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Six Thinking Hats for the Lorax: Corporate Responsibility and the Environment

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ARTICLES

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I. INTRODUCTION

Imagine that we are all gathered in a cavernous room somewhere on the planet. It could be the chamber of the United Nations General Assembly in New York City. It could be the palatial ballroom of London's Ritz Hotel—with cream and pink wallpaper and gold and silk trimmings, crystal chandeliers and Louis XVI furniture in the adjoining rooms. Our confab might possibly take place in the Great Hall of the People on Tiananmen Square in China's capital. It does not really matter where the room happens to be or what kinds of meetings have taken place there in the past. The important thing is that we find a room: ten times bigger than an airplane hanger; large enough to seat *ten thousand individuals* from around the globe; well-equipped enough to allow optimal interaction and feedback among the attendees, numbering two thousand CEOs from the world's largest corporations and their two thousand general counsel, one thousand leaders of the world's national legislatures, one thousand jurists from the world's supreme courts, the two hundred heads of state of the world's countries, two hundred ministers of environmental policy, two hundred finance ministers, two

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hundred national attorneys general, two hundred chief trade ministers, five hundred top officials of the most significant NGOs on the environment, five hundred business, technology and law professors, and two thousand citizens of the world chosen at random and apportioned *pro rata* based on the population of their country divided by the approximately six billion people on the planet.[1]

Furthermore, imagine that the mission of this global gathering is twofold: (1) to consider whether multinational enterprises can currently integrate environmental concerns over and above their basic legal responsibilities consistent with their fiduciary responsibilities to shareholders, and (2) to assess the wisdom of creating new legal and policy mechanisms to explicitly allow (and even encourage) multinational enterprises to lawfully go beyond environmental compliance to pursue environmental leadership.

The convener of our imaginary confabulation is none other than a bald, orange, fish-like little guy with an over-sized yellow mustache—the Dr. Seuss character called the Lorax who is known for his sympathy for nature[2] and his warnings about "biggering."[3] "Biggering," of course, is a pejorative term for corporate actions that damage the environment in the search for greater and greater profits. Given the wonders of wireless computer technology and consensus software, the Lorax is able to instantaneously communicate with each and every one of the ten thousand conference attendees and to synthesize and assimilate multiple perspectives into coherent quantitative graphs and qualitative literary synopses.

As the Lorax prepares for our meeting, he wonders aloud: "Can a corporation go beyond compliance with environmental laws and maintain their fiduciary responsibilities to shareholders? I think they could." Wondering some more, he adds: "Can legislatures expressly indicate by statutory amendment that going beyond environmental compliance is not a violation of director or officer fiduciary duties toward shareholders? I think they should."

II. SIX THINKING HATS

At the start of our global meeting, the Lorax reminds us of the brilliant technique of breaking problems into different components—or "hats"—which emphasize a particular feature or dimension of a problem and then weighing these different dimensions before making a decision.[4] Pioneered by Edward de Bono, this method uses different colors to describe the different components:

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1. ENCYCLOPÆDIA BRITANNICA, 2005 BOOK OF THE YEAR 738 (2005) (noting that as of the end of 2004, the world's population was 6,329,605,262 and that the world population projection for 2020 is 7,432,757,767).

2. For example, "'Mister!' he said with a sawdusty sneeze, 'I am the Lorax. I speak for the trees. I speak for the trees, for the trees have no tongues.'" DR. SEUSS, THE LORAX 23 (1971).

3. The Lorax opposed the Once-ler's "biggering" plans. As explained by the Once-ler: "I meant no harm. I most truly did not. But I had to grow bigger. So bigger I got. I biggered my factory. I biggered my roads. I biggered my wagons. I biggered the loads of the thneeds I shipped out." *Id.* at 39.

4. EDWARD DE BONO, SIX THINKING HATS (1985).

white for facts, *red* for emotions, *black* for critique, *yellow* for positive, *green* for future, and *blue* for process.[5] The Lorax goes on to explain that de Bono's psychological "theory is that the symbolic act of donning different colored hats allows the problem solvers to explore each aspect of the problem separately without bias or interference."[6] Moreover, he informs us that:

> This process allows greater clarity in the problem solving process because aspects of a problem that might otherwise taint the problem solving, such as one's feelings regarding the issue, are surfaced and categorized. The separation of facts from underlying biases and concerns, for instance, *may bring insight that can help us jump out of a rut.*[7]

What kind of "rut" might we be in? The kind involving tedious and unthinking patterns of mental behavior that are difficult to change, the Lorax responds.

With the Lorax at the podium and his image blown up on giant screens that all can see, we are ready now to consider the six different hats—starting with the white hat for facts.

