates as to whether businesses should join and implement the UN Global Compact.<sup>13</sup>

There are arguments that when businesses across the world participate in sustainable business practices, they are rewarded in the form of increased employee motivation<sup>14</sup> and advancing of their competitiveness<sup>15</sup> – which demonstrates that sustainable practices are good from a financial point of view.<sup>16</sup> A further argument is that

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<sup>9</sup> Arevalo & Fallon 'Assessing corporate responsibility as a contribution to global governance: the case of the UN Global Compact' (2008) *Corporate Governance*, 8, 4, at 458. Further, chapter three of this paper discusses, particularly, the business case for sustainability and corporate social responsibility.

<sup>10</sup> See the full list of participants at <https://www.unglobalcompact.org/what-is-gc/participants> (accessed April 6, 2017). There are representatives from all sectors like BP Plc from the oil industry, Airbus and Embraer from the aerospace manufacturing industry, and Diageo Plc, Starbucks and Carlsberg Group from the food and beverages industry.

<sup>11</sup> Lindgreen & Swaen 'Corporate Social Responsibility.' (2010) *International Journal of Management Reviews*, 12, 1, at 3. The authors define CSR as a concept that includes a corporation's efforts to address a wider variety of social and environmental issues.

<sup>12</sup> Sweeney & Coughlan 'Do different industries report Corporate Social Responsibility differently? An investigation through the lens of stakeholder theory' (2008) *Journal of Marketing Communications*, 14, 2, at 113.

<sup>13</sup> Voegtlin & Pless 'Global Governance: CSR and the Role of the UN Global Compact' (2014) *J Bus Ethics* 122: at 182 for an analysis of these debates.

<sup>14</sup> Brammer, Millington & Rayton, 'The contribution of corporate social responsibility to organizational commitment' (2007) *International Journal of Human Resource Management*, 18, at 1714

<sup>15</sup> Elkington 'Partnerships from cannibals with forks: The triple bottom line of 21<sup>st</sup> century business' (1999) *Environ. Qual. Manage* 8 at 40.

<sup>16</sup> Gonzalez-Perez & Leonard op cit n 4 at 32.

sustainability and the resultant public disclosure of the sustainability measures<sup>17</sup> by a business potentially increases customer loyalty and enhances corporate brand.<sup>18</sup>

Additionally, the concept of triple bottom-line, which is an approach that evaluates performance of businesses from economic, environmental and social aspects,<sup>19</sup> further exhibits the importance of sustainable business practices for multinational corporations. The triple bottom-line approach introduces the social and environmental imperatives that need to be evaluated when determining the performance of businesses instead of focusing only on the traditional technique of assessing performance – profitability.<sup>20</sup> Lastly, as a result of the stakeholder theory,<sup>21</sup> the enlightened shareholder value approach,<sup>22</sup> pressure from non-profits<sup>23</sup> and consumers,<sup>24</sup> corporations have had to entrench sustainability into their operations and also continuously and voluntarily report their progress and efforts to stakeholders and the public.

For a majority of multinational corporations, the development of global value chains<sup>25</sup> demands that sourcing, operations, production and other activities must be coordinated across geographies. Their supply chains are usually consisted of suppliers

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<sup>17</sup> Sweeney & Coughlan op cit n 12.

<sup>18</sup> Thorsen & Meisling 'A European Perspective' in Mullerat & Brennan *Corporate social responsibility: The corporate governance of the 21st century* (2011) 357. The authors argue that companies now use CSR strategy to brand themselves and gain competitive advantage.

<sup>19</sup> Adams, Frost & Webber 'Triple Bottom Line: A Review of the Literature' in Henriques & Richardson (eds.) *The triple bottom line, does it all add up?: Assessing the sustainability of business and CSR* (2004) 17.

<sup>20</sup> Zu *Corporate Social Responsibility, Corporate Restructuring and Firm's Performance: Empirical Evidence from Chinese Enterprises* (2008) 29. The author states that the TBL tool helps measure the sustainability of a business by measuring the impact of its activities on the world.

<sup>21</sup> Keay *The Enlightened Shareholder Value Principle and Corporate Governance* (2013) 71. The author states that the stakeholder theory is to the effect that businesses must take into account the interests of all stakeholders when making decisions – and these stakeholders include employees, environment and community among others.

<sup>22</sup> Ibid. The author explains that the enlightened shareholder value dictates that corporations should focus on maximising interests of the shareholders but at the same time, take into account wider interests including the impacts of the corporation's operations on the community and the environment.

<sup>23</sup> Spar & La Mure 'The Power of Activism: Assessing the Impact of NGOs on Global Business' (2003) *California Management Review*, 45(3) at 94. The authors state that corporations are more responsive in terms of sustainability when non-profits are involved either by working with them or through activism.

<sup>24</sup> Morrison *Business Ethics* (2015) 335. The author states that consumers are now more concerned and responsive to how products are sourced.

<sup>25</sup> Van Dijk & Trienekens 'Global Value Chains' in Van Dijk & Trienekens (eds.) *Global value chains. Linking local producers from developing countries to international markets* (2011) 9. Here, global value chains are explained to include all the systems and processes involved in linking producers of raw materials in different countries and the final consumers of the products globally.

from different countries with different laws, systems, standards, and other circumstances.<sup>26</sup> As a result, these multinational corporations face challenges when trying to implement the UN Global Compact down their supply chains which consists of independent corporations from different countries which the corporations have no control over in terms of shareholding and voting rights. But because the multinational corporations must deal with these corporations either as franchise partners, suppliers of raw materials or as producers of their products, it becomes fundamental to evaluate whether the multinational corporations need to entrench sustainability down their supply chains.<sup>27</sup>

As seen above, the UN Global Compact calls for the entrenchment of its principles down an entity's supply chain.<sup>28</sup> Further, it has also been established that other stakeholders like consumers are becoming increasingly conscious as to how products are manufactured, transported, sold and or sourced.<sup>29</sup> It is also clear that pressure from non-profits, the development of the enlightened shareholder value approach, and the financial benefits of sustainable business practices have pushed businesses to incorporate sustainable business practices into their operations. This means that, among other measures, these businesses have adopted codes of conduct and internal policies that are based on sustainable business practices and the UN Global Compact.

Therefore, when dealing with suppliers in their supply chains, there is a legitimate need in terms of internal policy, strategy and desire, to only deal with businesses that have corresponding corporate values and commitments.<sup>30</sup> Evaluating how multinational corporations can influence their supply chain partners in terms of sustainability when the

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<sup>26</sup> Touboulic & Ejodame 'Are we really doing the "right thing"? From a sustainability imperialism in global supply chains to an inclusive emerging economy perspective' in Bals & Tate (eds.) *Implementing Triple Bottom Line Sustainability into Global Supply Chains* (2016) 19.

<sup>27</sup> The UN Global Compact, Apply sustainable practices throughout the supply chain, <https://www.unglobalcompact.org/what-is-gc/our-work/supply-chain> (accessed April 6, 2017) on how a company's supply chain can have an impact in promoting human rights, fair labour practices, environmental progress and anti-corruption policies.

<sup>28</sup> Ibid.

<sup>29</sup> Morrison op cit n 24.

<sup>30</sup> CSCMP & Tate *The definitive guide to supply management and procurement: Principles and strategies for establishing efficient, effective, and sustainable supply management operations* (2014) 7. The authors state that improper management of suppliers can result in increased reputational risks that can have an impact on market share and sales.

partners are independent corporations and possibly operating in foreign jurisdictions with different laws and regulations governing their operations becomes crucial. The multinational corporations are evidently unable to control or monitor the operations of other corporations and therefore, if they are committed towards implementing the UN Global Compact down their supply chain, they require efficient tools or mechanisms.

## 1.2 Statement of the Problem

This research stems from the puzzle presented by the necessity for multinational corporations to implement the UN Global Compact principles down their supply chains, while on the other hand, there is the reality of how difficult it is as viewed from a corporate personality and control viewpoint. Evidently, there is a notable difficulty facing multinational corporations since they are unable to control the corporate strategy of their supply chain partners – who are independent and fully incorporated entities. To assist in unravelling this puzzle, this research will propose law of contract tools that multinational corporations can utilize to implement the UN Global Compact principles down their supply chains.

These law of contract tools are premised on the fact that multinational corporations primarily deal with their supply chain partners under predetermined and agreed upon contractual terms. Flowing from this premise, this research will propose the use of conditions precedent<sup>31</sup> and express contractual terms<sup>32</sup> in the contracting between multinational corporations and their supply chain partners.

Conditions precedent in law of contract simply refers to a state of affairs where parties agree that for one or both of them to perform their obligations under a contract, one or both of them must satisfy a set of pre-agreed conditions.<sup>33</sup> In this, the parties agree that they cannot perform the contract before the party bearing the obligation to satisfy the conditions does so and that failure by that party to perform those conditions discharges

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<sup>31</sup> For an analysis of the concept of conditions precedent in the law of contract, see Gillies *Concise contract law* (1988) 26-31.

<sup>32</sup> Lundmark *Common Law Tort & Contract* (1998) 178.

<sup>33</sup> Jennings *Business: Its legal, ethical, and global environment* (1999) 445.

the other from performing the contractual obligations.<sup>34</sup> Since conditions precedent are essentially contractual conditions and not warranties, their breach entitles the other party not to perform their obligations under the contract and or seek remedies available for breach of the contract.<sup>35</sup>

This paper will demonstrate that multinational corporations can use conditions precedent in their contracting process with supply chain partners to implement the UN Global Compact. By using conditions precedent to make it mandatory that the partners must implement certain minimum sustainability standards as set by the multinational corporations, they are able to ensure that all of their partners have complied with set sustainability standards. These conditions precedent may include but are not limited to requiring the prior adoption of supplier codes of conduct, certification by an international body, and adoption of specified sustainability policies and standards that guarantee the protection and promotion of minimum labour and human rights standards, environmentally friendly practices and ethical conduct.

This research will also show that express contractual terms can be used by having express terms that bind a supply chain partner to undertake certain measurable sustainable practices during the subsistence of the contract. The express contractual provisions will have the impact of entitling the multinational corporations to remedies for breach of a condition in the event that the supply chain partner breaches them.<sup>36</sup> These remedies may include repudiation. Repudiation implies that the multinational corporation is discharged from its contractual obligations.<sup>37</sup> Some of the express provisions may include but are not limited to requiring the implementation of a prescribed Supplier Code of Conduct, establishment and implementation of a Sub-Contractor Code of Conduct, establishment of specified minimum sustainability standards and policies, and regular disclosures, reviews and evaluation to monitor implementation of adopted sustainable

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<sup>34</sup> Denicola *Contracts* (2002) 142. The author states that when there are conditions precedent, the courts mainly adopt the rule of strict compliance.

<sup>35</sup> Beale, Bishop & Furmston *Contract: Cases and materials* (2008) 600. The authors argue that it is now accepted that conditions imply the terms of a contract going to the root of the contract itself.

<sup>36</sup> McKendrick 'Express Terms' in Chitty & Beale *Chitty on contracts* 32 ed. (2015) 1014.

<sup>37</sup> Lundmark *op cit* n 32. The author defines express terms of a contract as express conditions breach of which is construed as an end to the contract by courts.

practices. This tool may also involve the utilization of cancellation/termination clauses by the multinational corporation.

In effect, both conditions precedent and the express terms will require a supply chain partner to continuously engage in measurable CSR activities, promotion and protection of minimum labor and human rights standards, engaging in environmentally sustainable practices, and avoiding corrupt practices during the subsistence of the contract. Further, this research will illustrate that actively utilizing these law of contract tools, and especially conditions precedent and cancellation/termination clauses, will result in the creation of a supply chain culture of sustainability so that all potential supply chain partners are influenced, despite the lack of a contract, to operate sustainably.

### **1.3 Research Questions**

This research will seek to identify and evaluate the law of contract tools that multinational corporations can use to entrench their sustainability commitments down their supply chains and in so doing, implement the UN Global Compact with the intention of answering the following research questions:

- a. Do multinational corporations have an obligation to implement the UN Global Compact?
- b. Is there a need for multinational corporations to entrench sustainability down their international supply chains?
- c. What are some of the tools multinational corporations can use to entrench their sustainability commitments down their international supply chains and therefore, implement the UN Global Compact when their supply chain partners are independent corporations operating in foreign jurisdictions?

### **1.4 Significance of the Thesis**

This research contributes to the existing literature on sustainability by offering a new understanding on how multinational corporations can implement the UN Global Compact down their supply chains. Secondly, by suggesting innovative law of contract tools which multinational corporations can utilize to implement the UN Global Compact down their

international supply chains, this paper differs from and adds to the existing global literature on corporate sustainability and social responsibility.

## 1.5 Literature Review

In analysing the concept of CSR and whether multinational corporations have an obligation to implement the UN Global Compact, this paper relies on various resources. There is numerous existing literature on the subject of corporate sustainability. In a study on the environmental performance of corporations, Elkington<sup>38</sup> finds that environmental performance is now pursued by firms as a matter of corporate strategy to gain a competitive advantage over their competitors. While the author finds out that corporate social performance in the 21<sup>st</sup> century has morphed into a corporate strategic issue, it is also clear from the study that there is a direct relationship between CSR and the financial performance of a business.

Another study by Brammer, Millington and Rayton<sup>39</sup> reveals that when businesses participate in sustainable business practices, they are rewarded in the form of increased employee motivation. The study reveals that socially responsible corporations are more attractive to employees and as a result, benefit from increased productivity. Although the authors focus on the issue of employees and corporate sustainability, their study is crucial in providing the link between sustainability and the primary focus of a business – profitability.

A further study by Orlitzky et al<sup>40</sup> analyses the question whether there is a relationship between CSR performance and corporate financial performance by pointing out the reputational advantages originating from corporate social and environmental performance. Among these reputational advantages noted by the authors include the attraction of talent, relatively easier access to financing, and customer attraction, retention and loyalty. The authors conclude that essentially, these reputational advantages have a

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<sup>38</sup> Elkington op cit n 15.

<sup>39</sup> Brammer, Millington & Rayton op cit n 14.

<sup>40</sup> Orlitzky, Schmidt, & Rynes 'Corporate social and financial performance: A meta-analysis' (2003) *Organization Studies*, 24, at 407.

direct impact on the corporate financial performance of a business. Rühmkorf<sup>41</sup> also points out that CSR in businesses is heavily influenced by reputational risks as more businesses are exposed by publication of reports on their irresponsible conduct.

Liangrong Zu<sup>42</sup> analyses CSR from the lens of the triple bottom-line concept in which the performance of a business is measured from economic, environmental and social aspects. The triple bottom-line approach is closely related to the stakeholder theory as explained by Keay.<sup>43</sup> Keay states that the stakeholder theory is to the effect that businesses must take into account the interests of all stakeholders when making decisions – and these stakeholders include employees, environment and community among others. Both Liangrong Zu and Keay studies, based on the triple bottom-line concept and stakeholder theory respectively, show that businesses must now continuously be involved in CSR and sustainability activities.

Morrison,<sup>44</sup> in analysing the impact of customers on the decision of corporations to pursue sustainability, is categorical that consumers are now more concerned and responsive to how products are sourced. According to the author, this creates pressure on the corporations to not only adopt sustainable sourcing policies, but also to continuously report and disclose on the sourcing of raw materials to their customers as well as the general public.

