MANUAL

Regional Workshop on Ethical Business and Recruitment Practices in Labour Migration

Chapter 5
INTERNATIONAL CORPORATE RESPONSIBILITY

27-29 April 2016
Dubai, United Arab Emirates

DIPLOMACY TRAINING PROGRAM

AFFILIATED WITH THE FACULTY OF LAW UNIVERSITY OF NEW SOUTH WALES
UNSW SYDNEY NSW 2052
ABN 31 003 925 148
Tel: +61 (2) 9385 2277 Fax: +61 (2) 9385 1778
Email: www.dtp.unsw.edu.au

INTERNATIONAL CORPORATE RESPONSIBILITY

Professor Paul Redmond[1]

In 2008 the UN Human Rights Council unanimously adopted the framework for business and human rights that had been proposed by the Secretary-General's Special Representative on that subject. The framework comprises three core interlocking principles: the duty upon states to protect against human rights abuses by third parties, including business corporations; the corporate responsibility to respect human rights; and the need for more effective access to remedies. This 'Protect, Respect and Remedy' framework is but the most recent in a series of initiatives by the United Nations to identify standards of corporate responsibility for global business. It builds upon private initiatives to design voluntary schemes for social and environmental responsibility in global business. This chapter is concerned with the network of civil regulation of global business that has emerged since the 1980s.

The international human rights system is the principal international legal mechanism regulating the negative social impacts of business activity. Human rights treaties are agreed internationally but implemented nationally: effective regulation depends on state rather than international implementation and enforcement. Globalisation challenges this state-based system. Business has become increasingly global under production systems that transcend state borders and this global reach has weakened the capacity of and incentives for states to regulate multinational business. Responding to this governance gap, firms, civil society and states, singly and in myriad collaborations, have created a complex web of civil regulation moderating the power of firms and markets and asserting the interests and values of affected communities. The United Nations initiatives with respect to business and human rights complement this private regulation. Taken together, these elements represent a new model for global corporate governance whose integration with national corporate governance models is far from complete. This chapter surveys these developments in corporate responsibility standards and assesses the adequacy of these responses to governance deficits evident at the global level.

The chapter commences with foundational elements that set the context: the international character of modern business under globalisation, the application of the international regulatory regime for human rights protection to corporations, and the deficits in this protection (Part 1). Part 2 surveys voluntary measures developed by business, civil society and government for firms to assure responsibility for their social and environmental impacts. Part 3 examines the United Nations 'Protect, Respect and Remedy' framework, particularly the corporate responsibility to respect human rights. Part 4 assesses the civil regulation and human rights networks as governance system for responsible global business in the light of other regulatory options.

1. Globalisation and Human Rights

1.1. Corporations within the international human rights system

[1] This is a lsightly edited version of the chapter from the DTP Manual prepared by Emeritus Professor Redmond, Chair of the DTP Board and Former Dean, UNSW Faculty of Law.

There has been a quiet revolution since World War II in the development of international human rights, that is, rights recognized by international organizations such as the United Nations or governments as deserving international protection as human rights. Human rights express universal entitlements to respect and dignity arising from our common humanity. The bedrock of these rights is the Universal Declaration of Human Rights (Universal Declaration), adopted by the General Assembly of the United Nations in 1948. The Universal Declaration expresses fundamental rights and freedoms and 'embodies the moral code, political consensus and legal synthesis of human rights' (ICISS 2001: [2.16]). Two broad streams of human rights are recognized in the Universal Declaration. One stream, further elaborated in the International Covenant on Civil and Political Rights (ICCPR), protects individual civil and political rights such as the right to life and liberty, freedom of association and of thought, conscience, and religion, and protects against egregious harms such as torture and slavery. The second, further expressed in the International Covenant on Economic, Social and Cultural Rights, protects freedoms in the economic and social sphere, including conditions of work, the right to form and join trade unions, and the protection of children against exploitation. This covenant also expresses economic and social rights with a more collective dimension, such as the right to an adequate standard of living and rights to adequate food, housing, health, education and development.

Human rights form part of international law — the law of nations. International instruments creating human rights are addressed to states. Business corporations are bound by those rules of international law that are directly applicable to natural persons although these are for grave crimes only such as genocide, torture, slavery and forced labour, crimes against humanity and extra-judicial murder (Ratner 2001: 466-67). Otherwise, international law does not directly apply to corporations and it is only in a few exceptional and limited circumstances that international human rights instruments apply directly to corporations and other firms (Ruggie 2006: [60]). There is, however, no conceptual or technical barrier to international instruments imposing direct obligations on firms (Ruggie 2006: [65]). State preference remains for implementation and enforcement of international instruments at the national level despite difficulties in respect of global actors. There is no international court or tribunal to adjudicate claims against firms for breach of human rights and few informal means such as might be invoked against states under the United Nations treaty monitoring system (International Council on Human Rights Policy 2002: 99-116). Similarly, there are no international mechanisms to enforce the human rights obligations imposed under national legislation.