A. THE WHITE HAT (FACTS)

Up on the big stage, the Lorax wears a white *chapeau.* From a distance the Lorax resembles the "good guy" sheriff roaming the streets of a nineteenth-century western town. The Lorax is about to lead the gathering in discussing differing factual perspectives about whether or not corporations are properly managing the global environment as they pursue the profits of globalized business.

"The facts. Nothing but the facts," says the Lorax. What are the "facts" of corporate social responsibility and the environment?

One version of environmental facts is voiced by Bjørn Lomborg, who takes an optimistic view on the state of the planet. In his book, Lomborg argues that environmental problems are being managed properly (and will continue to be managed) so that food, energy, water, pollution, biodiversity, and global warming will not be significant human problems.[8] As Lomborg summarizes his upbeat environmental and human welfare themes:

> We are not running out of energy or natural resources. There will be more and more food per head of the world's population. Fewer and fewer people are starving. In 1900 we lived for an average of 30 years; today we live for 67.

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5. *Id.* at 31-32; Janet Weinstein & Linda Morton, *Stuck in a Rut: The Role of Creative Thinking in Problem Solving and Legal Education*, 9 CLINICAL L. REV. 835, 856 (2003).

6. Weinstein & Morton, *supra* note 5, at 856.

7. *Id.* at 857 (emphasis added).

8. BJØRN LOMBORG, THE SKEPTICAL ENVIRONMENTALIST: MEASURING THE REAL STATE OF THE WORLD 4 (2001).

According to the UN we have reduced poverty more in the last 50 years than we did in the preceding 500, and it has been reduced in practically every country.

Global warming, though its size and future projections are rather unrealistically pessimistic, is almost certainly taking place, but the typical cure of early and radical fossil fuel cutbacks is way worse than the original affliction, and moreover its total impact will not pose a devastating problem for our future. Nor will we lose 25-50 percent of all species in our lifetime—in fact we are losing probably 0.7 percent. Acid rain does not kill the forests, and the air and water around us are becoming less and less polluted.

Mankind's lot has actually improved in terms of practically every measurable indicator.[9]

But the Lorax points out that contrary to Lomborg's upbeat assessment of the global environmental facts are a host of more pessimistic commentators. Interestingly, *Case Western Reserve Law Review* published a symposium issue on Lomborg's *Skeptical Environmentalist.*[10] As summarized in the introductory essay to the symposium, Lomborg's critics in the fields of climate change, energy, population dynamics, and biodiversity attack him "not for factual errors, but for erroneous *interpretations* of the data and adopting the wrong policy conclusions."[11]

What about the more focused facts of corporate action in support of environmental protection and sustainability? The Lorax provides more detailed information to the proceedings.

Writing a little over a decade ago, Joel Hirschhorn observed that while there were some positive developments in corporate social responsibility toward the environment, there was, nevertheless, an implementation gap between the promise and performance of pollution prevention. On the one hand, according to

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9. *Id.* (citations omitted). An earlier book that anticipates Lomborg's rosy view of the environmental facts is THE STATE OF HUMANITY 1 (Julian L. Simon ed., 1995), which stated:

> The years have been kind to our forecasts [in *The Resourceful Earth*]—or more importantly, the years have been good for humanity. The benign trends we then observed have continued until the time of writing this volume. Our species is better off in just about every measurable material way. And there is stronger reason than ever to believe that the progressive trends will continue past the year 2000, past the year 2100, and indefinitely.

See also THE RESOURCEFUL EARTH (Herman Kahn & Julian Simon eds., 1984).

10. Symposium, *Bjørn Lomborg's* The Skeptical Environmentalist, 53 CASE W. RES. L. REV. 249 (2002).

11. Jonathan H. Adler & Andrew P. Morriss, *Introduction: The Virtues and Vices of Skeptical Environmentalism*, 53 CASE W. RES. L. REV. 249, 253 (2002). Some of the symposium articles are supportive of Lomborg's view of the global environmental facts. *See, e.g.*, James L. Huffman, *Either You're With Us or Against Us: No Room for the Skeptical Environmentalist*, 53 CASE W. RES. L. REV. 391 (2002); Bruce Yandle, *Mr. Lomborg and the Common Law*, 53 CASE W. RES. L. REV. 285 (2002); Terry L. Anderson & Lea-Rachel Kosnik, *Sustainable Skepticism and Sustainable Development*, 53 CASE W. RES. L. REV. 439 (2002). Some of the symposium articles are critical of Lomborg's view of the global environmental facts. *See, e.g.*, Daniel J. Rohlf, *Revenge of the Once-ler: The Skeptical Environmentalist*, 53 CASE W. RES. L. REV. 297 (2002); Allen Hammond & Emily Matthews, *Faulty Scholarship: Lomborg and Earth's Living Systems*, 53 CASE W. RES. L. REV. 353 (2002); John C. Dernbach, *Sustainable Versus Unsustainable Propositions*, 53 CASE W. RES. L. REV. 449 (2002).