On whether businesses should join and implement the UN Global Compact, there are notable scholarly debates. In their study, Voegtlin and Pless<sup>45</sup> argue that although there has not been empirical investigation of corporations that have joined the UN Global Compact in terms of whether there are any changes to their CSR policy, it is possible that corporations that join the UN global Compact promote responsible leadership across the industry. The authors examine existing literature on the relevance of the UN Global Compact with a view to determine whether the UN Global Compact has an impact on the current global CSR standards.

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<sup>41</sup> Rühmkorf *Corporate Social Responsibility, Private Law and Global Supply Chains* (2015) 1.

<sup>42</sup> Zu op cit n 20.

<sup>43</sup> Keay op cit n 21.

<sup>44</sup> Morrison op cit n 24.

<sup>45</sup> Voegtlin & Pless op cit n 13 at 189-90.

In the same breath, Gonzalez-Perez and Leonard<sup>46</sup> argue that the UN Global Compact is a tool for multinational corporations to utilize and demonstrate, through its requirement of annual progress reports, their commitment to advance the broader UN development goals. Lindgreen and Swaen,<sup>47</sup> by showing that the UN Global Compact draws its principles from CSR practices, demonstrates that the UN Global Compact incorporates practices that corporations have been practising as CSR over the time.

On whether multinational corporations should – in their quest to implement the UN Global Compact – entrench their sustainability commitments down their supply chains, Khan, Hussain and Ajmall<sup>48</sup> provide insights. The authors state that as part of sustainable supply chain management strategies, businesses must consider the issue of sustainable exploitation of the environment within their supply chains. As a result, and according to the authors, businesses integrate their supply chains in order to monitor the performance of their partners in terms of environmental sustainability and other sustainability issues. The authors conclude that this integration means that the multinational corporations entrench their sustainability commitments down their supply chains as part of the integrated sustainable supply chain management strategy. Rühmkorf<sup>49</sup> also highlights the supply chain reputational risk resulting from the use of child labour and poor working conditions by suppliers as a determinant for the increased entrenchment of sustainability by multinational corporations.

In analysing the law of contract tools that multinational corporations can use to entrench their sustainability commitments down their supply chains, the analysis of the concept of conditions precedent in the law of contract by Chen-Wishart<sup>50</sup> and Gillies<sup>51</sup> will be valuable. Denicola<sup>52</sup> will be a resource in analysing in depth the strict compliance approach adopted by courts in interpreting conditions precedent. Further, an analysis of

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<sup>46</sup> Leonard & Gonzalez-Perez op cit n 8.

<sup>47</sup> Lindgreen & Swaen op cit n 11.

<sup>48</sup> Saththasivan & Fernando 'Integrated Sustainable Supply Chain Management: Current Practices and Future Direction' in Khan, Hussain, Ajmal (eds.) *Green Supply Chain Management for Sustainable Business Practice* (2016) 219.

<sup>49</sup> Rühmkorf op cit n 41 at 80.

<sup>50</sup> Chen-Wishart 'The Agreement' in Chitty & Beale *Chitty on contracts* 32 ed. (2015) 297.

<sup>51</sup> Gillies op cit n 31.

<sup>52</sup> Denicola op cit n 34.

the concept of conditions precedent by Beale, Bishop and Furmston<sup>53</sup> will be relevant and especially in their conclusion that conditions precedent are essentially contractual conditions whose breach releases a party from contractual obligations.

Lastly, in analysing the use of express contractual terms as a law of contract tool that multinational corporations can use to entrench their sustainability commitments down their supply chains, Lundmark<sup>54</sup> will be relied on. The author is specific that the approach by courts in interpreting express contractual terms is to the effect that breach points to an end of the contract. This is the same approach adopted by McKendrick<sup>55</sup> in the 32<sup>nd</sup> edition of *Chitty on Contracts*.

None of the above listed works addresses the specific manner in which multinational corporations can implement their sustainability commitments under the UN Global Compact down their supply chains. Although Rühmkorf<sup>56</sup> illuminates how contract law might interact with CSR, the author does not show the linkage between the UN Global Compact principles and a multinational corporation's sustainability commitments. This research addresses this issue by proposing law of contract tools that multinational corporations can utilize to implement their sustainability commitments based on the UN Global Compact principles down their international supply chains while drawing from theoretical approaches to CSR, corporate sustainability and universally accepted law of contract principles.

## 1.6 Research Objective

The objective of this paper is to identify and evaluate the law of contract tools that multinational corporations can utilize to implement the UN Global Compact down their supply chains. These law of contract tools to be utilized in their contractual arrangements with supply chain partners are the concept of conditions precedent and express contractual terms.

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<sup>53</sup> Beale, Bishop & Furmston op cit n 35.

<sup>54</sup> Lundmark op cit n 32.

<sup>55</sup> McKendrick op cit n 36 at 1013-14

<sup>56</sup> Rühmkorf op cit n 41 at 204-6.

## **1.7 Research Methodology**

This research was carried out mainly through desk research reviewing relevant scholarly journal publications, books and reports with a view of establishing how multinational corporations can implement the UN Global Compact down their supply chains. In this, it theoretically analyses the law of contract tools as well as the foundations of business sustainability and corporate social responsibility. Relevant online materials were also relied upon.

## **1.8 Limitations of the Paper**

This paper is limited to the multinational corporations that have signed up to the UN Global Compact. As a result, the focus is narrow in that it does not consider multinational corporations that have not yet signed up the UN Global Compact or the many national businesses and other national and international non-profit organizations that are members of the initiative.

## **1.9 Chapter Summaries**

Chapter Two provides an in-depth analysis of the UN Global Compact principles and their potential impact on corporate sustainability globally. Chapter Three examines the case for sustainability and corporate social responsibility in light of the primary goal of businesses to make profits for their shareholders. Chapter Four analyses the obligation on multinational corporations to entrench sustainability commitments and principles down their international supply chains in light of the UN Global Compact principles, the development of global value chains, and the development of integrated sustainable supply chains among other concerns.

Chapter Five critically analyses the law of contract tools that can be utilized by multinational corporations to implement the UN Global Compact principles down their international supply chains while providing an in-depth analysis of the possible challenges and contemporary concerns that multinational corporations might face in their quest to implement the UN Global Compact principles down their international supply chains.

Lastly, Chapter Six offers a conclusion by highlighting the most prominent issues and offers various recommendations.

## Chapter Two

### 2. The UN Global Compact and Sustainability

#### 2.1 An Introduction

Launched by the UN in 2000, the UN Global Compact is an international voluntary initiative with the objective of promoting corporate citizenship.<sup>57</sup> It provides for a compact of ten principles<sup>58</sup> which require members to align their strategies and operations with basic principles in four key areas: human rights, labour, environment and anti-corruption.<sup>59</sup> Further, it encourages businesses to take actions that advance societal goals as per the different and often specific contexts of the societies that each business operates in.<sup>60</sup>

*'A call to companies to align strategies and operations with universal principles on human rights, labour, environment and anti-corruption, and take actions that advance societal goals.'*<sup>61</sup>

It provides norms for corporate behaviour to guide business practices<sup>62</sup> that are considered sustainable in terms of human rights, labour, the environment, and anti-corruption – but does not have any monitoring or enforcement mechanisms.<sup>63</sup> As a voluntary initiative<sup>64</sup> that provides a set of ten non-prescriptive principles<sup>65</sup> that do not have any monitoring, evaluation or enforcement mechanisms, the initiative targets corporations that have strong CSR commitments and provides them with baseline practices that they can align in their operations.<sup>66</sup> It is also a device that corporations can

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<sup>57</sup> The UN Global Compact was launched at the UN Headquarters in New York on 26 July 2000 by the former UN Secretary-General Kofi Annan. See Op cit n 1.

<sup>58</sup> For the ten principles, see <https://www.unglobalcompact.org/what-is-gc/mission/principles> (accessed April 6, 2017)

<sup>59</sup> Op cit n 2.

<sup>60</sup> Williams op cit n 3.

<sup>61</sup> Op cit n 2.

<sup>62</sup> Corell 'The Global Compact' in Mullerat (ed.) *Corporate social responsibility: The corporate governance of the 21st century* (2005) 235. The author contends that the UN Global Compact requires businesses to make the ten principles part of the business strategy and operations.

<sup>63</sup> Gonzalez-Perez & Leonard op cit n 4.

<sup>64</sup> Op cit n 1

<sup>65</sup> The ten principles are discussed below under section 2.2. The list of the ten principles is available at <https://www.unglobalcompact.org/what-is-gc/mission/principles> (accessed April 6, 2017).

<sup>66</sup> SAGE op cit n 6.

utilize to demonstrate, through the annual progress reports (the Communication on Progress),<sup>67</sup> their commitment to advance the broader UN development goals.<sup>68</sup>

The UN Global Compact is structured to allow and create local networks at every country in order to localize learning, dialogue and partnerships.<sup>69</sup> By lowering a global corporate sustainability initiative to the national level, the UN Global Compact is able to support businesses to take care of country-specific sustainability issues through concerted efforts between businesses, governments and civil society.<sup>70</sup> The UN Global Compact local networks enable all the various members in a specific country to work together through dialogue and partnerships on corporate sustainability – these efforts have borne fruits in some countries.<sup>71</sup>

Although it is a voluntary initiative, it has a mandatory reporting obligation for members.<sup>72</sup> In the mandatory annual report, members must state their actions to implement the UN Global Compact principles in terms of human rights, labour, environment, anti-corruption.<sup>73</sup>

## **2.2 An overview of the UN Global Compact Principles**

### **2.2.1 Human Rights: Two Principles**

The first two principles, which are under the area of human rights, are based on the iconic Universal Declaration of Human rights (UDHR).<sup>74</sup> The first UN Global Compact principle

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<sup>67</sup> Op cit n 7.

<sup>68</sup> Leonard & Gonzalez-Perez op cit n 8.

<sup>69</sup> The UN Global Compact, A Local Lens for Global Change <https://www.unglobalcompact.org/engage-locally> (accessed May 1, 2017).

<sup>70</sup> Civil society and non-profit organizations that are members of the UN Global Compact participate mainly through partnerships and the local networks. See <https://www.unglobalcompact.org/take-action/partnerships> (accessed May 1, 2017).

<sup>71</sup> For example, the Kenyan Global Compact Network produced the Code of Ethics for Business in Kenya which is accessible at <http://www.globalcompactkenya.org/index.php/en/about/code-of-ethics> (accessed May 1, 2017)

<sup>72</sup> The UN Global Compact, Why Report? See <https://www.unglobalcompact.org/participation/report> (accessed May 1, 2017). Here, it is clear that even non-profits who are members of the initiative must submit a Communication on Engagement every two years. Members who fail to submit the annual reports are downgraded from active to non-communicating, see <https://www.unglobalcompact.org/about/faq> (accessed May 1, 2017).

<sup>73</sup> Op cit n 7.

<sup>74</sup> Op cit n 5. It states that the UDHR provided, for the first time, the fundamental human rights to be universally protected.

provides that ‘businesses should support and respect the protection of internationally proclaimed human rights’.<sup>75</sup> This is a principle that requires that businesses should not only ensure that they do not infringe human rights, but that they should also take action to support the protection of human rights.<sup>76</sup> Flowing from this principle, certain social sustainability business actions like financial assistance to non-profits working to protect and promote human rights are now deemed as actions that implement the UN Global Compact.

The second principle provides that ‘businesses should make sure that they are not complicit in human rights abuses’.<sup>77</sup> On eliminating complicity of business in human rights abuses, the focus is to ensure that businesses conduct due diligence before dealing with other businesses (like supply chain partners) and that businesses are actively involved in speaking out against human rights abuses.<sup>78</sup> This principle addresses situations where businesses can be complicit in human rights abuses either through their action or inaction or dealing, knowingly or unknowingly, with other businesses in their supply chains or governments which abuse human rights.<sup>79</sup>

### **2.2.2 Labour Standards: Four Principles**

The next four principles, which are under the area of labour standards, are based on the International Labour Organization’s (ILO) Declaration on Fundamental Principles and Rights at Work.<sup>80</sup> The third UN Global Compact principle states that ‘businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining’.<sup>81</sup> This principle concerns fair labor-relations practices at workplaces which

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<sup>75</sup> The UN Global Compact, Principle One: Human Rights <https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-1> (accessed May 1, 2017).

<sup>76</sup> Ibid. A detailed analysis of how businesses can get involved in human rights issues is provided in the 2011 UN Guiding Principles on Business and Human Rights available at [www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf) (accessed May 1, 2017).

<sup>77</sup> The UN Global Compact, Principle Two: Human Rights <https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-2> (accessed May 1, 2017)

<sup>78</sup> Ibid. A detailed analysis of how businesses can avoid being complicit in human rights abuses is provided in the 2011 UN Guiding Principles on Business and Human Rights, [www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf) (accessed May 1, 2017)

<sup>79</sup> Ibid.

<sup>80</sup> Op cit n 5.

<sup>81</sup> The UN Global Compact, Principle Three: Labour, <https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-3> (accessed May 1, 2017).

allows for unionizing, collective bargaining, non-discrimination, non-interference with union activities, and engagement between labour and management in good faith.<sup>82</sup>

The fourth principle provides that 'businesses should uphold the elimination of all forms of forced and compulsory labour'.<sup>83</sup> This is one of the principles that is directly related with the supply chains of businesses since forced and compulsory labour are human rights violations that occur principally in jurisdictions with poor human rights systems. Among other requirements, it requires businesses to continuously evaluate their supply chains with a view to ensuring that they are not complicit with forced and compulsory labour.<sup>84</sup> Implementing this principle requires that, among other efforts, businesses should be aware of the practices of its supply chain partners in terms of labour standards.

The fifth principle provides that 'businesses should uphold the effective abolition of child labour'.<sup>85</sup> Child labour under this principle refers to the worst forms of child labour as per the 1999 ILO Worst Forms of Child Labour Convention No. 182.<sup>86</sup> Among the recognized worst forms of child labour includes forced or compulsory labour and work that may harm the health, safety or morals of children.<sup>87</sup> In implementing this principle, businesses are encouraged to continually influence their supply chains to get rid of child labour in every segment of their supply chains.<sup>88</sup>

The sixth principle provides that 'businesses should uphold the elimination of discrimination in respect of employment and occupation'.<sup>89</sup> The elimination of

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<sup>82</sup> Ibid.

<sup>83</sup> The UN Global Compact, Principle Four: Labour, <https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-4> (accessed May 1, 2017).

<sup>84</sup> Ibid.

<sup>85</sup> The UN Global Compact, Principle Five: Labour, <https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-5> (accessed May 1, 2017).

<sup>86</sup> See the 1999 ILO Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour. Available at [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C182](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C182) (accessed May 1, 2017).

<sup>87</sup> Article 3 of 1999 ILO Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour.

<sup>88</sup> Op cit n 85.

<sup>89</sup> The UN Global Compact, Principle Six: Labour <https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-6> (accessed May 1, 2017).

discrimination here is in terms of all protected areas and in respect to terms and conditions of employment.<sup>90</sup> Today, one of the most profound workplace discrimination relates to gender-based discrimination in terms of recruitment, remuneration and promotion. This principle requires that businesses not only respect all labour law rights of its employees in terms of non-discrimination but also support external programs promoting workplace equality.<sup>91</sup>

### 2.2.3 Environment: Three Principles

The next three principles are under the environment and are based on the Rio Declaration on Environment and Development.<sup>92</sup> The seventh principle, as based on Principle 15 of the Rio Declaration,<sup>93</sup> provides that ‘businesses should support a precautionary approach to environmental challenges’.<sup>94</sup> By applying the precautionary approach principle, the initiative seeks to ensure that businesses apply the preventive approach as opposed to the environmental remediation approach.<sup>95</sup> This discourages the destruction of the environment by businesses and instead, promotes due diligence by businesses in terms of sustainable utilization of the environment and natural resources.