When states ratify an international human rights treaty, the instrument does not merely require them to respect and fulfil the rights expressed in the instrument in their own practice and that of their officials, but also to ensure the observance of the protected rights by third parties such as firms operating within their jurisdiction (Ruggie 2007a: [7]-[17]). The precise scope of the state duty to protect, including the duty to ensure third party observance, depends upon the terms of the instrument although it may be that international law imposes a general duty upon state parties to protect treaty rights (Joint Committee on Human Rights 2009: 11). The state duty to protect is discharged by enacting and enforcing legislation giving domestic effect to the treaty provisions and through appropriate policies, regulation and adjudication. States may be held responsible under international law for failure to discharge their duty to protect treaty commitments against by breach by third parties such as companies (International Council on Human Rights Policy 2002: 83-88).

Legal responsibility for human rights protection lies, therefore, at the national level. Human rights standards might be applied to firms through the state in which they are incorporated or headquartered (their home state) (*The Barcelona Traction Co, (Belgium v. Spain)* 1970 ICJ 3) or through the state in which they are operating (the host state). In practice, there is almost no home state regulation of offshore activity of firms, much less of their foreign affiliates. Effective responsibility for human rights protection rests with the host state and the first point of redress for victims is to its domestic law and courts. The leverage of host governments over firms is, however, weakened by economic globalisation, namely, by differences in relative economic size between state and firm, the increased mobility of investment capital and the resulting competition between potential host countries for lower regulatory barriers to foreign direct investment (see below, at 1.2). These power differentials, and the problems inherent in enforcing domestic laws against global firms, undermine the capacity of and incentive for developing country hosts to enforce the human rights commitments that they have assumed. This weakening creates particular difficulties in countries without a strong commitment to the rule of law or institutions to secure its observance. Of course, in many cases the developing state is strong and it is the disposition to human rights protection that is weak, and made weaker by globalisation's competitive auction for inbound investment.

Another consequence of the statist character of international human rights is that little guidance is given to firms regarding the norms that constitute their human rights responsibilities. The human rights standards contained in international instruments are addressed to state conduct. Firms are not states and have different functions; standards addressed to states require translation if they are to provide clear guidance to firms with respect to their conduct and responsibilities (Stephens 2002: 34-5). That translation is effected incrementally through the network of civil regulation by voluntary codes for corporate social responsibility (see below, Part 2) and United Nations initiatives to assert and elaborate the corporate responsibility to respect human rights (see below, Part 3).

1.2. The new conditions of global business

The character of modern globalisation

Ours is not the first global age or the first globally integrated trading system. Such claims might be made for the trading system opened up with the European discovery of the New World in the 15th century and for the global trading system based on the British Empire during the Victorian and Edwardian periods. The latter age, at least, saw the mass migration of peoples as well as of trade and investment (Kozul-Wright 1995). This Victorian era of globalisation disintegrated, however, with the closure of trade routes during the 1914-1918 war, the Great Depression and resulting trade protectionism (Ferguson 2005). The modern global age during the past half-century returns to earlier closer integration of people and countries in culture, communication and economic activity. Modern globalisation is based not in empire but in revolutions in information and transportation technology, and the international liberalisation of trade, investment and currency controls. Together these disparate developments have combined to allow the creation of modern global production and distribution networks and a global trading and investment system. Where economic activity was previously nationally constrained, increasingly it is global in character, jumping national borders.

Modern information and communications technology enables firms to operate globally through central coordination of business operations, facilitated by dramatic reduction in transportation costs flowing from shipping containerisation and the development of jet aircraft engines (Hummels 2007). Globalisation permits firms to adopt new technologies and organise production networks on a global scale through management of a dispersed production network. Global production systems source components and locate stages of production to sites of lowest cost, with multi-country locations for different stages of production. For tradable goods and services, the issue is where to locate production facilities for maximum efficiency and lowest cost. That calculus has seen much manufacturing move from developed to developing countries, often through contracting relationships substituting for direct investment through foreign branches and subsidiaries. Firms are now part of global supply chains operating as global networks crossing national boundaries, often with limited control and responsibility for suppliers and producers. The components of these international production networks are highly mobile and relatively easily transferable.