Hirschhorn, "every significant corporation has exactly the sort of politically correct corporate statement on environmental management that includes pollution prevention in one way or another."[12] But, on the other hand, he concluded that there was insufficient attention to capital investment and technological change in corporate production facilities and equipment because of a lack of commitment to empowering employees and managers in production and raw material purchases to pursue cleaner production methods.[13]

Indeed, starting in the mid-1970s with 3M Corporation's "Pollution Prevention Pays," or 3P, program, an assortment of major corporations picked up on the voluntary, win-win 3M philosophy that sought "to prevent the production of pollutants at their source, rather than controlling them at the end of the manufacturing process."[14] American government, at the national and state levels, responded with a hodgepodge of programs to encourage "green corporate stewardship" and voluntary corporate waste reduction and pollution prevention.[15] Ultimately, this spate of corporate and governmental activities, as of the mid-1990s, proved to be more image than substance.[16]

And yet, the Lorax informs the crowd that writing more recently, some observers have claimed that, as of the start of the twenty-first century, major global corporations have achieved extraordinary results in proactively and pragmatically working with environmental NGOs. Some corporations have made "significant progress toward sustainability, especially in areas such as eco-efficiency, EMS, communications with stakeholders, and transparency."[17] Other corporations have collaborated with government in pursuing market-based strategies to improve the environment.[18] The Lorax tells the conference that they should keep in mind additional foundational facts of corporate environmental responsibility. James Speth, Dean of Yale University's School of Forestry and Environmental Studies, cites the following examples of corporate environmental stewardship in his 2004 book, *Red Sky at Morning: America and the Crisis of the Global Environment*:

- Seven large companies—DuPont, Shell, BP Amoco, and Alcan among them—have agreed to reduce their greenhouse gas emissions to 15 percent below their 1990 levels by 2010. Indeed, Alcoa is reported to be on track to reduce its emissions 25 percent below 1990 levels by 2010, and DuPont is on

12. Robert F. Blomquist, *Government's Role Regarding Industrial Pollution Prevention in the United States*, 29 GA. L. REV. 349, 350-51 n.4 (1995) (citation omitted)

13. *Id.*

14. *Id.* at 369 (internal quotation marks omitted) (citation omitted).

15. *Id.* at 448.

16. *Id.*

17. *See* William L. Thomas, *Rio's Unfinished Business: American Enterprise and the Journey Toward Environmentally Sustainable Globalization*, 32 ENVTL. L. REP. 10873, 10894 (2002).

18. *See* Dennis A. Rondinelli, *A New Generation of Environmental Business Collaboration in Environmental Management*, 31 ENVTL. L. REP. 10891, 10902 (2001).

schedule to reduce emissions by 65 percent by 2010. At least thirty-eight major corporations have adopted energy or emission reduction targets, and a baker's dozen of North American companies—including International Paper, Mead Westvaco, and Motorola—have joined the Chicago Climate Exchange with a commitment to reduce their greenhouse gas emissions by 4 percent by 2006.

- Eleven major companies—DuPont, GM, and IBM among them—have formed the Green Power Market Development Group and have committed to develop markets for a thousand megawatts of renewable energy over the next decade.
- Home Depot, Lowe's, Andersen, and others have agreed to sell wood (to the degree that it is available) only from sustainably managed forests certified by an independent group against rigorous criteria. Unilever, the largest possessor of fish in the world, has agreed to the same regarding fish products.
- Today, more than $2 trillion reside in socially and environmentally screened funds. In October 2002, institutional investors managing over $4.5 trillion in assets wrote the five hundred largest global companies asking for full disclosure of their emissions of climate-changing gases and their policies on global climate change. Shareholders, bond ranking agencies, insurance companies, and state pension-fund managers are now coming to see the risks of inaction on climate change; meanwhile a quiet campaign is building to get the Securities and Exchange Commission to require more disclosure of company exposure to potential environmental costs.
- Major corporations are now routinely issuing "sustainability reports" to stakeholders, scores of them following the rigorous practices recommended by the Global Reporting Initiative for reporting their environmental and social impacts.[19]

But, then again, the Lorax asks, is all this talk about corporate environmental initiatives just the latest hype and public-relations campaign?

B. THE RED HAT (EMOTIONS)

The red hat tops off the head of the Lorax like a firefighter's helmet. What are the various emotions (from anger to frustration) on the matter of corporate environmental responsibility (or irresponsibility)? The emotions flow. The NGO representatives, joined by many citizens and legislative leaders, are angry at the corporate CEOs and their general counsel for what is perceived to be massive pollution of the planet and rapacious business practices on the part of multinational enterprises.[20] Moreover, "[t]here is . . . a strong perception among many stakeholders that companies invest resources in the corporate citizenship agenda simply to influence public perceptions [about environmental stewardship and

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19. JAMES GUSTAVE SPETH, RED SKY AT MORNING: AMERICA AND THE CRISIS OF THE GLOBAL ENVIRONMENT 186-7 (2004) (endnotes omitted).