The eighth principle provides that ‘businesses should undertake initiatives to promote greater environmental responsibility’.<sup>96</sup> This principle is guided by the principle of self-regulation spelled out in Chapter 30 of Agenda 21.<sup>97</sup> It requires that businesses make environmental sustainability a part of their operational strategy as part of the journey towards sustainable development.<sup>98</sup> This principle can be implemented through

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<sup>90</sup> Ibid.

<sup>91</sup> Ibid.

<sup>92</sup> Op cit n 5.

<sup>93</sup> See Principle 15 of the 1992 UN Rio Declaration on Environment and Development. Available at <http://new.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163> (accessed May 1, 2017).

<sup>94</sup> The UN Global Compact, Principle Seven: Environment <https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-7> (accessed May 1, 2017).

<sup>95</sup> Ibid.

<sup>96</sup> The UN Global Compact, Principle Eight: Environment, <https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-8> (accessed May 1, 2017).

<sup>97</sup> Agenda 21 is the Plan of Action adopted at the 1992 United Nations Rio Conference on Environment and Development (UNCED). Available at <https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf> (accessed May 1, 2017).

<sup>98</sup> Op cit n 96.

a variety of ways which include environmental impact assessments, the use of renewable energy and biodegradable packaging, and eco-design of structures among others.<sup>99</sup>

The ninth principle states that ‘businesses should encourage the development and diffusion of environmentally friendly technologies’.<sup>100</sup> This principle promotes the mainstreaming of environmentally friendly technologies that are less harmful to the environment especially in terms of utilization of resources and emission of waste products.<sup>101</sup> A business can implement this principle both internally and also across its supply chain by influencing the production processes of its partners. This may involve inventions that reduce carbon emissions in production processes or even in the products themselves.

#### **2.2.4 Anti-corruption: One Principle**

The tenth and final principle of the UN Global Compact, and the only principle under anti-corruption, provides that ‘businesses should work against corruption in all its forms, including extortion and bribery’.<sup>102</sup> It is based on the UN Convention against Corruption.<sup>103</sup> It is also one of the principles where implementation can be done down the supply chains of the businesses.<sup>104</sup> By addressing corruption in the private sector and requiring businesses to report on their actions on the fight against corruption, this principle is key in ensuring that businesses fight against corruption within their operations as well as in their supply chains. This Principle recognises that some businesses are involved in irregular public procurement cases and other corrupt malpractices especially through bribery and extortion.

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<sup>99</sup> Op cit n 96.

<sup>100</sup> The UN Global Compact, Principle Nine: Environment, <https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-9> (accessed May 1, 2017).

<sup>101</sup> Ibid.

<sup>102</sup> The UN Global Compact, Principle Ten: Anti-Corruption, <https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-10> (accessed May 1, 2017).

<sup>103</sup> The UN Convention against Corruption is a legally binding anti-corruption agreement adopted in 2003. It is available at <http://www.unodc.org/unodc/en/treaties/CAC/index.html> (accessed May 1, 2017).

<sup>104</sup> Op cit n 102.

## 2.3 The UN Global Compact and Supply Chain Sustainability

The UN Global Compact states that apart from mainstreaming the principles into the operations of a business, a member can also implement the principles through the supply chain.<sup>105</sup> The initiative offers guidance to a member business by stating that a business can ‘set expectations for best practices across its supply chain.’<sup>106</sup> This can be in the form of effective due diligence before contracting, and ‘training, auditing and remediation’<sup>107</sup> in the course of the relationship.

The initiative provides businesses with a website dedicated to resources on supply chain sustainability.<sup>108</sup> Here, the initiative compiles case examples of corporate sustainable supply chain practices,<sup>109</sup> sector-specific resources<sup>110</sup> and continuing partnerships<sup>111</sup> by members to promote supply chain sustainability.

Among other resources, there are two critical sustainable supply chain guides that have been produced by the UN Global Compact to provide guidance on continuous improvement<sup>112</sup> and traceability of products.<sup>113</sup> The guide on continuous improvement in sustainable supply chain management, as revised in 2015, provides for the development

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<sup>105</sup> The UN Global Compact, Supply Chain Sustainability, <https://www.unglobalcompact.org/what-is-gc/our-work/supply-chain> (accessed May 1, 2017).

<sup>106</sup> Op cit n 27.

<sup>107</sup> Op cit n 27.

<sup>108</sup> The UN Global Compact, Sustainable Supply Chain, Resources and Practices, <http://supply-chain.unglobalcompact.org/> (accessed May 1, 2017).

<sup>109</sup> The UN Global Compact, Sustainable Supply Chain, Corporate Practices, <http://supply-chain.unglobalcompact.org/site/corporateLanding/> (accessed May 1, 2017).

<sup>110</sup> The UN Global Compact, Sustainable Supply Chain, Resources, <http://supply-chain.unglobalcompact.org/site/resourcesLanding/> (accessed May 1, 2017).

<sup>111</sup> The UN Global Compact, Sustainable Supply Chain, Initiatives <http://supply-chain.unglobalcompact.org/site/initiativesLanding/> (accessed May 1, 2017).

<sup>112</sup> The UN Global Compact *Supply Chain Sustainability: A practical Guide for Continuous improvement 2* ed. (2015). Available at <https://www.unglobalcompact.org/library/205> (accessed May 1, 2017).

<sup>113</sup> The UN Global Compact *A Guide to Traceability: A Practical Approach to Advance Sustainability in Global Supply Chains* (2014). Available at [https://www.unglobalcompact.org/docs/issues\\_doc/supply\\_chain/Traceability/Guide\\_to\\_Traceability.pdf](https://www.unglobalcompact.org/docs/issues_doc/supply_chain/Traceability/Guide_to_Traceability.pdf) (accessed May 1, 2017).

of supplier code of conduct,<sup>114</sup> supply chain mapping,<sup>115</sup> monitoring and evaluation,<sup>116</sup> and the role of goal setting in supplier relationships.<sup>117</sup>

The other guide focuses specifically on traceability of products in a supply chain. It provides that businesses should incorporate initiatives to verify the origin of products from a sustainable perspective in order to enhance the protection of the people and the environment.<sup>118</sup> The guide provides a detailed analysis on how to trace certified and non-certified products within a supply chain – which assists businesses in ensuring the accuracy of product information, and especially quality, safety and labeling of products.<sup>119</sup>

## 2.4 The mandatory annual Communication on Progress publication

Businesses which are members of the UN Global Compact must annually submit the Communication on Progress describing the manner in which they are implementing the ten principles.<sup>120</sup> The Communication on Progress is made public via the initiative's website<sup>121</sup> and can therefore be accessed by all the stakeholders as well as the general public.<sup>122</sup> Actually, this is the only compulsory compliance mechanism for members of the UN Global Compact. It must also contain top leadership statement of commitment<sup>123</sup> towards the ten principles.<sup>124</sup>

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<sup>114</sup> Op cit n 112 at 23. It provides that the supplier code of conduct must be based on the ten UN Global Compact principles.

<sup>115</sup> Op cit n 112 at 30. It provides that a business must map its supply chain in order to ensure that it possible to trace products across the whole supply chain.

<sup>116</sup> Op cit n 112 at 39. It provides that a business must have effective monitoring and evaluation systems that enables them to track the implementation of the supplier code of conduct and other sustainability initiatives by the supplier.

<sup>117</sup> Op cit n 112 at 67. It provides that a business, together with its suppliers, must set 'goals for impact' which are based on the specific circumstances of the jurisdictions the supplier operates from.

<sup>118</sup> Op cit n 113 at 6.

<sup>119</sup> Op cit n 113 at 6.

<sup>120</sup> Op cit n 7.

<sup>121</sup> COPs of current members are available at

<https://www.unglobalcompact.org/participation/report/cop/create-and-submit/> (accessed May 1, 2017).

<sup>122</sup> Op cit n 7. Also see Deva *Regulating Corporate Human Rights Violations: Humanizing Business* Routledge (2012) 95.

<sup>123</sup> The UN Global Compact, What's the Commitment? See

<https://www.unglobalcompact.org/participation/join/commitment> (accessed May 1, 2017).

<sup>124</sup> Op cit n 7.

If a business member fails to submit the Communication on Progress, it is designated as ‘non-communicating’ – and this information is made public<sup>125</sup> in the website.<sup>126</sup> Further, a member who has been designated as non-communicating is expelled<sup>127</sup> from the UN Global Compact if after a year of becoming non-communicating, it fails to submit a Communication on Progress.<sup>128</sup> As a result, within two years of a business failing to submit a Communication on Progress, they are expelled from the initiative. This is a policy based on the need to protect the integrity of the initiative.<sup>129</sup>

The Communication on Progress policy means that once businesses sign up to the UN Global Compact, their names are listed in the website and are accessible to the stakeholders and the public. It is essentially a publication from the business to its stakeholders (employees, consumers, the society and the public) regarding the corporate sustainability practices of the business.<sup>130</sup> However, the mandatory nature of the obligation to submit the annual Communication on Progress means that businesses which are non-compliant risk having their names published as expelled members – probably forever if they do not reapply.<sup>131</sup> From a business point of view, this is a reputational risk which must be avoided.

Given this reputational risk, it is difficult to understand why businesses join the initiative. Apart from the fact that businesses join it out of the need to make public their actions regarding corporate sustainability and show their support to the UN Global Compact principles, it is also possible that it is a corporate brand strategy. Members

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<sup>125</sup> For the list of the members currently designated as non-communicating members, see <https://www.unglobalcompact.org/participation/report/cop/create-and-submit/non-communicating> (accessed May 1, 2017).

<sup>126</sup> The UN Global Compact *Policy on Communicating Progress* (2008, updated in 2013) 3. Available at <https://www.unglobalcompact.org/library/1851> (accessed May 1, 2017).

<sup>127</sup> For a list of the expelled members, see <https://www.unglobalcompact.org/participation/report/cop/create-and-submit/expelled> (accessed May 1, 2017).

<sup>128</sup> Op cit n 126.

<sup>129</sup> Hamid & Johner ‘The United Nations Global Compact Communication on Progress policy: origins, trends and challenges’ in Rasche & Kell (eds) *The United Nations global compact: Achievements, trends and challenges* (2010) 265.

<sup>130</sup> Akhtarkhavari, *Global Governance of the Environment: Environmental Principles and Change in International Law and Politics* (2010) 162.

<sup>131</sup> Op cit n 126.

possibly gain more reputation than their competitors if they are listed as members<sup>132</sup> and in addition, have their sustainable practices listed under the case examples,<sup>133</sup> and their annual Communication on Progress published in the website.<sup>134</sup> Without a doubt, this can be said to be prestigious – and eventually builds the corporate brand and reputation from the perspective of their customers and other relevant business stakeholders. However, there is criticism that the publication compliance requirement is too flexible,<sup>135</sup> and as a result, any business can comply even though there is no tangible evidence of implementation of the UN Global Compact principles.

## 2.5 Conclusion

It is apparent that the UN Global Compact principles are also majorly featured in the code of conduct of major businesses in regards to corporate sustainability. As a result, it is critical to evaluate why businesses join the UN Global Compact when they can implement the principles using their internal policies. Further, given the reputational risk of getting expelled from the initiative but still being listed publicly and possibly forever after the expulsion, it also reinforces the need to analyse why businesses join the UN Global Compact.

The requirement for resources and the above-noted reputational risks faced by businesses pursuing corporate sustainability begs the question whether there is a need at all for businesses to be sustainable in their operations. Chapter Three responds to this question in depth by analysing the business case for corporate sustainability and CSR.

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<sup>132</sup> Op cit n 10.

<sup>133</sup> For the case examples from different businesses, see <http://supply-chain.unglobalcompact.org/site/corporateLanding/> (accessed May 1, 2017).

<sup>134</sup> The Communications on Progress of all members are published available at <https://www.unglobalcompact.org/participation/report/cop/create-and-submit/active> (accessed May 1, 2017).

<sup>135</sup> Rasche & Kell (eds) *The United Nations global compact: Achievements, trends and challenges* (2010) 265 and 267. The authors point out to the lack of monitoring of the implementation statements by businesses.

## Chapter Three

### 3. The Business Case for Corporate Social Responsibility and Sustainability

#### 3.1 An Introduction

The debate on why businesses should engage in CSR and sustainability, and why they actually do engage in sustainability is attributed majorly to the Berle-Dodd debate in the 1930s.<sup>136</sup> Adolf A. Berle, in his 1931 article, was of the opinion that in corporations, the managers are trustees of the shareholders and therefore, they should only maximize shareholders' interests in terms of profits.<sup>137</sup> This shareholder primacy model of running corporations was, a year later in 1932, challenged by E. Merrick Dodd – who was of the opinion that managers of corporations are trustees of a much wider range of stakeholders who are affected by the decisions they make.<sup>138</sup> This position of Dodd can be considered the backbone of the stakeholder theory in corporate management today.<sup>139</sup>

The concept of CSR involves the conscious and voluntary efforts by a business entity to address a wider variety of social and environmental issues in the society it operates in.<sup>140</sup> Although there is yet to be developed a universally agreed definition of CSR, presently, there is a conscious movement towards describing CSR as business decision making that is based on ethics, legal compliance, respect for the people, environment and community.<sup>141</sup> However, this development also causes challenges since there is an intersection of CSR – a voluntary concept – with a company's legal obligations with regard to, for instance, respect and protection of human rights and adherence to labour laws.<sup>142</sup>

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<sup>136</sup> Shestack 'Corporate Social Responsibility in a Changing Corporate World' in Mullerat (ed) *Corporate social responsibility: The corporate governance of the 21st century* (2005) 98.

<sup>137</sup> Berle 'Corporate Powers as Powers in Trust' (1931) *Harvard Law Review* 44 at 1049-1074.

<sup>138</sup> Dodd 'For whom are corporate managers trustees?' (1932) *Harvard Law Review* 45 at 1145-1163.

<sup>139</sup> *Ibid* at 1154. The author lists shareholders, employees, customers and the general public as the groups that are affected by the decisions of a business entity.

<sup>140</sup> Lindgreen & Swaen *op cit* n 11.

<sup>141</sup> Thilakam & Mahadevi 'Role of CSR in Social Development' in Vasan (ed.) *Corporate Social Responsibility* (2015) 63.

<sup>142</sup> Mullerat 'The Global Responsibility of Business' in Mullerat (ed.) *Corporate social responsibility: The corporate governance of the 21st century* (2005) 4.

The CSR obligations of businesses have attracted a huge scholarly debate and attention over the years.<sup>143</sup> However, what is increasingly clear from this CSR debate is that the position of Dodd to the effect that the corporation has a duty to the shareholders, employees, customers and the general public has gained impetus.<sup>144</sup> Although there is no settled form of CSR or sustainability, over the years, it has become clear that various businesses practice CSR from different strategic and operational standpoints.<sup>145</sup> The practice of CSR can also be said to have been influenced, quite significantly, by the growth of global value chains and globalisation.<sup>146</sup>

There are also considerable arguments that because of the increased access to information by consumers, potential employees and non-profits,<sup>147</sup> corporations are now facing increased pressure to adopt sustainable practices in terms of sourcing, promotion and protection of labour rights, and the protection of the environment. This chapter examines the case for sustainable business practices and CSR in businesses by specifically examining the theories and arguments noted above that try to elucidate the case for sustainability and CSR in businesses.