Globalisation's consequences

Free trade enables poor states with low labour costs to exploit this natural advantage in global production networks (Baghwati 2004). Foreign direct investment is one of the most important means of promoting development in developing countries through job creation, technology transfer, knowledge and competence building, scientific advances, management skilling, integration with the global trade system and development of a more competitive private sector. All these effects boost economic growth, an important tool to combating poverty.

Yet there are also significant negative consequences of globalisation. When the United Nations and its human rights system were created, the state had few rivals. The position is radically different a half century later under globalisation. The international human rights system depends on state parties to enforce treaty protection. International production systems, with their disaggregation and global distribution of the elements of production, promote the mobility of investment capital. The threat of capital flight to a more accommodating jurisdiction is a constant for developing countries, driven by the economic calculus favouring relocation to lower cost sites. The mobility that globalisation gives to foreign direct investment (FDI), in the context of a competitive auction for investment capital, undermines host state capacity to enforce human rights protection and social standards since these impose costs for firms. Thus, states seek FDI by liberalising entry and operating conditions, guarantees, and direct subsidies. These liberalizing measures are rational responses to the competitive auction for foreign investment. These pressures are most clearly evident in the creation of export production zones in which local labour regimes are further attenuated in the interests of attracting international investment (Lang 2010). In this competitive environment for FDI, these pressures towards cost reduction translate into downward pressure upon labour conditions, environmental protection, occupational health and safety regulation, and other protections that have cost imposts.

1.3. Recurrent corporate-related human rights abuses

Adoption of the new production methods has major human rights consequences. The opening up of the world economy has intensified global competition in production. Firms rely upon a vast array of subcontractors and partners with contract rather than ownership control over social and labour practices. Reliance upon supply chain sourcing also weakens the tie between firms, their management and home state since that corporate domicile is as substitutable as the factors of production: '[t]echnological and structural developments, combined with changes in the way in which global sourcing and distribution is done, have weakened and, in some cases, eliminated the identification of the management of a global enterprise with a given home country' (Tapiola 2001: 2). And, of course, firms operate to a greater extent than before in countries where there is little respect for human rights or where its protection is subordinated to national economic development. The fact that child labour emerged in the first half of the 1990s as a major issue for global firms illustrates the change that has taken place: 'no-one who drafted or adopted [the principal inter-governmental standards of business conduct in the mid-1970s] thought that the world's leading companies would condone forced labour or child labour or crude forms of discrimination in employment' (Tapiola 2001: 2).

Corporate operations and relationships now pose a distinct body of threats to human rights, either through firms' conduct or their complicity in the invasion of rights by others. The principal recurrent concerns are with labour rights (freedom of association and collective bargaining, the use of child labour and bonded or forced labour, and the provision of decent and safe working conditions), working in areas of conflict, the domestic allocation of revenues from corporate operations, bribery and corruption, the use of state (military) and private security forces to secure corporate operations, and ensuring respect for indigenous people's rights (Prince of Wales Int'l Bus Leaders Forum & Amnesty Int'l 2000: 8-61).

2. Corporate Social Responsibility

2.1. Global civil regulation of business

The modern corporate social responsibility (CSR) movement is an apparent paradox, a self-imposed discipline assumed by firms that forgoes some of globalisation's freedoms. CSR initiatives have proliferated over the past two decades and it is unusual for a major corporation from a developed country not to have adopted a policy that addresses the negative social and environmental impacts of its operations and those of its supply chain. Firms make voluntary commitments dealing with labour standards and working conditions, respect for human rights, social and environmental impacts and corruption avoidance. Codes range from of initiatives by individual firms, industries and sectors, to those created with wider stakeholder input and some with the further legitimacy of government participation. Other voluntary instruments cover reporting, compliance and verification. These commitments go beyond the firm's legal obligations; indeed, that is their ostensible purpose—to signify commitment to standards *beyond* those required by the legal systems of the countries in which they operate. They create a vast governance network of voluntary obligation, or 'soft law', embracing most industries and sectors of global business. This is not CSR as philanthropy but rather CSR as avoidance of social and environmental harm and responsiveness to the expectations of stakeholders, a new form of CSR (Vogel 2005: 17-24).

This network is variously called 'private regulation' (Vogel 2009), 'civil regulation' (Zadek 2001) and 'regulatory standard-setting' (Abbott and Snidal 2009) and 'a new form of transnational regulation' (Abbott and Snidal 2009a: 45). The term 'regulation' is justified on the basis that these voluntary codes organise and control 'economic … and social activities by means of making, implementing, monitoring, and enforcing of rules' albeit that they are voluntary (Abbott and Snidal 2009a: 45). Despite this regulatory function, the familiar term 'corporate social responsibility' (or CSR) is used here to refer to the network of unilateral and collaborative instruments that express voluntary standards of corporate responsibility in global business. The network differs from the international human rights system in key respects. Thus, most CSR instruments are created from the 'bottom up' by firms acting alone or in some combination with civil society actors and, less often, states. They largely operate free of state support and their 'legitimacy, governance and implementation are not rooted in public authority' (Vogel 2009: 153-4). Their sanctions are social or market-based penalties, not legal. In contrast to international human rights law, CSR instruments apply directly to firms and do so globally, not at the national level.