20. See, for example, LORI WALLACH & PATRICK WOODAL, WHOSE TRADE ORGANIZATION? 4-5 (2004), which describes—in language of disapproval—the alleged "themes" running through the WTO legal agreements:

other issues] without really changing the way that they do business."[21]

Firing back with hot emotion on the topic of corporate social responsibility and the environment, the corporate CEOs, general counsel, conservative business-oriented legislators, finance ministers, and trade ministers endorse the following argument:

> [T]here cannot be corporate responsibility without profit. We cannot negate the basis of a company's motivations. Its first responsibility is profits to its owners meaning most of the time shareholders and from there it can use corporate responsibility as another business tool. Corporate responsibility is related to profits as without them it cannot dedicate itself to corporate responsibility.[22]

C. THE BLACK HAT (CRITIQUE)

The Lorax is sporting a coal-black hat now, ready to take on both the environmental NGOs and their tree-hugging allies as well as the corporate apologists for their latest environmental "flavor of the month." The Lorax is ready to subject each side's claims to a vigorous cross-examination to test their validity and salience.

"Corporations survive," the Lorax sneers into the microphone, "only to make a

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- *privatize and commodify* all elements of the economy and society by pushing countries to treat everything from bulk water and public services to genetic materials and food as commodities to be made accessible as new for-profit tradeable units;
- *deregulate* by constraining the role of all levels of government and designating some domestic environmental, food safety and other regulations as trade barriers that must be eliminated;
- *harmonize* by pressuring countries to replace national and local policies with uniform global standards that are presumed to be WTO compliant while national standards providing a greater level of consumer protection in pesticide and meat inspection standards, environmental policies, accounting rules and more are exposed to WTO challenge;
- *"liberalize" investment* by requiring governments to eliminate policies regulating who can own what, including essential services, and to eliminate conditions on investors, such as requiring certain labor standards or environmental protections;
- *"liberalize" finance* by requiring countries to eliminate policies regulating banks, currency trading, derivatives, and stockmarkets;
- *manage trade* according to WTO rules. In contrast to "free trade," this is a "corporate-managed trade'" system because of the special protections it provides for certain interests. For instance the WTO protects subsidies given to agribusiness to export commodities . . . while certain domestic subsidies to support small farms are characterized as illegal trade distortions;
- *create new property protections*, for instance requiring nations to adopt twenty-year monopoly patents on a wide array of items and giving foreign investors special rights not enjoyed by local businesses or citizens; and
- *homogenize culture and consumer demands* by treating culture as another commodity and eliminating government policies aimed at maintaining diverse media content.

See also PETER SINGER, ONE WORLD: THE ETHICS OF GLOBALIZATION 1-105 (2002) (critiquing corporate-governmental alliances that pollute the environment and favor free trade over domestic government regulation of the environment).

21. Halina Ward et al., *Corporate Citizenship: Revisiting the Relationship Between Business, Good Governance and Sustainable Development*, *in* SURVIVAL FOR A SMALL PLANET: THE SUSTAINABLE DEVELOPMENT AGENDA 343, 345 (Tom Bigg ed., 2004).

22. *Id.* at 346 (emphasis omitted) (individual bulletin board participant omitted).

buck and they can't make a buck by spending more money than their competitors on costly environmental programs that go beyond the basic rules of compliance."[23] Our conference convener points out that environmental compliance costs for corporations are huge;[24] if corporate managers develop a business strategy of going beyond compliance with pertinent environmental laws, they may well create liability for themselves and for corporate directors for breach of fiduciary duties to shareholders. The corporate CEOs, general counsel, and their many friends at the conference chime in. In theory, corporate directors who do not intervene with management to question and stop corporate expenditures that go over and above the corporation's legal responsibilities to comply with environmental laws will expose themselves to shareholder litigation for breach of their duty of due care in overseeing business decisions by corporate officers.[25]

A case like *National Union Fire Ins. Co. of Pittsburgh v. U.S. Liquids, Inc.*[26] illustrates this danger—albeit in reverse. In that case, the corporate directors were sued for intentional and negligent breach of fiduciary duties in causing U.S. Liquids to violate federal securities and environmental laws by allowing managers of the corporation to falsify compliance with state and federal law and to inflate corporate earnings by engaging in illegal toxic waste disposal. The legal risk of the principle raised in the *U.S. Liquids* case is that corporate environmental policy decisions which detrimentally impact corporate earnings (whether inflating corporate earnings because of *under-compliance* with relevant environmental laws or deflating corporate earnings because of *over-compliance* with these laws) may breach the fiduciary duties which directors owe to shareholders. Indeed, the CEO/general counsel contingent continue in pressing their critique to make the following additional points about potential liability for corporate directors who allow management to waste assets by costly over-compliance with environmental standards: (1) given the brutal competitive posture of most industries in this era of globalization, even slightly higher environmental costs can doom a corporation to a higher break-even point, necessitating higher product costs, lower market share, and eventual business failure; (2) standards of corporate director due diligence always become more onerous with the passage of time;[27] (3) standards of what practice is generally accepted as sufficient by the directors of other similar corporations would tend to establish director liability