### **3.2 The Various Theories and Arguments for CSR and Sustainability**

#### **3.2.1 The Stakeholder Theory**

According to the stakeholder theory, stakeholders include all the groups affected by the decisions of the business.<sup>148</sup> It is a theory that is premised on the position of Dodd that apart from the shareholders, the management is also a trustee of the society.<sup>149</sup> The principle that the interests of society must also be considered in business decision making

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<sup>143</sup> Sweeney & Coughlan op cit n 12.

<sup>144</sup> Horrigan *Corporate Social Responsibility in the 21st Century: Debates, Models and Practices Across Government, Law and Business* (2010) 210. Here, the author states that corporate law is now moving towards requiring directors to recognize the interests of employees and other stakeholders in their decision making, and that specifically, this movement has been reflected not only in judicial decisions but also in statutes in the United Kingdom.

<sup>145</sup> Mullerat op cit n 142 at 3. These standpoints are analysed here to include the practice of CSR in pursuance of an economic theory, legal obligation, market tool, or as a management risk instrument.

<sup>146</sup> Shestack op cit n 136 at 102-103.

<sup>147</sup> Thilakam & Mahadevi op cit n 141 at 65.

<sup>148</sup> Idowu & Louche *Theory and practice of corporate social responsibility* (2011) 247.

<sup>149</sup> Dodd op cit n 138; and Keay op cit n 21 at 71.

is a movement away from the shareholder primacy theory promoted by Berle.<sup>150</sup> For a corporation, these stakeholders have an expectation that the corporation will act in a way that is consistent with their interests.<sup>151</sup> This theory recognises the complexity of the business and social environment in which a business operates in today's cross-cultural world.<sup>152</sup>

This is a theory that advocates that the interests of shareholders, employees, consumers, suppliers, environment, financiers, creditors, regulators, government, creditors, potential investors, society, and the general public must be taken into account during the business decision making.<sup>153</sup> This means that sustainability measures like respecting the labour rights of employees, protecting the environment, and the support of social concerns like access to healthcare, education and poverty alleviation, are ingrained in the way the corporation conducts its business.<sup>154</sup>

It is settled that these stakeholders, as viewed from the impact they have on businesses, are key to the success of a business. Specifically put, there is a clear interdependence between a corporation and its employees, consumers, suppliers, creditors, environment, and surrounding community from a long-term viability outlook.<sup>155</sup> This interdependence means that businesses have had to entrench sustainability into their operations and also continuously report their progress and efforts to these stakeholders.<sup>156</sup> Through this, operations of the business become principally sustainable, and the business consciously gets involved in CSR as part of fulfilling its social obligations to the wider society.<sup>157</sup> At its perfect manifestation, the stakeholder theory supposes that all the interests of stakeholders, and therefore sustainability and CSR in practice, are integrated into the operational and strategic aspects of the business.

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<sup>150</sup> Berle op cit n 137. Here, the author states that the management is an agent of the shareholders and therefore should only promote the interests of the shareholders.

<sup>151</sup> Idowu & Louche op cit n 148.

<sup>152</sup> Banerjee *Corporate social responsibility: The good, the bad and the ugly* (2011) 23-27.

<sup>153</sup> Idowu & Louche op cit n 148.

<sup>154</sup> Timms 'A Sociological Approach to the Problem of Competing CSR Agendas' in Vertigans & Idowu (eds.) *Corporate Social Responsibility: Academic Insights and Impacts* (2017) 111.

<sup>155</sup> Horrigan op cit n 144 at 7.

<sup>156</sup> Keay op cit n 21.

<sup>157</sup> Horrigan op cit n 144 at 8.

Fundamentally, the stakeholder theory is to the effect that a business gets its license to operate from the society – since, broadly speaking, the regulator represents the society.<sup>158</sup> Therefore, a business has to be socially responsible in order for it to maintain and guard its license to operate. This aspect of society licensing business is also grounded on the fact that, figuratively, a business cannot possibly exist without a society since there will not be employees for it to employ or even consumers to purchase its products. Further, if the environment is destroyed, then its employees' health and wellbeing is potentially affected and if the children in the society it operates are not educated, then the purchasing power goes down in the long run, and insecurity in the region will potentially increase. These illustrations showing the inherent interdependence between a corporation and the stakeholders demonstrate why the stakeholder theory has currently gained momentum as the basis for CSR and sustainability in businesses.

### 3.2.2 The Enlightened Shareholder Value doctrine

This is a theory developed from the agency theory<sup>159</sup> in which the management must act in the best interests of the shareholders,<sup>160</sup> and the stakeholder theory in which an organization must take into account the interests of all stakeholders affected by its decisions.<sup>161</sup> However, under this doctrine, the trade-off between the two theories means that this doctrine supports the consideration of the interests of all the stakeholders as an avenue for creating long-term value for the shareholder.<sup>162</sup> In doing this, the corporation has a duty to primarily focus on maximising interests of the shareholders but at the same time, take into account the interests of the other stakeholders including the impact of the corporation's operations on the community and the environment.<sup>163</sup>

The enlightened shareholder value doctrine implies that the management takes a long-term approach, as opposed to short-termism, in growing the shareholder value by

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<sup>158</sup> Roselle 'The Triple Bottom Line: Building Shareholder Value' in Mullerat (ed) *Corporate social responsibility: The corporate governance of the 21st century* (2005) 124.

<sup>159</sup> Keay op cit n 21 at 133. Here, the author states that the agency theory is used to explain the relationship between directors and shareholders of a company.

<sup>160</sup> Tricker *Corporate governance: Principles, policies, and practices* (2015) 61.

<sup>161</sup> Idowu & Louche op cit n 148.

<sup>162</sup> Jensen, Murphy & Wruck 'Remuneration: Where We've Been, How We Got to Here, What Are the Problems, and How to Fix Them' (2004) *ECGI Working Paper Series in Finance* 44/2004 at 17.

<sup>163</sup> Keay op cit n 21.

being inclusive of all other stakeholders and sustainable in the manner it operates. In doing this, the business prioritizes issues that have an impact on the long-term success of the business<sup>164</sup> like reputation, customer satisfaction, employee satisfaction and productivity, protecting corporate brand, and being transparent.<sup>165</sup>

Essentially, this doctrine deduces that when management participates in CSR and other sustainability activities, it is actually committed to its core responsibility – creating value for the shareholder. As a result, the doctrine expects that the shareholder is well informed, and hence the term ‘enlightened’, on the benefits of substituting short-term returns with the prospects of long-term value when the corporation operates sustainably. For instance, this means that when a business invests heavily in technological improvements in pursuance of environmental preservation, the shareholders are able to appreciate that there is value – not in the short-term – but in the long-term, of operating in an environmentally friendly manner.<sup>166</sup>

It is a theory of understanding sustainability and CSR by businesses that has been abridged from the traditional corporate management position that a corporation exists to pursue, without exception, its self-interest.<sup>167</sup> The pursuance of the self-interests of a corporation is what has been branded the enlightened self-interest approach.<sup>168</sup> It posits that engaging in CSR and operating sustainably is essentially in tandem with the core business of a corporation – which is to further the financial interests of the shareholders. In effect, operating sustainably is fundamentally pursuing the corporation’s core business of pursuing profitability.

This approach of promoting sustainability in decision making by directors has now been incorporated in laws regulating companies at the national levels in some

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<sup>164</sup> Jensen, Murphy & Wruck op cit n 162. The authors appraise what long-term success of the business means and conclude that the long-term success of the business benefits a variety of stakeholders and not just the shareholders.

<sup>165</sup> Martin ‘Corporate Social Responsibility and Public Policy’ in Mullerat (ed.) *Corporate social responsibility: The corporate governance of the 21st century* (2005) 78-79.

<sup>166</sup> Shoop ‘Corporate Social Responsibility and the Environment – Our Common Future’ in Mullerat (ed.) *Corporate social responsibility: The corporate governance of the 21st century* (2005) 165.

<sup>167</sup> Bakan *The Corporation: The Pathological Pursuit of Profit and Power* (2004) 160.

<sup>168</sup> Ibid

countries.<sup>169</sup> Among other considerations, the consideration of the long-term consequences of the decisions of directors has now been mainstreamed into corporate management practices. Clearly, the enlightened shareholder value and enlightened self-interest of the corporation approaches have impacted corporate management by promoting the integration of sustainability into the operations of businesses. The ‘enlightened’ shareholders approach and the reflection of key sustainability values in the national law today indicates that businesses have no option but to operate in a sustainable and socially responsible manner.

### 3.2.3 The triple-bottom line approach

The concept of triple bottom-line can be described as an accounting and business performance approach that evaluates performance of businesses from economic, environmental and social aspects.<sup>170</sup> These three areas have simply been reduced to ‘profit, planet and people’ or ‘the three Ps’.<sup>171</sup> The triple bottom line concept is critical in CSR for introducing the social and environmental performance of a business as opposed to the traditional assessment of corporate performance from an exclusively financial perspective.<sup>172</sup>

It is a concept that denotes that performance of a business is best analysed from the lens of the business’ impact to the people it interacts with, its impact on the planet generally and ultimately, its profitability.<sup>173</sup> As a concept that borrows heavily from the stakeholder theory addressed above, the triple bottom-line approach recognises that businesses must take into account the interests of all stakeholders who are affected by

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<sup>169</sup> Section 172 of UK’s 2006 Companies Act on the duty of a director to promote the success of the company where a director is mandated to have regard to the long-term consequences of any decision as well as the interests of employees, customers, suppliers, community and the environment. These provisions, stated verbatim, are also found under the duty of a director to promote success of the company under section 143 of Kenya’s Companies Act passed in 2015. Further, under section 159 (3) (b) (iii) of the 2008 Companies Act of South Africa, it is clear that directors have a duty to run the business of the company in manner that does not endanger the health or safety of any individual, or damage the environment.

<sup>170</sup> Adams, Frost & Webber op cit n 19.

<sup>171</sup> Olson-Buchanan, Bryan & Thompson *Using Industrial-Organizational Psychology for the Greater Good: Helping Those Who Help Others* (2013) 76.

<sup>172</sup> Zu op cit n 20. The author states that the triple-bottom line tool is used to measure the sustainability of a business by measuring the impact of its activities on the world.

<sup>173</sup> Zu op cit n 20.

its decisions when making decisions.<sup>174</sup> It recognises that these stakeholders include the shareholders as investors, the environment, and the people in terms of employees, shareholders and the general public.

In this light, the environment is considered a stakeholder of the business. Accordingly, sustainability practices and CSR obligations necessitate the business to take conscious and intentional actions to reduce the impact of the business on the environment, protect the environment, and contribute to the efforts directed at addressing environmental challenges like climate change. The common areas that businesses are increasingly contributing in include the reduction of carbon emissions, reduction of waste, introduction of innovative waste management initiatives, and sustainable utilization of natural resources.<sup>175</sup>

In the area of social performance, the people that the organization interacts with are considered as being stakeholders. People in this sense means the employees, shareholders, residents of the society it exists in, and the general citizenry of the country it operates in. The common efforts that businesses have undertaken as CSR include initiatives that have an impact on the employees in terms of fair labour practices, development and training of employees, and provision of formal and informal support to employees.<sup>176</sup> Other social performance issues include the conscious initiatives to enhance democracy, access to education, alleviate poverty, empower women and other minorities, and address underemployment.<sup>177</sup>

The triple bottom-line approach has been enhanced by other aspects apart from the stakeholder theory. For instance, the performance of a business in terms of management of its human resources is now monitored by the progressively responsive and enlightened consumers in the market.<sup>178</sup> This consumer monitoring and possibility

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<sup>174</sup> Keay op cit n 21.

<sup>175</sup> Seadon 'Sustainable waste management systems' (2010) *Journal of Cleaner Production* 18 at 1647

<sup>176</sup> Richardson 'Accountability for Sustainability: Measuring Quantities or Enhancing Qualities' in Henriques & Richardson (eds.) *The triple bottom line, does it all add up?: Assessing the sustainability of business and CSR* (2004) 38.

<sup>177</sup> Timms op cit n 154.

<sup>178</sup> Gond et al 'A corporate social responsibility – corporate financial behavioral model for employers' in Smith et al (eds) *Global challenges in responsible business* (2010) 35. The author states that management

of product boycott compels businesses to adopt sustainable and effective human resource systems that are respectful to the labour rights of the employees.<sup>179</sup> Generally, in order to achieve a positive triple bottom line, a business must seek profits sustainably, continuously set and implement socially responsible targets, and create CSR partnerships with government bodies or other likeminded organizations as appropriate.<sup>180</sup>

Undoubtedly, as more corporations commit to perform economically, environmentally and socially, they are able to operate sustainably and consciously participate in CSR. The pursuit of this triple-bottom line approach by corporations explains why some businesses are involved in CSR and sustainable practices.

### **3.2.4 The Consumer pressure and Corporate Brand aspect**

Globalisation and development of information technology has enabled consumers and non-profits much easier access to corporate information. This information, and the instant distribution through online platforms, enables consumers and non-profits to exert pressure on unsustainable corporations by boycotting or threatening to boycott its products, or posing reputational risks to its corporate brand.<sup>181</sup> This consumer pressure and related reputational risk is key in realigning corporate strategies towards sustainability and social responsibility.<sup>182</sup> It has also been suggested that internal corporate practices like how a business manages its human resources is now monitored by consumers and thereby having an impact on the financial performance of a business.<sup>183</sup>

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of human resources by a business now has an influence on consumer purchasing behaviour in the marketplace.

<sup>179</sup> Voy 'Trade and Child Labour' in Morrissey, López & Sharma (eds.) *Handbook on Trade and Development* (2015) 160.

<sup>180</sup> Roselle op cit n 158 at 138.

<sup>181</sup> Voy op cit n 179.

<sup>182</sup> Seidman *Beyond the boycott: Labor rights, human rights, and transnational activism* (2007) 42. Among other illustrations, the author points out the anti-apartheid consumer movements to draw parallels between consumer pressure and sustainable corporate practices.

<sup>183</sup> Gond et al op cit n 178.

Because of the threat to profitability of a business, the pressure from non-profits<sup>184</sup> and consumers<sup>185</sup> has compelled corporations to entrench sustainability into their operations and also continuously and voluntarily report their progress and efforts to stakeholders and the public. Further, as a result of the pressure on other businesses in similar or different sectors, it can be contended that businesses integrate sustainability into their operations in order to mitigate the risk of future consumer and non-profits pressure.

Recently, corporations have experienced consumer and non-profit pressure in matters such as sourcing of raw materials or products,<sup>186</sup> packaging of products<sup>187</sup> and labour rights of employees.<sup>188</sup> This has, to some extent, led to the reduction of unethical sourcing of products in supply chains where there are concerns of infringement of labour rights of employees.<sup>189</sup> The consumer pressure for corporations to halt unethical sourcing can also be attributed to the global reduction of, for example, the use of child labour in fashion supply chains.<sup>190</sup> Other instances where consumer pressure has had a positive impact in terms of sustainability include the area of sourcing of minerals classified as conflict minerals<sup>191</sup> and in the use of environmentally unfriendly packaging materials.<sup>192</sup>

Further, the reputation of a business is directly related to its profitability and competitiveness in a market.<sup>193</sup> Since CSR performance and its reporting has a considerable impact on the reputation of a business, the involvement of a business in

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<sup>184</sup> Spar & La Mure op cit n 23. The authors state that corporations are more responsive in terms of sustainability when non-profits are involved either by working with the corporations, or when the nonprofits are involved in independent activism.