The international CSR movement represents a more complex reality of international relations, a dynamic of advocacy, negotiation and consensus building between parties few of whom are recognised as participants in the formal, state-based model of international law. These players include firms and their industry and trade associations, civil society organisations and, to a lesser degree, governmental and inter-governmental organisations including the United Nations. The pressures to which firms respond with code adoption reflects the leverage of civil society organizations which seek to hold firms to higher standards of conduct in relation to labour, consumer, environmental and human rights issues.

CSR codes generally impose costs on their adopter through higher labour, human rights or environmental standards. Why, then, are they so widely adopted? For some firms codes represent a form of 'values entrepreneurialism' — achieving market advantage in competition for consumers or investors by signalling respect for higher standards (Steinhardt 2001). In a few instances, industry-wide codes are adopted to forestall national legislation imposing more stringent standards (Vogel 2009: 167-68). However, the prospect of such legislation or its enforcement is slight for most multinationals, especially in developing countries. A more probable explanation of code adoption lies in the 'demonstration effect' of regulatory failure in a specific area that triggers a voluntary response but one grounded in the threat or apprehension of campaign advocacy against the firm or industry. Thus, the Responsible Care health and safety code for chemical manufacturers was introduced after the Bhopal disaster at the plant of Union Carbide's Indian subsidiary in 1984; the thalidomide scandal and the Chernobyl and Exxon Valdez oil spills triggered like responses (Mattli and Woods 2009: 22-25). Similarly, the emergence of abusive labour practices, the corrupt use of corporate royalty payments, and the financing of civil conflict from 'blood diamonds' prompted CSR initiatives in response to these demonstrated governance deficits.

Modern CSR flourished from the early 1990s among US-based clothing manufacturers and retailers following their adoption of global production methods using external contractors and suppliers. With increased social movement pressure for enterprise accountability, and the use of targeted 'naming and shaming' campaigns by NGOs, international firms felt exposed to the labour practices of foreign partners in the commodity or service chain. Key sensitivities remain concerning low wages, the use of child labour and suppression of trade unions. Targeted advocacy in the footwear and apparel industries around the issue of 'sweatshop' production has been decisive in CSR adoption, especially of the more exacting codes created with multi-stakeholder participation (Bartley and Child 2010). From the firm's perspective CSR may signify 'Crisis Scandal Response' as much as the normative expression of responsibility (Vogel 2009: 169). This vulnerability of many large firms is reinforced by the high valuations placed upon intangible assets represented by branded products and services in their financial statements. Codes serve as tools to manage reputational and other non-financial risk. NGO advocacy extends beyond production: sustained campaigns against the lending practices of the major private banks financing large development projects led to the drafting and wide adoption of the Equator Principles imposing environment and social safeguards on project finance (O'Dwyer and O'Sullivan 2010).

2.2. Corporate and industry codes of conduct

The earliest codes were individual company codes, adopted on the firm's own initiative. Most major firms and industries have now promulgated codes of responsible behaviour. It has been estimated that more than 3,000 global firms issue reports on their social and environment performance and that there are more than 300 industry codes (Vogel 2009: 158). Since there is no systematic reporting of codes, precise data on incidence and content is not available. However, an inventory taken in 2000 of 246 codes adopted by firms based in OECD member countries found that individual company codes were the most numerous, representing 48 percent of all codes; codes issued by industry and trade associations were 37 percent of the inventory and multi-stakeholder codes, adopted following consultation among those with an interest in a particular industry such as trade unions and NGOs as well as firms and their industry associations, represented 13 percent of the inventory. Codes developed by international organizations represented a mere 2 percent (OECD 2000). Finally, there are numerous model standards, usually proposed by civil society organizations as benchmarks or frameworks for individual or industry codes.