23. Compare the cautionary tale of General Motors, a company that now seems to be in the business of losing money from its bloated, over-extended labor and production costs. *See* Rick Popely, *GM Tightens Belt, Slashes 30,000*, CHI. TRIB., Nov. 22, 2005, at 1 (detailing steady drop in market share, rising costs, and continuing earnings losses in recent years).

24. *See generally* J. CLARENCE DAVIES & JAN MAZUREK, POLLUTION CONTROL IN THE UNITED STATES: EVALUATING THE SYSTEM 125-26, 130-33, 143-46 (1998).

25. *See generally* ROBERT W. HAMILTON, THE LAW OF CORPORATIONS 444 (5th ed. 2000).

26. 271 F. Supp. 2d 926 (S.D. Tex. 2003).

27. *See, e.g.*, Anderson v. Bundy, 171 S.E. 501, 506 (Va. 1933) (pointing out that yesterday's standards of vigilance are inadequate today).

for allowing more costly over-compliance with pertinent environmental laws; and (4) the director of a corporation is presumed to know that which it is his or her duty to know and is generally charged with knowledge of corporate transactions and expenditures contained in various environmental reports and statements presented at directors' meetings which would indicate more costly than necessary environmental compliance measures which exceeded the norm for a particular industry.[28]

Tipping the brim of his sable top hat in the direction of the environmental NGO representatives, their citizen friends, and sympathetic government officials, the Lorax punches in a few keystrokes on his wireless computer PowerPoint presentation. Up on the conference screen in big black letters appear the words: "Business Judgment Rule." The Lorax speaks into the microphone: "Let's get *real*, you *heels*, or you're likely to slip on a banana *peel*." The crowd goes wild! The environmental NGOs take the hint. They point out that corporate fear of director liability for breach of fiduciary duty in allowing management to expend excessive money in over-complying with appropriate environmental standards is disingenuous. One of the NGO speakers cites a recent case applying Delaware law, *In re Tower Air Inc.*,[29] which shows the utter implausibility of any multinational enterprise incorporated in Delaware (the favorite forum for business incorporation) having corporate directors held legally liable for reasonable decisions implemented by management—like proactive, beyond-compliance corporate environmental policies. The NGO speaker summarizes the Delaware Business Judgment Rule: For corporate officers' or directors' decisions to be regarded as "irrational," and thus not protected by the business judgment rule, the decisions must go so far beyond the bounds of reasonable business judgment that their only explanation is bad faith.[30]

"So," interjects the Lorax, "even assuming that a corporate environmental strategy of going *beyond* compliance was real—something other than an elaborate public relations ruse—corporate directors would seem to be protected by the business judgment rule, wouldn't they?"

A silence descends upon the gathering. It would seem that the corporate complaints about the risks of breaching the fiduciary duty that directors and officers owe shareholders for going beyond environmental compliance are much ado about nothing.

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28. *See generally* 18A AM. JUR. 2D *Corporations* § 1277 (2004) (collecting cases).

29. 416 F.3d 229 (3d Cir. 2005) (upholding a lower court judgment that petitioners had failed to state a breach of duty claim when respondent directors declined to repair an airline's jet engines and instead replaced them with new engines simply because initial payment for purchase of the new engines was less than the cost of repairs).

30. *Id.* at 238 ("Overcoming the presumptions of the business judgment rule on the merits is a near-Herculean task. . . . The burden here is to show irrationality: a plaintiff must demonstrate that no reasonable business person could possibly authorize the action in good faith.").

D. THE YELLOW HAT (POSITIVE)

After a quick change backstage, the Lorax comes back out into the limelight donning a yellow hat—a shade lighter and brighter than his mustache. "Let's not speak of bad and badder," he says, "but *how* we can all be gladder." The Lorax wants the mood to shift from negative to positive.

A panel of NGO leaders who have helped to develop voluntary corporate environmental responsibility codes join a panel of CEOs who have signed on to these voluntary undertakings to urge the conference to endorse these novel arrangements with the hope and expectation that they will improve the level of MNC environmental performance.[31]

Next, a contingent of environmental ministers, finance ministers, and trade ministers speak to the assembly urging that more time and patience will prove fruitful in the development of policies and institutions that meld freer trade; greater movement of goods, capital, and labor across national borders; and better corporate environmental performance.