<sup>185</sup> Morrison op cit n 24. The author states that consumers are now more concerned and responsive to how products are sourced.

<sup>186</sup> Morrison op cit n 24.

<sup>187</sup> Chen & Chai 'Attitude towards the Environment and Green Products: Consumers' Perspective' (2010) *Management Science and Engineering* 4 at 30.

<sup>188</sup> Gond et al op cit n 178.

<sup>189</sup> Goebel et al 'The influence of ethical culture on supplier selection in the context of sustainable sourcing' (2012) *Int. J. Production Economics* 140 at 8.

<sup>190</sup> Shum et al 'Globalization and the role of multinational corporations' in Yu, Wai-Kee & Kwan (eds.) *International Economic Development: Leading Issues and Challenges* (2014) 69.

<sup>191</sup> For example, public pressure in the United States led to the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act (2010) to combat the sourcing of conflict minerals. Under section 1502 of the Act, publicly traded U.S. companies must disclose the source of certain minerals classified as conflict minerals.

<sup>192</sup> Chen & Chai op cit n 187.

<sup>193</sup> Jeurissen & Rijst *Ethics in business* (2007) 108.

CSR can be attributed to the resulting boosting of its reputation in terms of corporate brand and image.<sup>194</sup> The reputation enables the business to be able to attract and retain talent, access financing relatively easier, and attract and retain customers in the market.<sup>195</sup> Needless to state, these reputational advantages have a positive impact on the financial performance of a business.

The consumer pressure and risk of imminent exposure damaging the corporate brand of the businesses forces them to not only adopt sustainable sourcing policies, but also to continuously report and disclose on their sourcing practices to their customers as well as the general public.<sup>196</sup> Evidently, consumers have an impact on the decision of corporations to pursue sustainability and practice CSR. The corrective actions taken by the businesses, although arguably motivated by the need to protect their corporate brand with a view of maintaining or increasing profitability, means that the businesses essentially operate sustainably and in a socially responsible manner.

At a time when consumers are more responsive to information touching on sustainability than ever, from the above analysis, it is easy to understand why businesses have now become particularly responsive to information touching on their corporate brand. However, there are critics that argue that the pursuance of CSR from this perspective is tantamount to using CSR as public relations smokescreen for a business.<sup>197</sup> Other critics argue that companies may, in pursuance of corporate brand and marketing, use CSR to entice employees and consumers and not necessarily to be sustainable as a business, better the society and or protect the environment.<sup>198</sup>

However, despite the criticisms, there is consensus that there are essentially resultant positive benefits in terms of sustainability and social development despite the motivations behind the practice of CSR and sustainability by a business. Lately, and as discussed above, consumer pressure and the need to protect corporate brand have contributed to the practice of CSR and the pursuance of sustainability by businesses.

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<sup>194</sup> Orlitzky, Schmidt & Rynes op cit n 40.

<sup>195</sup> Orlitzky, Schmidt & Rynes op cit n 40.

<sup>196</sup> Morrison op cit n 24.

<sup>197</sup> Roselle op cit n 158 at 131.

<sup>198</sup> Mullerat op cit n 142 at 5.

The risk of public disclosure of unsustainable practices by non-profits<sup>199</sup> or the boycott of products by consumers<sup>200</sup> compels businesses to adopt sustainable practices. As discussed above, such sustainability practices by a business potentially increases customer loyalty and enhances corporate brand.<sup>201</sup> Further, companies today increasingly use CSR as a corporate strategy to brand themselves and possibly gain competitive advantage in the market.<sup>202</sup> It can be surmised that consumer pressure and the need to preserve corporate brand compels businesses to practice CSR and adopt sustainable practices.

### **3.2.5 The Employee attraction, retention and productivity aspect**

Studies have shown that participation in CSR and the resultant communication of the CSR activities by a business has a direct positive impact on employee organizational commitment.<sup>203</sup> Further, the involvement in CSR activities by a business has also been established to play a key role in the attraction of talent to a business.<sup>204</sup> Employees who are highly committed to a business are undoubtedly more productive in their work while the attraction of the best talent provides a business with a bigger pool of talent to choose its workforce from. These two facets in human resources undeniably have an impact on the competitiveness and profitability of the business.

At the same time, studies in human resources management indicate that when businesses across the world participate in sustainable business practices, they are rewarded in the form of increased employee motivation<sup>205</sup> and advancing of their competitiveness.<sup>206</sup> Since employee motivation translates to increased productivity and hence increased competitiveness<sup>207</sup> in the market, it is clear that sustainable practices are good to a business, from a financial point of view.<sup>208</sup> As a result, operating sustainably

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<sup>199</sup> Spar & La Mure op cit n 23.

<sup>200</sup> Voy op cit n 179.

<sup>201</sup> Thorsen & Meisling op cit n 18.

<sup>202</sup> Thorsen & Meisling op cit n 18.

<sup>203</sup> Brammer, Millington & Rayton op cit n 14.

<sup>204</sup> Gond et al op cit n 178 at 39.

<sup>205</sup> Brammer, Millington & Rayton op cit n 14.

<sup>206</sup> Elkington op cit n 15.

<sup>207</sup> Deb *Strategic approach to human resource management: Concept, tools and application* (2006) 273.

<sup>208</sup> Gonzalez-Perez & Leonard op cit n 4 at 32.

makes socially responsible corporations beneficiaries of a bigger pool of talent to choose employees from, and possibly increases the productivity of their employees.

Further, apart from increasing productivity and job satisfaction, CSR has also been linked to increasing employee retention.<sup>209</sup> These benefits that corporations enjoy from the perspective of the impact CSR practices have on their employees informs today's corporate governance approach of looking at CSR from a strategic standpoint.<sup>210</sup> This is because employee productivity, motivation, attraction, and retention have now been mainstreamed as core strategic objectives of any business in today's highly competitive world.<sup>211</sup>

All these facets in human resource management and their impact on the profitability of the business in the long-term possibly inform the decision of businesses to adopt sustainable practices and practice CSR. The importance of being able to attract, retain and secure increased employee productivity is informed by the human resources management view of employees as key resources in every organization that have a significant impact on the long-term productivity of an organization.<sup>212</sup>

These illustrations show that current and potential employees monitor CSR performance of businesses, and that the manner in which they respond has financial consequences to the business. Therefore, it can be concluded that a business has to be sustainable in its operations and practice CSR in order to secure, attract and retain top quality and highly motivated employees.

### **3.2.6 The business strategy and advancement of competitiveness concept**

From the perspective of corporate strategy and the objective of increasing the competitiveness of a business, CSR can be viewed as a tool of generating strategic capital.<sup>213</sup> One of the ways this has been obvious is when CSR activities are designed to

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<sup>209</sup> Sen, Bhattacharya & Korschun 'Using corporate social responsibility to win the war for talent' (2008) *MIT Sloan Management Review* 49/2: at 38.

<sup>210</sup> Ibid at 44.

<sup>211</sup> Deb op cit n 207.

<sup>212</sup> Mensah *Principles of Human Resource Management* (2013) 24.

<sup>213</sup> Brammer, Millington & Rayton op cit n 14 at 1702.

increase employee retention, motivation, performance and productivity<sup>214</sup> even when the CSR is directed at external stakeholders.<sup>215</sup> Further studies have revealed that environmental performance is now pursued by firms as a matter of corporate strategy to gain a competitive advantage over their competitors.<sup>216</sup>

There is no doubt that strategic capital generates an indirect financial advantage to a business in terms of employee motivation, productivity and performance, and consumer loyalty. For instance, sustainable human resources management has been shown to influence consumers and therefore, positively impact on the performance of the business in the market.<sup>217</sup> Also, the environmental sustainability can generate strategic capital when an organization's environmental management system is certified as being effective by the International Standards Organisation.<sup>218</sup> Clearly, when viewed from a corporate strategy perspective, it is comprehensible why pursuing CSR and sustainability makes business sense to corporations.

Further arguments underlining the enhancement of competitiveness of a business by its involvement in CSR include the advantage socially responsible businesses have in terms of employee productivity<sup>219</sup> and the flexibility of their pricing.<sup>220</sup> They enjoy flexibility in pricing because the customer loyalty generated by CSR involvement and operating sustainably enables them to price differently and still be able to compete with other businesses in the market. All these facets have an impact on the financial performance of a business and therefore, it is possible to conclude that businesses possibly adopt sustainable practices and CSR as part of implementing a business strategy and advancing their competitiveness in the market.

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<sup>214</sup> See section 3.2.5 above.

<sup>215</sup> Gond et al op cit n 178 at 39.

<sup>216</sup> Elkington op cit n 15.

<sup>217</sup> Gond et al op cit n 178.

<sup>218</sup> ISO 14001:2015 is an Environmental Management System that can be adopted by any organization, regardless of size, to manage its environmental responsibilities in a systematic manner that contributes to the environmental pillar of sustainability. See <https://www.iso.org/standard/60857.html> (accessed May 1, 2017).

<sup>219</sup> See section 3.2.5 above

<sup>220</sup> Roselle op cit n 158 at 126.

### 3.3 Conclusion

Critics of CSR and sustainable practices argue that the use of CSR reporting as a marketing tool and also to enhance reputation often leads to exaggerations as to the magnitude or impact of the CSR by the business.<sup>221</sup> This means that CSR reports by companies may not be factual and that there is entirely a lot of hypocrisy in the manner in which businesses practice and report on CSR.<sup>222</sup> Others attribute CSR as part of public relations by a business.

Although these criticisms of CSR and sustainability activities are well founded, they do not suggest any other option for businesses to have an impact on the society they operate in nor do they deny that CSR actually has a positive impact on the society. Therefore, the movement towards developing responsible corporations continues to be boosted by the various theories analysed above – and especially the enlightened shareholder value doctrine, the stakeholder theory and the increasing pressure from consumers and non-profits. Further, from a financial and competitive point of view, it has progressively become clear that participation in CSR enhances the profitability, competitiveness and reputation of a business.

Having determined that indeed there is a valid case for sustainability and CSR in businesses, Chapter Four will now examine whether businesses, and especially multinational corporations, should be obligated to implement their sustainability and CSR obligations down their supply chains.

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<sup>221</sup> Shestack op cit n 136 at 108.

<sup>222</sup> Ibid.

## Chapter Four

### 4. International Supply Chains and the Entrenchment of Sustainability

#### 4.1 An Introduction

As discussed previously in chapter three, there are various motivating factors behind the adoption of sustainable practices by a business. The development of international trade has made it easier for transnational businesses to source raw materials and other industrial products from firms possibly in different continents and manufacture the end products in other countries across the world.<sup>223</sup> This has led to the creation of global supply chains that involve various firms operating in different countries across the world to make a single final product.<sup>224</sup> Industrial products now are manufactured using inputs from different countries.<sup>225</sup>

Today, consumers care about ethics.<sup>226</sup> For instance, consumers implicate businesses with human rights abuses within their supply chains.<sup>227</sup> These concerns about ethical conduct by consumers have, as compared to the past, been widely broadened to cover the supply chains of multinational corporations.<sup>228</sup> In response, multinational corporations have taken conscious steps, especially for reputational reasons,<sup>229</sup> to influence their supply chains towards sustainable conduct in terms of labour standards, anti-corruption, human rights and environmental protection.<sup>230</sup> Ingrained in these steps is capacity building to enable the supply chain partners operate sustainably and the concept of continuous improvement.<sup>231</sup> Therefore, the impact of consumer and regulatory

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<sup>223</sup> Goes & Van Dijk 'Global Competition in the Semiconductor Industry: A comparative Study of Malaysian and Chinese Semiconductor Value Chains' in Van Dijk & Trienekens (eds.) op cit n 25 at 167.

<sup>224</sup> Bossche & Zdouc *The law and policy of the World Trade Organization: Text, cases, and materials* (2013) 1018.

<sup>225</sup> Ibid at 460.

<sup>226</sup> New, 'The transparent supply chain' (2010) *Harvard Business Review*, 88, 10 at 78

<sup>227</sup> Taka, 'Emerging Practice in Responsible Supply Chain Management: Closed-Pipe Supply Chain of Conflict-Free Minerals from the Democratic Republic of Congo' (2016) *Business and Society Review*, 121, 1, at 42.

<sup>228</sup> New op cit n 226 at 77.

<sup>229</sup> Kovács, 'Corporate environmental responsibility in the supply chain' (2008) *Journal of Cleaner Production* 16, 15 at 1572.

<sup>230</sup> Ciliberti, Pontrandolfo, & Scozzi 'Investigating corporate social responsibility in supply chains: a SME perspective' (2008) *Journal of Cleaner Production*, 16, 15 at 1580.

<sup>231</sup> Ibid.

pressure with regard to product safety, ethics of sourcing and the environmental impact of a business supply chain can be perceived in the manner in which multinational corporations manage their international supply chains today.<sup>232</sup>

As illustrated under chapter three, there is a visible business case for sustainability. This explains why a big number of businesses, as discussed in chapter three, have joined the UN Global Compact initiative or adopt identical sustainable practices. Because of the contemporary supply chain sustainability concerns highlighted in the above paragraph, multinational corporations who have adopted these practices, whether members of the UN Global Compact or not, have been compelled to imbed their sustainability undertakings down their supply chains.<sup>233</sup> This has led to the development of written sustainability requirements for suppliers,<sup>234</sup> adoption of supplier codes of conduct,<sup>235</sup> supply chain monitoring and evaluation to guarantee compliance<sup>236</sup> and due diligence processes.<sup>237</sup> The interaction between these concepts and the law of contract is discussed in more detail in the next chapter – chapter five.

This chapter examines, in depth, why multinational corporations today are particularly concerned with issues of sustainability down their supply chains. It also seeks to unveil whether they have an obligation to entrench their internal sustainability commitments, as inspired or based on the UN Global Compact principles, down their international supply chains so that those commitments determine whether, or even influence how, they transact with specific supply chain partners.

## **4.2 The development of global value chains and consumer pressure**

Global value chains in international supply chains denotes all the systems and processes involved in linking producers of raw materials in different countries and the final consumers of the products globally.<sup>238</sup> Ideally, it involves the coordinated global sourcing

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<sup>232</sup> Ibid.

<sup>233</sup> New op cit n 226 at 77.

<sup>234</sup> Ciliberti, Pontrandolfo, & Scozzi op cit n 230.

<sup>235</sup> Ciliberti, Pontrandolfo, & Scozzi op cit n 230 at 1585.

<sup>236</sup> Seuring & Müller 'From a literature review to a conceptual framework for sustainable supply chain management' (2008) *Journal of Cleaner Production*, 16, 15 at 1704.

<sup>237</sup> Taka op cit n 227 at 42-3.

<sup>238</sup> Dijk & Trienekens op cit n 25.

of raw materials and the production and delivery of products by a variety of firms operating in different countries or regions.<sup>239</sup> The development of global value chains demands that sourcing, operations, production and other activities must be coordinated across geographies in order to create efficiency and cost leadership in increasingly competitive business environments.<sup>240</sup>

Although a multinational corporation may have strong internal control measures to guarantee efficacy and productivity, the actions of the suppliers have a big impact on its operational efficiency and product quality.<sup>241</sup> As a result, the efficiency of the multinational corporation depends on the efficiency of all supply chain partners.<sup>242</sup> This dependency on supplier efficiency necessitates the creation of longer-term supplier relationships.<sup>243</sup> These relationships are key because supplier delays, the supply of poor quality products or supplier disregard of contractual obligations has a big impact on the operations, productivity and profitability of the firm. Today, competition is between supply chains and not corporations.<sup>244</sup>

Further, and probably because of the close relationship with suppliers, consumers today view supplier actions as being the actions of the multinational corporation itself.<sup>245</sup> They are concerned about the ethics of the entire supply chain of a firm.<sup>246</sup> As a result, actions of supply chain partners in terms of human rights complicity, degradation of the environment, infringement of basic labour rights, and involvement in unethical and corrupt practices have an impact on the reputation of a multinational corporation.<sup>247</sup> As discussed previously in chapter three, reputation and corporate brand have a significant negative impact on a business from a profitability point of view. It was also displayed that, for

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<sup>239</sup> Gibbon, Bair & Ponte 'Governing global value chains: an introduction' (2008) *Economy and Society*, 37, 3 at 318.

<sup>240</sup> Vijayan & Kamarulzaman 'An Introduction to sustainable supply chain management and business implications' in Khan, Hussain & Ajmal *Green supply chain management for sustainable business practice* (2016) 47.

<sup>241</sup> Li et al 'The impact of supply chain management practices on competitive advantage and organizational performance' (2006) *Omega*, 34, 2, at 109.

<sup>242</sup> Ibid.

<sup>243</sup> Gibbon, Bair & Ponte op cit n 239.

<sup>244</sup> Li et al op cit n 241 at 118.

<sup>245</sup> Taka op cit n 227.

<sup>246</sup> Chen & Chai op cit n 187 at 18.

<sup>247</sup> Jagers 'Will transnational private regulation close the governance gap?' in Deva & Bilchitz (eds.) *Human rights obligations of business: Beyond the corporate responsibility to respect?* (2015) 304.

instance, such consumer pressure has led to the reduction of unethical sourcing practices in supply chains where there were concerns of infringement of labour rights of employees.<sup>248</sup> Consumer activism was also credited to the global reduction of the use of child labour in, for example, apparel supply chains.<sup>249</sup>

Consequently, as a result of the development of global value chains, multinational corporations today have to take deliberate steps to promote, monitor and track sustainable practices in their supply chains.<sup>250</sup> This means that, although the suppliers operate from different countries with different laws, systems, standards, and other circumstances,<sup>251</sup> the firm takes advantage of the longer-term relationships to influence sustainable conduct. This shows that the development of global value chains has necessitated businesses to entrench their sustainability commitments and practices down their international supply chains in order to influence the conduct of supply chain partners.

### 4.3 Legal compliance with international and national regulations

The contemporary movement towards the promotion of sustainable business practices has led to the development of national regulations on how firms can report on their social and environmental matters<sup>252</sup> as well as how firms can source for their products.<sup>253</sup> Further, international regulations and initiatives have been developed to prohibit firms from dealing with certain minerals specified as ‘conflict minerals’<sup>254</sup> or engaging with suppliers who have infringed on human rights in order to ensure multinational

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<sup>248</sup> Goebel et al op cit n 189.

<sup>249</sup> Shum et al op cit n 190.

<sup>250</sup> Seuring & Müller op cit n 236.

<sup>251</sup> Touboullic & Ejodame op cit n 26.

<sup>252</sup> Directive 2013/34/EU of the European Parliament and of the Council as regards disclosure of non-financial and diversity information by certain large undertakings and groups. This Directive, which is to be implemented as a national law of every EU member state, requires strategic report the inclusion of a business review report in every which must include information relating to environmental, social and employee matters, respect for human rights, and bribery and anti-corruption matters. Available at [www.eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0095&from=EN](http://www.eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0095&from=EN) (accessed August 7, 2017).

<sup>253</sup> Section 1502 of the US Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. This provision amends the Securities Exchange Act of 1934 to require listed companies to conduct third party supply chain audits to determine whether they were sourcing conflict minerals from eastern Democratic Republic of Congo.

<sup>254</sup> See the Kimberley Certification Process. This is an initiative that unites administrations, civil societies, and industry in reducing the flow of ‘rough diamonds used to finance wars against governments’ around the world. It has been able to stem 99.8% of the global production of ‘conflict diamonds’. See <https://www.kimberleyprocess.com/en/what-kp> (accessed August 4, 2017).

corporations are not complicit in human rights abuses.<sup>255</sup> A good example of a national law of such a kind is the United States Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 amendment of the Securities Exchange Act of 1934 regarding conflict minerals.<sup>256</sup> Among other requirements, section 1502 of this law requires publicly traded U.S. companies to perform due diligence before sourcing certain minerals and disclose the source of those minerals classified as conflict minerals. This is an example of a regulation passed as a result of public, non-profit and consumer pressure to regulate the conduct of multinational corporations in terms of sustainability.<sup>257</sup> Lobbying by civil society has also been credited to the formation of the Kimberley Process, an international initiative, to eradicate trade in 'blood diamonds'.<sup>258</sup>

In order to be compliant with these regulations, the multinational corporations operating in such territories must necessarily setup processes to guarantee their compliance.<sup>259</sup> In this, they must establish, among others, due diligence procedures and traceability mechanisms to ensure that their suppliers do not transact in prohibited conduct.<sup>260</sup> Further, the compliance with these regulations possibly requires a system to guarantee the establishment and enforceability of legally binding sustainability commitments between the supply chain partners.<sup>261</sup> Ideally, the multinational corporations must avoid legal sanctions for breaching the now legally binding regulations and will necessarily seek to guarantee that the whole supply chain operates in a manner that is compliant with these regulations.<sup>262</sup>

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<sup>255</sup> The United Nations Guiding Principles on Business and Human Rights: *Implementing the United Nations "Protect, Respect and Remedy" Framework*, page 18. Available at [http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf) (accessed August 4, 2017).

<sup>256</sup> Op cit n 253.

<sup>257</sup> Cater, 'The Resource Curse and Transparency' in Currie-Alder et al *International development: Ideas, experience, and prospects* (2014) 399.

<sup>258</sup> Ibid at 401.

<sup>259</sup> Camilleri, *Corporate Sustainability, Social Responsibility and Environmental Management: An Introduction to Theory and Practice with Case Studies* (2017) 82. The author states that third party supply chain audits and adoption of codes of conduct are one of the ways of ensuring legal compliance.

<sup>260</sup> Taka op cit n 227 at 42-3.

<sup>261</sup> This is dealt in more detail in the succeeding chapter.

<sup>262</sup> Taka op cit n 227 at 44.

#### 4.4 The development of integrated sustainable supply chain management

As highlighted above, the development of international supply chains has triggered the creation of longer-term relationships between partners in global value chains.<sup>263</sup> The dependency that arises between the various partners necessitates the development of effective supply chain management which involves prioritization of cost reduction and enhancement of efficiency of each supply chain partner.<sup>264</sup> Flowing from the objective of efficiency and cost-reduction is the pursuit of coordination of operations between the partners in order to increase supply chain efficiency and reduce operational costs.<sup>265</sup> It becomes necessary to integrate the business strategies of the partners in order to achieve this objective.<sup>266</sup> The longer-term relationship, integration of business processes and information sharing between the supply chain partners creates an integrated international supply chain.<sup>267</sup> The necessity for this integration further means that the contracting of suppliers is influenced by the potential of aligning the operational and business strategies of the potential partners in order to achieve strategic supplier relationships.<sup>268</sup>

Because of this alignment of business strategies, an individual firm that operates in such an integrated supply chain and has adopted sustainable business practices will only be able to fully implement its sustainability commitments if they are part of the integrated supply chain strategy.<sup>269</sup> The alignment of such sustainability commitments, that make the entire supply chain sustainable, has led to the development of integrated sustainable supply chain management approach.<sup>270</sup> However, the challenge in this approach is that partners have, first, divergent views on the need to address sustainability

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<sup>263</sup> Gibbon, Bair & Ponte op cit n 239.

<sup>264</sup> Taka op cit n 227 at 44.

<sup>265</sup> Taka op cit n 227 at 44.

<sup>266</sup> Montabon, Pagell, & Wu, 'Making Sustainability Sustainable' (2016) *Journal of Supply Chain Management*, 52, 2, at 13. The authors argue that there must be properly aligned incentives for an entire supply chain to act sustainably.

<sup>267</sup> Lee, 'Designing Integrated Supply Chains' in Lan & Unhelkar *Global integrated supply chain systems* (2006) 99.

<sup>268</sup> Li et al op cit n 241.

<sup>269</sup> Vijayan & Kamarulzaman op cit n 240.

<sup>270</sup> Saththasivan & Fernando op cit n 48.

issues, and secondly, different approaches to addressing sustainability challenges like social and environmental matters altogether in their operations.<sup>271</sup>

In order to pursue integrated sustainable supply chain management, the focal firms are compelled to entrench their sustainability commitments down the supply chain in order to influence the operations of all the partners in the supply chain. This requires that the multinational corporation, usually the focal firm in these supply chains, takes a conscious decision to address any sustainability issues that are inconsistent with its sustainability commitments as well as ensure that the partners adopt equivalent sustainability policies and commitments.<sup>272</sup> Clearly, the development of integrated sustainable supply chain management means that a focal firm with sustainability policies has to implement strategies to influence the supply chain partners to operate sustainably. This is because, as discussed in preceding paragraphs, supply chains today have to be both integrated and sustainable.

#### **4.5 The need to implement the UN Global Compact requirements**

As earlier highlighted in chapter two, the UN Global Compact provides that in addition to a member business implementing the UN Global Compact principles, it can also implement the principles through its supply chain.<sup>273</sup> It further goes ahead to offer guidance to the members by stating that a business can 'set expectations for best practices across its supply chain.'<sup>274</sup> Effectively, a business is able to adopt the best practices through due diligence before contracting, and 'training, auditing and remediation'<sup>275</sup> in the course of the established longer-term relationship with its supply chain partners.

This requirement means that the UN Global Compact members who are keen to comply with the initiative are obliged to consciously take action to implement the principles

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<sup>271</sup> Meutcheho, 'A mixed methods-analysis of the effect of global sustainable supply chain management on firm performance' in Bals & Tate (eds.) *Implementing triple bottom line sustainability into global supply chains* (2016) 59.

<sup>272</sup> Seuring & Müller op cit n 236 at 1699.

<sup>273</sup> Op cit n 27.

<sup>274</sup> Op cit n 27.

<sup>275</sup> Op cit n 27.

down their supply chain. In principle, this implies that the firm has to ensure that its supply chain partners do not act in a manner that is inconsistent with the UN Global Compact principles in terms of the environmental responsibility, human rights, labour standards, and anti-corruption principles.<sup>276</sup> The initiative provides sector-specific resources<sup>277</sup> that offer guidance on how to achieve supply chain sustainability and also provides useful resources on ongoing successful partnerships<sup>278</sup> between member businesses that promote supply chain sustainability. These resources are meant to assist a member in achieving supply chain sustainability.

The obligation on member businesses to implement the initiative's principles, in addition to other factors, possibly explains why member multinational corporations today are particularly concerned with issues of sustainability down their supply chains.<sup>279</sup> The common approaches promoting sustainability down the supply chain include the conducting of due diligence before contracting suppliers,<sup>280</sup> the promotion of continuous improvement in terms of sustainability,<sup>281</sup> and the tracing of products to ensure supply chain partners source their products ethically and in compliance with the initiative's principles.<sup>282</sup> Other businesses use supplier codes of conduct<sup>283</sup> and supply chain mapping<sup>284</sup> to achieve their supply chain sustainability commitments as per the initiative's principles and guidelines.<sup>285</sup>

Clearly, the need to implement the UN Global Compact makes a multinational corporation particularly concerned with issues of sustainability that have an impact on the UN Global Compact principles down its supply chain(s).

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<sup>276</sup> Op cit n 5.

<sup>277</sup> Op cit n 110.

<sup>278</sup> Op cit n 111.

<sup>279</sup> Kashmanian, 'Building a sustainable supply chain: Key elements' (2015) *Environmental Quality Management*, 24, 3, at 21.

<sup>280</sup> Taka op cit n 227 at 42-3.

<sup>281</sup> Ciliberti, Pontrandolfo, & Scozzi op cit n 230.

<sup>282</sup> Taka op cit n 227 at 42-3.

<sup>283</sup> Häusler, Lukas & Planitzer 'Non-judicial remedies' in Alvarez & Yiannibas (eds.) *Human rights in business: Removal of barriers to access to justice in the European Union* (2017) 87.

<sup>284</sup> Rosenbloom et al 'Supply Chain: Responsible Supply and Demand' in Conaway & Laasch *Principles of responsible management: Global sustainability, responsibility, and ethics* (2014) 303.

<sup>285</sup> Op cit n 112.

## 4.6 Conclusion

It emerges that today multinational corporations who have adopted sustainable commitments, whether members of the UN Global Compact or not, are particularly concerned with the sustainability of the supply chains they are involved in for various reasons. These reasons include the need to respond to consumer, non-profit, public and regulatory pressure resulting from the development of global value chains flowing from increased international trade. Also, there is the need to comply with national and international sustainable sourcing regulations, the pursuit of integrated sustainable supply chain management and the need to implement the requirement by the UN Global Compact for firms to entrench sustainability down their supply chains.

This chapter has illustrated that multinational corporations have an obligation to entrench their sustainability commitments down their international supply chains. It has indicated that a multinational is not sustainable if its supply chain is not sustainable. In doing this, it sets the foundation for the discussion of how, specifically, multinational corporations, as focal firms in international supply chains, can implement their sustainability commitments down these supply chains. In this regard, the succeeding chapter critically analyses the law of contract tools that can be utilized by multinational corporations to implement these sustainability commitments, as based on the UN Global Compact principles, down their international supply chains.

## Chapter Five

### 5. Law of Contract Tools in Promoting Sustainability and Implementation of the UN Global Compact

#### 5.1 Introduction

In chapters two and three, it was established that businesses have an obligation to implement sustainable business practices, which are inspired by the UN Global Compact principles, in their operations. In the same breath, chapter four exhibited that multinational corporations have a further responsibility to entrench their sustainability commitments down their supply chains. Entrenchment of sustainability commitments involves the adoption of mechanisms and systems by a multinational corporation that guarantees that its supply chain partners act in a manner that is consistent with the sustainability commitments.<sup>286</sup>

Because the supply chain partners are distinct entities with different business strategies and attitudes as to how to do business, they principally engage with each other through predetermined and agreed upon contractual terms.<sup>287</sup> This takes the form of legally enforceable written contractual instruments. In order to avoid the challenges posed by the lack of direct control of the operations of the supply chain partners, rooting a solution to the challenge of ensuring supply chain sustainability in these contractual instruments becomes critical.

This chapter proposes two law of contract tools that these multinational corporations can utilize to ensure that their sustainability commitments, which are essentially based on the UN Global Compact principles, are implemented down their international supply chains. Since it is the multinational corporation that uses these tools to guarantee sustainable conduct from its supply chain partner(s), it is able to design the terms in a manner that affords it flexibility in enforcement so as to ensure continuous improvement

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<sup>286</sup> Fussler, Cramer & Vegt *Raising the Bar: Creating Value with the United Nations Global Compact* (2004) 172.