Even citizen representatives join in the glow of optimism. Several citizens tell the conference members that, like the Beatles' song, they have to admit that things are getting better all the time. These citizen-speakers concur with the view that voluntary corporate-NGO-citizen-government partnerships have a *real chance* in improving corporate environmental responsibility in the coming decades. They invoke the 2002 World Summit on Sustainable Development in South Africa for the model "of a shift from the stiff formal waltz of traditional [law and] diplomacy to the jazzier dance of improvisational solution-oriented partnerships that may include non-government organizations, willing governments and other stakeholders."[32]

To complete this segment of the conference, the Lorax quips: "Money talks and you know what walks. But green for future environmental progress and yellow for an optimistic mold, come together for business with Green Gold."[33] The Lorax has led the grand assembly to see the positive possibilities of corporate environmental stewardship leading to corporate profits.

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31. *See infra* notes 41-45 and accompanying text.

32. Charlotte Streck, *The World Summit on Sustainable Development: Partnerships As New Tools in Environmental Governance*, *in* 13 YEARBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 63, 65 (2002).

33. *See generally* CURTIS MOORE & ALAN MILLER, GREEN GOLD: JAPAN, GERMANY, THE UNITED STATES AND THE RACE FOR ENVIRONMENTAL TECHNOLOGY (1994). In this regard, imagine how American, European and Japanese firms could do well by doing good in selling China advanced environmental technologies. *See* David Lague, *China Blames Oil Company for Benzene Spill in River*, N.Y. TIMES, Nov. 25, 2005, at A8 ("The contamination of one of China's major rivers has drawn attention to the environmental price that the country is paying for a three-decade economic boom. Living standards have sharply risen in many regions of China . . . but severe environmental degradation threatens further development.").

E. THE GREEN HAT (FUTURE)

Has St. Patrick's Day come early this year? No, not really. The Lorax's cap of a "touch of the Irish" is actually a look into the future. The Lorax wants to guide the group into an exploration of the future of corporate environmental responsibility.

"The future is now," begins the Lorax. "In fact, the future of greater and greater corporate responsibility toward the environment has its roots back in the early 1990s." The Lorax beckons to a contingent of progressive governmental officials in the sea of faces. They come up on the giant stage accompanied by some farsighted corporate executives. The President of Costa Rica takes over. She points out that in 1991, two authors wrote a path-breaking book, *Prosperity Without Pollution*,[34] which articulated the logic and attractiveness of corporate policies that went well beyond simple compliance with command and control environmental laws. As the authors wrote back then:

> To have an environmental strategy based principally on a commitment to pollution prevention is to take the first and most necessary step to ensure that pollution prevention will be fully used in both the short and the long term. The implications of doing so for constructing an environmental strategy are several. First, it means that the general but universal goal is to *strive for an absolutely minimum amount of waste and pollutant generation from every source.* This, in turn, means that governments and persons shift their attention from deciding what "safe" or "acceptable" levels of wastes and pollutants are to targeting *any* level of waste and pollutant production for elimination or reduction. *No amount of waste or pollutant generation should be seen as inevitable, acceptable, necessary, economically tolerable, or safe.*[35]

A young professor of business administration steps to the microphone. He points out that over a decade ago there was "a shift from a defensive approach" by enlightened global corporations "toward a more offensive or proactive

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34. JOEL S. HIRSCHHORN & KIRSTEN U. OLDENBURG, PROSPERITY WITHOUT POLLUTION: THE PREVENTION STRATEGY FOR INDUSTRY AND CONSUMERS (1991).

35. *Id.* at 340 (emphasis added). The authors continued this point by arguing:

> The object should not be to prove with scientific certainty that a waste or pollutant will result in damage to human health or the environment before it can be eliminated. The presumption should be that any waste or pollutant is potentially harmful and preventable. . . .
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> With a pollution prevention strategy, human intelligence and creativity as well as science and technology can focus on preventing, eliminating, or reducing the production of all wastes and pollutants. That, and not the management or treatment of wastes and pollutants, is the prime objective of a prevention-based strategy. Zero waste outputs on the planet is, of course, an abstraction, but it defines an ideal state. *The planetary system must strive to move toward zero waste.* It is either that or moving in the opposite direction, toward producing more waste, which is exactly where the world is today—heading in the wrong direction, toward planetary disequilibrium and destruction. *To their credit, some major corporations, such as 3M and Monsanto, have openly spoken of the need to strive for zero waste generation. Polaroid also has major reduction goals.*

Id. at 340-41 (emphasis added).

approach" to environmental issues.[36] "Indeed," he continues, "in the early 1990s the most visionary firms were starting to embrace a business strategy of moving *beyond compliance.*" These firms, the young professor points out, although a minority at the time, were