<sup>287</sup> Backer 'Governance without Government: An Overview and Application of Interactions between Law-State and Governance-Corporate Systems' in Handl & Zekoll (eds.) *Beyond Territoriality: Transnational legal authority in an age of globalization* (2012) at 114.

and collaborative capacity building between the multinational corporation and the supply chain partner. However, this chapter does not go into the specifics on how multinational corporations can retain this flexibility in terms of contract enforcement, but rather, it broadly appraises how conditions precedent and express terms of contract can be utilized by a multinational corporation to implement its sustainability commitments down its international supply chains.

## 5.2 Utilizing Conditions Precedent

Conditions precedent exist when parties agree that for one or both of them to perform their obligations under a contract, one or both of them must satisfy a set of pre-agreed conditions.<sup>288</sup> The pre-agreed conditions must be precise and satisfied before the other party can be bound under the contract.<sup>289</sup> These conditions precedent have also been defined as comprising a situation where parties agree that a contract is not 'binding until the specified event occurs'<sup>290</sup> at a future time. This means that before the satisfaction of those conditions, the other party is not bound to perform under the contract.<sup>291</sup>

Here, the parties agree that performance under the contract cannot commence before the party bearing the obligation to satisfy the conditions precedent has satisfied them to the satisfaction of the other party.<sup>292</sup> Clearly, the failure by that party to satisfy those specified conditions discharges the other party or parties from the contractual obligations under the contract.<sup>293</sup> The failure to satisfy conditions precedent as per the contract absolutely releases the other party, as opposed to the situation for the breach of warranties, from the potential contractual obligations under the contract.<sup>294</sup> Subject to contractual provisions, the failure to satisfy these conditions, in addition to the release,

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<sup>288</sup> Jennings op cit n 33.

<sup>289</sup> Corbin, 'Conditions in the Law of Contract' (1919) *The Yale Law Journal*, 28(8), at 747.

<sup>290</sup> Chen-Wishart op cit n 50.

<sup>291</sup> Chen-Wishart op cit n 50 at 298.

<sup>292</sup> Corbin 'Supervening Impossibility of Performing Conditions Precedent' (1922) *Columbia Law Review*, 22, 5, at 423.

<sup>293</sup> Denicola op cit n 34. The author states that when there are conditions precedent, the courts mainly adopt the rule of strict compliance.

<sup>294</sup> Beale, Bishop & Furmston *Contract: Cases and materials* (2008) 600. The authors argue that it is now accepted that conditions mean terms of the contract going to the root of the contract itself.

may also entitle the innocent party to a claim for remedies available for breach of the contract.<sup>295</sup>

Having established the use of conditions precedent in the law of contract, it is vital to focus on how multinational corporations can utilize them to implement the UN Global Compact. In the context of supply chain sustainability, focal firms (multinational corporations) can make use of conditions precedent to ensure potential supply chain partners adopt and implement specified sustainable practices prior to the principal contract taking effect. The implementation of the conditions precedent guarantees that the potential contractors have satisfied certain specified minimum sustainability measures and standards as set by the focal firm. Some of the specific ways that focal firms can utilize conditions precedent to guarantee supply chain sustainability in terms of human rights, labour, environmental responsibility and anti-corruption are discussed below.

#### **a. Require the prior adoption of a Supplier Code of Conduct**

Traditionally, multinational corporations develop voluntary supplier codes of conduct to regulate the conduct of their supply chain partners in terms of labour and environmental standards.<sup>296</sup> These codes have developed over the time from being voluntary to being prescriptive<sup>297</sup> and today, they specify, in detail, the minimum labour, human rights and environmental standards that a multinational corporation considers appropriate for its supply chain partners to maintain.<sup>298</sup> The movement from voluntary codes containing minimum labour standards can be attributed to nonprofit activism and the public calls for increased sustainability.<sup>299</sup> Today, the codes provide for these minimum labour, environmental, anti-corruption and human rights standards in a prescriptive manner.<sup>300</sup>

These codes of conduct are usually implemented by the suppliers during the duration of the contract.<sup>301</sup> However, in order to guarantee commitment on the part of the

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<sup>295</sup> Beale, Bishop & Furmston op cit n 35.

<sup>296</sup> Wells 'Too Weak for the Job' (2007) *Global Social Policy*, 7, 1, at 52.

<sup>297</sup> Keller 'Codes of Conduct and their Implementation: the Question of Legitimacy' in Wolfrum & Röben (eds.) *Legitimacy in International Law* (2008) at 222.

<sup>298</sup> Ibid at 242.

<sup>299</sup> Ibid at 240.

<sup>300</sup> Cumming *Management Systems for Sustainability: How to Connect Strategy and Action* (2013) at 68.

<sup>301</sup> Jiang 'Implementing Supplier Codes of Conduct in Global Supply Chains: Process Explanations from Theoretic and Empirical Perspectives' (2009) *Journal of Business Ethics*, 85, 1, at 78.

suppliers, multinational corporations can utilize conditions precedent to require that a potential supplier adopts the code and puts in place mechanisms to guarantee compliance. For instance, labour standards regarding forced labour, child labour and safe working conditions have been shown to be one of the most widely contravened standards by suppliers.<sup>302</sup> In addition, there is ineffective monitoring by the multinational corporations to guarantee compliance with these standards.<sup>303</sup> This is an example of a sustainability challenge in international supply chains that can be addressed by requiring the adoption of supplier codes of conduct and the establishment of mechanisms to guarantee implementation prior to the coming into effect of the principal contract.

The multinational corporations can address this challenge by requiring the adoption of detailed supplier codes of conduct by a potential supplier prior to the coming into effect of the principal contract. This supplier code of conduct must be based on the UN Global Compact principles for it to have the desired impact from a sustainability perspective. Further, the condition precedent may require that the potential supplier not only adopts the code but also puts in place indicated measurable mechanisms that guarantee compliance and make it possible to monitor implementation. Any potential supplier that fails to adopt this specified code of conduct and or setup the stated mechanisms will not be qualified as a potential supplier.

The use of the supplier code of conduct as a condition precedent in this manner can also be extended to cover sub-contractors. In effect, this means that the supplier must also adopt a similar approach in the manner in which it contracts with its contractors in order to mainstream the principal supplier code of conduct down the various supply chains. Regulating, through the conditions precedent, how the supplier can engage its suppliers means that the multinational corporation guarantees that all the supply chains that it is involved in are sustainable and consistent with its sustainability commitments.

Using conditions precedent in this manner will be key in ensuring that the multinational corporation only engages supply chain partners with consistent sustainability commitments and whose compliance with those commitments is certain and

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<sup>302</sup> Wells op cit n 296 at 65.

<sup>303</sup> Ibid.

measurable. Apart from managing reputational and revenue risks associated with dealing with businesses involved in unsustainable practices,<sup>304</sup> the multinational corporation is able to enter into partnerships with like-minded firms that are committed to sustainability and potentially boost its reputation and corporate brand image.<sup>305</sup> Further, it saves on the cost of resolving potential challenges associated with inconsistent business strategies and philosophies when the firms attempt to create the longer-term partnerships associated with integrated supply chains later on.<sup>306</sup>

#### **b. Require prior international certification**

As discussed previously in chapter three, an organization gains in terms of reputation and corporate brand if its management systems, like the environmental management systems, are certified by reputable organizations like the International Standards Organization (ISO) as being effective in guaranteeing environmental responsibility.<sup>307</sup> The certification of a potential supplier can be required by a multinational corporation, as a condition precedent, before it can be bound under the principal contract.<sup>308</sup> This means that the multinational corporation will require a potential supplier to get certification under a specified system (like ISO 14001:2015) before the obligations otherwise arising out of the principal contract become enforceable. Failure by the potential supplier to get the certification within the stipulated timeline means that the multinational corporation cannot engage the entity.

Because of the assurance as to the sufficiency of systems in terms of ensuring sustainability that comes with a certification from reputable international organizations, the multinational corporation is guaranteed that the supplier it is going to engage with has effective systems that ensure it operates sustainably.<sup>309</sup> This enhances the multinational corporation's efforts in mainstreaming its sustainability commitments down its supply chain since the supply chain partners will have consistent or even identical commitments.

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<sup>304</sup> Kovács op cit n 229.

<sup>305</sup> Kovács op cit n 229.

<sup>306</sup> This is discussed in depth in chapter four above.

<sup>307</sup> Op cit n 218.

<sup>308</sup> Awaysheh & Klassen 'The impact of supply chain structure on the use of supplier socially responsible practices' (2010) *International Journal of Operations & Production Management*, 30, 12, at 1247.

<sup>309</sup> Ibid.

Clearly, by making certification a condition precedent, a multinational corporation is able to entrench its sustainability commitments down its supply chains since all its supply chain partners will be certified as entities that operate sustainably.

In the same breath, requiring certification as a condition precedent means that whenever a supply chain partner loses the certification, it is immediately deemed to have breached the principal contract. This ultimately means that the supply chain partner must maintain the status of certification throughout the period of the contract. Evidently, using sustainability certification as a condition precedent will play a big role in entrenching sustainability commitments of multinational corporations down international supply chains because the process of certification itself is rigorous, and there are established systems to guarantee effective monitoring and evaluation. What is key in designing this condition precedent is to ensure that the required certifications are clearly spelled out for the purpose of safeguarding the integrity of the process.

**c. Require the adoption of specified sustainability policies and standards**

A multinational corporation can design a condition precedent so that a potential supplier has to adopt specified policies and standards which the multinational corporation considers as being sustainable. Primarily, this involves the potential supplier exterminating certain practices that are unsustainable in addition to adopting practices that are considered sustainable. Case in point, a potential supplier may be required to halt environmental degradation and abolish the use of child labour in its operations. Such withdrawal of unsustainable practices must be in good faith, genuine and verifiable by the multinational corporation for the condition precedent to have the desired impact.

Abolition of unsustainable practices will then be followed by the adoption of specified sustainability policies and standards that guarantee continuous improvement from the potential supplier going forward. This might involve, for example, the adoption of an internal code of conduct, policies and controls that guarantee ethical and sustainable practices in the future that are consistent with the multinational corporation's sustainability commitments. As a result, the multinational corporation has to necessarily pre-approve such code of conduct, policies, systems and standards as part of its due diligence processes and possibly recommend further arrangements that guarantee sustainable

practices.<sup>310</sup> Clearly, before the adoption of the principal contract, the multinational corporation will be entitled to confirm the implementation of the conditions precedent by conducting due diligence on the policies, systems and standards established in compliance with the conditions precedent by way of audit.<sup>311</sup>

The effective auditing of such policies, processes, systems and standards will be key when certifying the potential supplier as compliant<sup>312</sup> with the conditions precedent. The effective use of specified sustainability policies and standards will ultimately lead to the entrenchment of a multinational corporation's sustainability commitments as a focal firm in a supply chain in terms of protection and promotion of minimum labour and human rights, adoption of environmentally friendly production methods, eradication of corporate corruption, and adoption of measurable social responsibility commitments.

### 5.3 Utilizing Express Contractual Terms

The express contractual terms in the principal contract reflect the terms agreed upon and written down to form part of the contract.<sup>313</sup> Conditions, which are fundamental terms of a contract, usually go to the very core of the contractual relationship breach of which entitles the other party to a claim for remedies under the contract.<sup>314</sup> These remedies for breach of a condition may include, but are not limited to, specific performance,<sup>315</sup> claim for damages<sup>316</sup> and repudiation,<sup>317</sup> as the case may be. The express terms must be precise and unambiguous for the purpose of clear interpretation of the intention of the parties by both the parties and dispute settlement bodies.<sup>318</sup>

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<sup>310</sup> Robins, Roberts & International Institute for Environment and Development *The reality of sustainable trade* (2000) at 25.

<sup>311</sup> Awaysheh & Klassen op cit n 308.

<sup>312</sup> Wells op cit n 296.

<sup>313</sup> McKendrick 'Performance and Discharge' in Chitty & Beale *Chitty on contracts* 32 ed. (2015) at 1013-1014.

<sup>314</sup> Ibid at 1014.

<sup>315</sup> Poole *Textbook on contract law* (2016) at 407.

<sup>316</sup> Ibid at 293.

<sup>317</sup> Ibid at 293.

<sup>318</sup> Van der Merwe et al *Contract: General principles* (2012) at 263

Performance in the law of contract means performance as per the terms of the contract.<sup>319</sup> These terms bind the parties in the contract by assigning responsibilities between them over a specified period of time.<sup>320</sup> These are the terms that govern the relationship between parties in a supply chain. The question that then arises is how a multinational corporation can utilize the express terms in the principal contract to entrench its sustainability commitments down its supply chain.

A multinational corporation with sustainability commitments can use express contractual terms by negotiating terms that bind a supply chain partner to undertake certain measurable sustainable practices during the duration of the contract. In effect, if the supplier does not perform as per the requirements of those terms, then it is deemed to have breached the contract. The specific sustainable practices that may be included in the contract as part of its written terms are discussed in detail below.

#### **a. Requiring the implementation of a Supplier Code of Conduct**

A contract between a multinational corporation and a supply chain partner can include a requirement that the supply chain partner shall adopt and implement the provisions of an identified supplier code of conduct.<sup>321</sup> The supplier code of conduct can be paraphrased into the agreement or it can be incorporated into the agreement by way of reference, schedule or an annexure. By negotiating the supplier code of conduct into the contract, the multinational corporation is able to make the code part of the terms and conditions of the contract. The supply chain partner will therefore have to implement and perform the obligations required by the code of conduct in order for it to be compliant with the contract.

Incorporating the supplier code of conduct as part of the terms and conditions of the contract arms the multinational corporation with the power to deem the contract as rescinded when the supply chain partner fails to comply with the terms of the code. This guarantees that the supply chain, in performance of its contractual obligations, operates in a manner that implements the contents of the supplier code of conduct. In the event of wrongful conduct in that regard, the multinational corporation will have remedies under

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<sup>319</sup> McKendrick op cit n 36 at 1585.

<sup>320</sup> McKendrick op cit n 36 at 1585.

<sup>321</sup> Wells op cit n 296.

the contract for breach of contract. This may involve ending the relationship with the supply chain partner.<sup>322</sup>

Because of the incorporation of this code into the contract, the multinational corporation is also empowered by the contract to review and evaluate performance of the supply chain partner on implementation of the code.<sup>323</sup> This is key for the purpose of monitoring and substantiating any implementation claims by the supply chain partner. Such opportunity to incorporate the code into the terms, review and evaluate implementation of the code,<sup>324</sup> and generally, track the implementation of the code is key if a multinational corporation is to implement its sustainability commitments down its supply chain. Although the supply chain partners are independent entities operating in different jurisdictions, the incorporation provides the multinational corporation with the legitimacy to control, though indirectly, the operations of the supply chain partner in terms of environmental responsibility, labour management, human rights, and corruption.

#### **b. Requiring the establishment and implementation of a Sub-Contractor Code of Conduct**

Since many supply chain partners have sub-contractors assisting them to perform under the main contract,<sup>325</sup> a multinational corporation can also negotiate into the contract the inclusion of a duty on the supply chain partner to establish and implement a code of conduct for sub-contractors. In this case, the principal contract specifies the code of conduct that the sub-contractors under it are required to abide by so that any breach by a sub-contractor entitles the supply chain partner to consider it as a breach of the principal contract by the partner. This prescription of sub-contractor codes of conduct is effective in mainstreaming sustainability across the entire supply chain. It demonstrates that apart from ensuring that the direct entities are monitored, the focal firm actually monitors implementation across the entire supply chain.

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<sup>322</sup> Awaysheh & Klassen op cit n 308 at 1267.

<sup>323</sup> Awaysheh & Klassen op cit n 308.

<sup>324</sup> Wells op cit n 296.

<sup>325</sup> Rühmkorf op cit n 41 at 98.

Prescribing a sub-contractor code of conduct is key since some supply chain partners choose to sub-contract a major part of its obligations under the principal contract.<sup>326</sup> It guarantees implementation of sustainable principles down the supply chain by establishing control mechanisms at every stage of the supply chain. The multinational corporation is able to not only require the establishment of such a code, but also prescribe its contents and manner in which it is to be implemented by the supply chain partner.

**c. Requiring the establishment of specified minimum sustainability standards and policies**

The multinational corporation can negotiate the inclusion of specified minimum sustainability standards and policies into the contract as part of the terms and conditions of the contract. Ultimately, the supply chain partner has to implement these minimum standards for it to be compliant with the terms of the contract. By specifying the minimum standards and policies that can be adopted by the partner, the multinational corporation is able to control the operations of the partner to guarantee that they are consistent with its sustainability commitments.<sup>327</sup> The clause guarantees sustainable labour management, anti-corruption, environmental responsibility and maintenance of minimum human rights standards.

The express term may specifically require certain actions like adherence to national and international laws,<sup>328</sup> adoption of specified sector-specific or international sustainability initiatives (like the UN Global Compact), and establishment of internal measures like a code of conduct or establishment of a social and ethics committee. In the event of breach of these prescriptive clauses, the multinational corporation will end the relationship with the partner. This clause can prove key in ridding the supply chain of a multinational corporation of child labor, poor wages, poor working conditions, human rights violations, poor waste management, corrupt practices, and unsustainable exploitation of the environment

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<sup>326</sup> Rühmkorf op cit n 41 at 98.

<sup>327</sup> Awaysheh & Klassen op cit n 308. The authors analyse the 'Coffee and Farmer Equity' (C.A.F.E) practice adopted by Starbucks as an example of such standards.

<sup>328</sup> Fussler, Cramer & Vegt op cit n 286.

#### **d. Requiring regular disclosures, reviews and evaluation to monitor implementation of adopted sustainable practices**

A multinational corporation with sustainability commitments may utilize express terms in the contract to require the disclosure of certain verifiable information relating to sustainability.<sup>329</sup> Such disclosures are key in providing information that assists the multinational corporation in gauging the prioritization and implementation by the supply chain partner of certain sustainability subjects.<sup>330</sup> These disclosure requirements are also key in promoting socially responsible investing on the part of the multinational corporation since they may stipulate, for example, the disclosure of the partner's Environmental, Social and Governance (ESG) information.<sup>331</sup>

These disclosures promote both socially responsible investing on the part of the multinational corporation by enabling it to continuously review the partner's compliance and sustainable conduct on the part of the supply chain partner since the contract may require publication of such information. The fact that this information may be disclosed to the public may prompt a supply chain partner to adopt sustainable practices (like sustainable labour management because of reputation considerations).<sup>332</sup> For instance, the contract may require the disclosure and publication of certain information relating to employees like pay structures, minimum age for the employees, maximum working hours, and working facilities.

For a supplier that already has internal sustainable policies and practices that are consistent with the sustainability commitments of the multinational corporation, then the option of monitoring and evaluating supplier compliance is key.<sup>333</sup> By incorporating the requirement of regular reviews and evaluation by the multinational corporation for the purpose of monitoring the implementation of those internal measurable sustainable practices, the multinational corporation is able to guarantee that such internal sustainable

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<sup>329</sup> This information may include the supply chain partner's internal policies regarding child labour, the use of renewable energy, remuneration of employees, employee working hours, waste management, corruption and the total expenditure on social responsibility initiatives.

<sup>330</sup> Awaysheh & Klassen op cit n 308.

<sup>331</sup> Horrigan, op cit n 144 at 17. ESG information is key in the making of Socially Responsible Investing (SRI) decisions.

<sup>332</sup> Kovács op cit n 229.

<sup>333</sup> Rühmkorf op cit n 41 at 195.

policies are not used as a smokescreen by the contractor. This is crucial in guaranteeing that a supply chain partner actually implements its own sustainability policies and that they implement them in a manner that is consistent with its own sustainability commitments as well as those of the multinational corporation. The monitoring and evaluation by the multinational corporation is enhanced by the contractual requirement to disclose prescribed verifiable information relating to sustainability.

For instance, if a supply chain partner has an internal commitment to end child labour in its plants within an agreed period of time, then its failure to implement such a commitment will be unearthed by a review and evaluation by the multinational corporation. Having this as a term of the contract means that the supply chain partner is able to implement its commitments effectively since the multinational corporation can treat the absence of action or poor implementation of the commitment as constituting a breach of the contract. Prescribed disclosures afford the multinational corporation with an opportunity to track, review and monitor implementation of sustainable practices so that it is not duped by potential misrepresentations by the partner.

#### **e. Using cancellation/termination clauses**

Cancellation/termination clauses entitle a party to be discharged from a contract when the other party commits a specified breach.<sup>334</sup> The right to cancel or terminate a contract is a key concept in the law of contract since it permits a party to unilaterally abandon its contractual obligations when the other party is in breach of obligations that are considered core to the contract.<sup>335</sup> This clause is usually inserted when breach of certain conditions cannot be reasonably remedied by monetary damages.<sup>336</sup> Such conditions are core to the contract and are usually specified by the parties in a cancellation/termination clause.<sup>337</sup>

The focal firm in a supply chain – the multinational corporation – can utilize the cancellation/termination to ensure that breach of specified sustainability clauses in the

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<sup>334</sup> Huyssteen, Merwe & Maxwell *Contract law in South Africa* (2010) 179.

<sup>335</sup> McKendrick 'Discharge by Agreement' in Chitty & Beale *Chitty on contracts* 32 ed. (2015) 1663.

<sup>336</sup> Huyssteen, Merwe & Maxwell op cit n 334.

<sup>337</sup> McKendrick op cit n 335 at 1664.

contract fall under the cancellation/termination clause. As a result, the breach by a supply chain partner of such a sustainability clause entitles the multinational corporation to cancel or terminate the contract as per the cancellation/termination clause. For instance, a clause prohibiting corrupt practices by the supply chain partner may be negotiated to fall under the cancellation/termination clause so that when the partner is implicated in a corruption case, then the multinational corporation is discharged from the contract immediately. The predominant purpose is to discourage the supply chain partner from deliberately breaching its sustainability obligations under the contract. This guarantees sustainable supply chain practices that further the multinational corporation's sustainability commitments.

By actively and consistently enforcing this contractual remedy, over a period of time, the multinational corporation is able to develop a set of acceptable values and practices within its supply chain. These values safeguard that its entire supply chain is sustainable in terms of respect for human rights, maintenance of indicated minimum labour standards, environmental responsibility, and anti-corruption. Supply chain partners keen to continue engaging with the multinational corporation under the contract will have to adopt practices that satisfy its sustainability commitments under the contract in order to avoid triggering the cancellation/termination clause. In the end, its sustainability commitments are entrenched and implemented across the entire supply chain.

#### **5.4 Potential Challenges**

The use of conditions precedent and express terms in a contract as tools for entrenching sustainability in international supply chains faces various challenges. First, because of the responsibility on the multinational corporation to review and monitor implementation of these sustainability clauses, there are costs and administration considerations that may inhibit the effective operation of these law of contract tools.<sup>338</sup> These considerations may limit the capacity of the multinational corporation to effectively review and monitor implementation of the conditions precedent or the express contractual clauses. This challenge can be addressed by increasing cooperation for enhanced capacity building of

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<sup>338</sup> Alwaysheh & Klassen op cit n 308.

the partners in order to ensure that sustainability is engrained in their operations.<sup>339</sup> Also, the risk of loss of reputation, non-profit pressure and consumer activism may likely compel the multinational corporation to commit its resources towards monitoring and evaluation despite the costs.

Second, there is the challenge of scarcity of some resources, especially minerals, so that there are very few suppliers in the market. Although this is rare, it means that the multinational corporation in such a circumstance has to work with a supply chain partner who has not complied with the established conditions precedent or express contract terms. However, this can be addressed through awareness, concerted industrywide action and continuous capacity building.

Third, there is a possibility of suppliers lacking commitment so that, in the example of express contractual terms, the multinational corporation ends up being involved in financially detrimental contract cancellations owing to the potential of the numerous number of terminated contracts over a short period of time. This means that the business will not be able to create the much-needed long-term relationships in international supply chains as discussed earlier in chapter four. Such relationships require long-term information sharing, investment and capacity-building.<sup>340</sup> Again, this is a challenge that can be addressed through continuous capacity building and collaboration<sup>341</sup> to endow such partners with knowledge and skills on the importance of sustainability and also how to operate sustainably.

Finally, there is the possibility of potential and current supply chain partners concealing certain unsustainable practices<sup>342</sup> so that the multinational corporation cannot possibly make an informed decision at the contracting stage. This means that there is a possibility of a multinational corporation engaging with unsustainable partners without their knowledge even after conducting due diligence.<sup>343</sup> Further, the discovery of such

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<sup>339</sup> Seuring & Müller op cit n 236 at 1705.

<sup>340</sup> Yawar *Corporate Social Responsibility in Supply Chains: Relevance of Supplier Development* (2015) 88.

<sup>341</sup> Ibid at 87.

<sup>342</sup> Chen & Slotnick 'Supply chain disclosure and ethical sourcing' (2015) *International Journal of Production Economics*, 161, 2, at 19.

<sup>343</sup> Ibid.

concealed information and practices may be too late when the multinational corporation is already heavily invested in the relationship with the supply chain partner. This challenge may be addressed through effective due diligence practices and continuous capacity building geared towards collaboration that influences corporate practices that are sustainable going forward.<sup>344</sup>

## **5.5 Conclusion**

Conditions precedent and express terms of contract have been appraised as law of contract tools that can be utilized to implement sustainability commitments of focal firms in international supply chains. By negotiating sustainable practices and policies to form part of the contract, a focal firm in a supply chain (the multinational corporation) is able to induce sustainable practices in its supply chain. These law of contract tools enable a focal firm to address the challenges posed by the lack of direct control of its contractors and sub-contractors in terms of influencing sustainability in their operations. By using these law of contract tools, the UN Global Compact principles will be implemented in supply chains that cut across different countries, regions and continents. Ultimately, these law of contract tools will contribute to the existing national and global initiatives working towards the promotion of sustainability worldwide and the creation of corporate citizenship.

The potential challenges that may arise in the use of these law of contract tools have been appraised with a view to bring to the fore the various ways of addressing them. The concepts of creating awareness, collaborating and building capacity across the entire supply chain have been prominently proposed as effective mechanisms in addressing the identified potential challenges.

Generally, the proposed law of contract tools will prove effective in guaranteeing that multinational corporations with sustainability commitments are able to promote and implement their sustainability commitments down their international supply chains.

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<sup>344</sup> Yawar op cit n 340.

## **Chapter Six**

### **6. Conclusion and Recommendations**

#### **6.1 Conclusion**

The preceding chapters have analysed in depth the UN Global Compact principles, the theoretical foundations of CSR and corporate sustainability, and the need for multinational corporations to entrench sustainability within their supply chains. Further, the law of contract tools that can be utilized to entrench the sustainability commitments of multinational corporations down their international supply chains were appraised with the aim of elucidating that the contractual instruments they use to engage their supply chain partners can be used as drivers of sustainability in international supply chains.

Five main conclusions are drawn. These are: (a) that the UN Global Compact Principles, which promote the maintenance of minimum labour and human rights standards, environmental responsibility and anti-corruption, have gained immense support and membership from countless multinational corporations and they feature prominently in the sustainable practices and codes of conduct of major businesses keen on CSR and corporate sustainability; (b) that today, as a result of, among other concepts, the stakeholder theory, the enlightened shareholder value, the triple bottom line approach, and consumer and nonprofit pressure, there is a prominent business case for sustainability in the manner businesses are run; (c) that as a result of this need to be sustainable, businesses adopt sustainable practices and policies which are inspired or based on the UN Global Compact principles; (d) that the development of integrated sustainable supply chains, global value chains, consumer pressure, regulations, and the provisions of the UN Global Compact on supply chain sustainability has made it necessary for multinational corporations to implement their sustainability commitments down their international supply chains; and (e) that these multinational corporations can use conditions precedent and express contractual terms as the law of contract tools applicable in guaranteeing implementation of their sustainability commitments down their international supply chains.

The paper illustrates that operating sustainably is no longer voluntary for businesses as buttressed by the various contemporary corporate governance, sustainability and CSR theories. It also indicates that among other factors, consumers, regulators, non-profits and the general public exert pressure on multinational corporations to ensure that their supply chain partners operate sustainably. In short, the analysis points out that supply chains of multinational corporations must be sustainable. Since these multinational corporations engage with their supply chain partners through contractual instruments, this paper proposes solutions that are based on those contractual instruments. The law of contract tools proposed (conditions precedent and express contractual terms) are suggested as effective tools for multinational corporations in their quest to entrench and implement their sustainability commitments down their international supply chains.

Since conditions precedent must be complied with before the main contract becomes enforceable, they were suggested as effective tools of guaranteeing that supply chain partners adopt and implement sustainability commitments. It was also clear that they afford the multinational corporations with an opportunity to audit the systems, processes and practices of their potential supply chain partners with the purpose of ensuring that the partner is committed towards the principles of sustainability. Express contractual terms were also analysed and illustrations of how specific contractual terms can be used by multinational corporations were explained. The analysis revealed that these businesses can negotiate express terms that bind the supply chain partner to adopt and implement various sustainability initiatives like supplier codes of conduct and specified minimum sustainability standards and practices.

In effect, it became clear that conditions precedent and express contractual terms can be used as effective law of contract tools that multinational corporations can utilize to implement their sustainability commitments down their international supply chains. Using these law of contract tools, the multinational corporations will be able to: (i) implement their sustainability commitments, which are essentially based on the UN Global Compact principles, down their international supply chains; (ii) improve their corporate brand, customer loyalty, employee productivity and generally, long-term financial performance;

(iii) cushion themselves against sustainability risks inherent in international supply chains by avoiding supply chain partners with unsustainable practices; (iv) contribute to the creation of a global culture of corporate sustainability; and (v) influence other multinational corporations and their supply chain partners towards the creation of sustainable international supply chains.

## **6.2 Recommendations**

As highlighted above, operating sustainably is no longer voluntary for businesses. In the same breath, having internal sustainability commitments but being involved in a supply chain that is unsustainable poses both business and reputational risks to a multinational corporation. As a result, this paper recommends the use of conditions precedent and express contractual terms appraised in chapter five.

These law of contract tools will assist multinational corporations that have adopted sustainable practices or are members of the UN Global Compact to entrench their sustainability commitments down their international supply chains. By doing this, they will make the implementation of set minimum sustainability standards and supplier codes of conduct mandatory, among other accomplishments. Further, these tools will guarantee that the sustainable policies or codes of conduct adopted by supply chain partners are implemented in a measurable manner. Lastly, since these tools afford a multinational corporation with the opportunity to review and evaluate implementation by the supply chain partner, they are able to guarantee continuous improvement, collaboration and capacity building. In addition to other benefits highlighted above, the creation of sustainable international supply chains by multinational corporations will contribute immensely to the promotion of sustainable business practices at both the global and national levels. This will enable the UN Global Compact achieve its intended global reach.

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