> developing what could be called an environmentally innovative strategy. Such a strategy is based on the expectation that excelling in protecting the environment is necessary, creates new opportunities, and eventually could lead to competitive advantages. This strategy does not start in a single demonstration to produce a specific environmentally friendly product because of public or regulatory pressure. On the contrary, it aims first of all at increasing the firm's *capability* to develop environmentally sound product/market combinations. Second, firms employing an innovative strategy tend to be heavily engaged in waste and emission reduction at the source as a practice of continuous improvement, with a final goal of zero emission. A third characteristic of firms that follow an innovative strategy is transparency. To develop long-lasting and good relations with the public, consumers and regulators, these firms tend to monitor emissions and waste streams and disclose information.[37]

A corporate CEO whose Fortune 500 electronics and technology firm recently decided to move from a compliance-oriented environmental management approach to an innovative, beyond-compliance business strategy supports the business professor's statements. The CEO points out that she convinced her board of directors that the risks of an environmental compliance strategy for their firm had started to outweigh the benefits. She mentions that she made the following argument to her board:

> Regulatory and public pressures [around the world] will become stronger and more powerful. More important, environmental considerations will enter the marketplace more forcefully. New markets will become more articulated and visible, which will create the danger that existing competitors or new firms will innovate and gain a competitive advantage. To reduce financial risk and exploit new opportunities, investors will start looking more rigorously at the environmental practices of firms.[38]

The Lorax reassumes the floor of the conference and—referring to some notes that his staff has compiled in preparation—brings the audience of conferees up to date. He notes that the "World Business Council for Sustainable Development, a group of now more than 120 companies originally created to provide industry counsel to the Earth Summit, has adopted the goal of sustainable development

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36. Johan Schot & Kurt Fischer, *Introduction: The Greening of the Industrial Firm*, *in* ENVIRONMENTAL STRATEGIES FOR INDUSTRY: INTERNATIONAL PERSPECTIVES ON RESEARCH NEEDS AND POLICY IMPLICATIONS 12 (Kurt Fischer & Johan Schot eds., 1993).

37. *Id.* (emphasis in original).

38. *Id.* at 13 (citation omitted).

and is promoting a business strategy known as, 'eco-efficiency.'"[39] The Lorax continues his focus on the future: "An important factor driving such business initiatives has been [and will be] the increasing recognition by environmental groups and governments that business, although often the primary source of environmental problems, *must also* be part of the long-term solution."[40] The Lorax observes that a number of voluntary corporate codes of conduct for environmental management have been adapted by cutting-edge firms looking toward the future, including the OECD Guidelines for Multinational Enterprises,[41] the CERES Principles,[42] the Global Reporting Initiative,[43] the International Chamber of Commerce Business Charter for Sustainable Development Principles for Environmental Management,[44] and the U.N. Global Compact initiated by U.N. Secretary-General Kofi Annan.[45]

The Lorax smiles, knowing he has helped the group to appreciate that the future of corporate environmental responsibility is fairly bright.

F. THE BLUE HAT (PROCESS)

And now, at the close of our imaginary conference, the Lorax appears before the assembled delegates in a tall blue hat—the color of the Caribbean ocean. What processes should the world (and its dizzying array of governments, civic organizations, business enterprises, and citizens) pursue on the road to better corporate responsibility?

Starting off with the most ambitious of process changes, the international community might form an International Court for the Environment to regulate corporate environmental behavior by articulating and enforcing primary and secondary norms regarding the environment while adjudicating human rights and environmental claims.[46] Equally ambitious as a process innovation for regulating

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39. DAVID HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 1409 (2d ed. 2002) (emphasis in original).

40. *Id.*

41. *Id.* at 1410-12 (discussing OECD Guidelines); Organisation for Economic Co-operation and Development [OECD], Guidelines for Multinational Enterprises, http://www.oecd.org/department/0,2688,en_2649_34889_1_1_1_1_1,00.html (last visited Apr. 24, 2006).

42. HUNTER ET AL., *supra* note 39, at 1412-15 (discussing Coalition for Environmentally Responsible Economies Principles developed after the Exxon Valdez oil spill in 1989); CERES, CERES Principles, http://www.ceres.org/coalitionandcompanies/principles.php (last visited Apr. 24, 2006).

43. HUNTER ET AL., *supra* note 39, at 1415 (discussing the founding of the GRI in 1997 and its subsequent development); Global Reporting Initiative, http://www.globalreporting.org (last visited Apr. 24, 2005).

44. HUNTER ET AL., *supra* note 39, at 1416-17 (discussing ICC's Charter and Principles); Int'l Chamber of Commerce, Business Charter for Sustainable Development Principles for Environmental Management, http://www.iccwbo.org/id1292/index.html (last visited Apr. 24, 2006).

45. HUNTER ET AL., *supra* note 39, at 1418 (discussing the U.N. Global Compact); U.N. Global Compact, http://www.unglobalcompact.org (last visited Apr. 24, 2006). But see criticisms of the U.N. effort to the effect that "[a]llowing corporations to claim the U.N. stamp of approval is particularly troubling since the Global Compact provides no verification or enforcement measures." HUNTER ET AL., *supra* note 39, at 1418.

46. *See* Amedro Postiglione, *A More Efficient International Law On the Environment and Setting Up An*

MNC environmental behavior would be to create an international environmental legislature—where nations would be bound to follow and enforce international norms—that could enact new rules by majority vote.[47]

A less ambitious, but more pragmatic, approach to improving corporate responsibility would be to develop a model corporate code (which could be enacted as a matter of national legislation or state/provincial legislation) that simply, but elegantly, states: "The directors and officers of a corporation do not breach fiduciary responsibilities by approving of a business strategy of environmental innovation which seeks to lower pollutant emissions beyond permitted levels and even to pursue zero discharge of environmental residuals."[48] Such a clearly stated legislative standard for corporate governance (joined with incentives like tax credits for advanced environmental performance, governmental publicity of corporate environmental leaders and laggards, and mandated corporate disclosure of potential corporate environmental liabilities)[49] would go far in encouraging more MNCs to reach higher levels of corporate environmental responsibility.

To ensure that corporate policies of environmental innovation get implemented, legislatures might consider adding the following provision to their corporate governance codes:

> Any shareholder may compel a corporation in which she holds stock to implement the corporation's environmental innovation policy in a court of competent jurisdiction after ninety days notice to the corporation of intent to sue. The corporation shall have an affirmative defense of diligent implementation of the environmental innovation policy. Attorney fees and costs shall be ordered by the court to the prevailing shareholder; otherwise the parties shall bear their own attorneys fees and costs.

Such a provision would allow interested NGOs to buy shares of MNCs' stock, urge the corporate boards of directors to adopt environmental innovation policies that go beyond compliance, and, ultimately, monitor (and enforce) corporate implementation of the environmental innovation policy.

International Court for the Environment Within the United Nations, 20 ENVTL. L. 321, 321-22 (1990).

47. *See* Geoffrey Palmer, *New Ways to Make International Environmental Law*, 86 AM. J. INT'L. L. 259, 264 (1992).

48. Perhaps this provision could condition a corporate business strategy of environmental innovation to following an appropriate corporate management system like the European Union's Eco-Management and Audit Scheme (EMAS) or ISO 14001 environmental procedures. *See* HUNTER ET AL., *supra* note 39, at 1425-29. However, due to environmentalists' criticisms of the corporate drafters of the ISO 14001 standards, a legislature might want to incorporate by reference only select provisions of the ISO 14001 standards into statutory law or, alternatively, set up a governmental agency to draft governmental standards.

49. *See* ROGER W. FINDLEY ET AL., CASES AND MATERIALS ON ENVIRONMENTAL LAW 674-87 (6th ed. 2003) (discussing mandatory disclosure of information).

III. CONCLUSION

The Lorax has sported six different colored "thinking hats" in helping us consider how to improve corporate responsibility for the global environment. The white hat helped to discern the pertinent facts about the quality of the global environment and the progress of corporations in meeting (or even exceeding) relevant environmental norms. The red hat brought out the various emotions attending the matter. The black hat facilitated a critique of both corporate and environmental positions. The yellow hat provided a positive glow to the possibility of improving MNC environmental responsibility. The green hat permitted us to peer into the future. Finally, the blue hat helped us to think about some possible process changes that would strengthen corporate accountability for environmental responsibility while encouraging corporate officers, directors, and shareholders to take more risks to improve corporate environmental performance.

Indeed, "[a] shift to an innovative [environmental corporate] strategy will not come about easily" for firms.[50]

> Taking an innovative stance means adding complexity, and firms already live in a world of increasing uncertainty and complexity. One significant obstacle is that some of the existing technological trends, such as shorter product life cycles, are at odds with environmental goals, such as extending product life cycles. But there are many more obstacles as well. Because of these problems, it is tempting to rely on a compliance-driven approach. Becoming green not only *implies going beyond regulation, but also going beyond state-of-the-art behavior*. [Indeed] . . . firms have to be better than the rest of industry and even better than the desires of their consumers. Is this too much to expect? No. If it were, no firm would ever innovate.[51]

The Lorax's antagonist—the Once-ler—provides a parting thought that serves to crystallize the entire conundrum:

> "But *now*," says the Once-ler, "Now that *you're* here, the word of the Lorax seems perfectly clear. UNLESS someone like you cares a whole awful lot, nothing is going to get better. It's not."[52]

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50. Schot & Fischer, *supra* note 36, at 13.
51. *Id.* (emphasis added) (citations omitted).
52. SEUSS, *supra* note 2, at 56 (emphasis in original).