2.3. Multi-stakeholder codes and labels

Collaborative governance by civil society and firms

The second stage of CSR development is represented by initiatives that involve collaboration between two or more of the 'governance triangle' parties. The most active collaboration has been between firms and NGOs. The garment and footwear industries are especially active in view of the dominance of branded products. The Ethical Trading Initiative is an alliance of UK garment firms, trade unions and civil society organizations to promote and certify compliance with its codes of practice for supply chain working conditions. Its US counterpart is the Fair Labor Association, a partnership between apparel and footwear firms, human rights NGOs, unions and consumer groups to govern labour standards in international garment and footwear production. Both were formed in the late 1990s with the support of their respective governments. The Forestry Stewardship Council was created by a coalition of firms and NGOs after the failure of the 1992 Rio Summit to reach agreement on international forestry practices. The FSC has developed forestry management standards and certifies wood products for compliance.

Social labelling programs developed by NGOs cover many food and consumer products and assure consumers about the conditions of production; firms collaborate by seeking certification for products sold with the label. Social labels explicitly signal ethical production and maximise prospects of a price premium. The labels variously certify the fairness of trade terms for agricultural producers (Fair Trade International) and the sustainability of fish product sources (Marine Stewardship Council), and assure against the use of child labour in manufacture (Rugmark). There is increasing resort in business-to-business dealings to the principal social labels with their global reach, reputation and transparency. Some European governments have introduced social labels, such as the German Blue Angel eco-label introduced in 1978, and the European Union now regulates the use of ecolabels. The price premium reflecting higher production costs constrains market penetration for products in price-competitive markets and market share of socially labelled products is generally modest.

Collaborative governance between states and firms

State participation in voluntary programs has mostly been with business rather than civil society, and has mostly been at the inter-governmental level. These codes do not generally provide for any enforcement. The principal example is the United Nations Global Compact introduced in 1999 by the Secretary-General of the United Nations. Firms subscribe to the Global Compact by committing to ten principles including respect for international human rights; non-complicity in human rights abuses; freedom of association and recognition of the right to collective bargaining; the elimination of forced and compulsory labour and the abolition of child labour; the elimination of discrimination in employment and support for a precautionary approach to environmental challenges. The Global Compact has over 8,000 corporate participants and other stakeholders and describes itself as the world's largest voluntary corporate responsibility initiative. Over 2,000 firms have been expelled for persistent failure to communicate progress in integrating the principles into their strategies and operations.

The Equator Principles set voluntary environmental and social standards for member banks in the financing of infrastructure projects. They draw upon the Performance Standards on Social and Environmental Sustainability created by the International Finance Corporation, the World Bank's financing arm. The United Nations Principles of Responsible Investment, an institutional investor initiative in partnership with the United Nation Environment Program, promotes the recognition of economic, social and governance perspectives in long-term investment policy. Finally, the International Organization for Standardization

(ISO), a network of the national standards associations of member countries, draws on private sector technical expertise to promulgate its widely accepted standards.

Collaborative governance between states, firms and civil society

Three multi-stakeholder initiatives providing collaborative governance between states, firms and civil society stand out. They are specific in scope, voluntary and firm facilitative in their effect. Each responds to problems where agreement was reached on the need for protective standards or guidance. In each initiative government played a key role along with firms and civil actors, and their relative success is explicable in terms of that contribution. They are true instances of collaborative governance.

The Voluntary Principles on Security and Human Rights (VPs) were developed in 2000 by the US and UK governments in collaboration with oil, mining, and energy firms and human rights and corporate responsibility NGOs.

The Kimberley Process Certification Scheme (KP) is designed to stem the flow of funds to insurgent groups in Africa from the sale of 'blood diamonds', a problem that arose initially in Angola but spread to Sierra Leone and, in a different form, Zimbabwe. In 2000 the South African Government convened a process involving the principal diamond producing and trading countries, diamond producers and retailing firms, and NGOs. The parties agreed upon the KP, an import-export certification scheme under which exporting governments certify the origin and conflict-free status of rough diamonds. Exporting countries endorsing the KP agree to on-site monitoring of the certification process. Since participant countries may trade rough diamonds only with other members (this trade restriction has been exempted by the WTO), there is a strong incentive for producer membership and compliance with the KP for fear of effective exclusion from the principal world diamond markets. The concentrated nature of the diamond producing and retailing industry and their shared reputational stake strengthen the program.

The Extractive Industries Transparency Initiative (EITI) is a global multi-stakeholder standard addressing the 'resource curse' where, paradoxically, in many countries abundant oil, gas and mineral resources coexist with low economic growth and human development and high levels of corruption. EITI promotes revenue transparency from oil, gas and mining in resource-rich countries through reporting and verification of company payments and government revenues.

EITI shares the mission of extractive industry transparency with Publish What You Pay (PWYP), a coalition of over 300 civil society groups working in more than 55 countries. While PWYP supports EITI's country-by-country implementation, it considers that country-based implementation alone is insufficient for effective transparency (van Oranje and Parham 2009: 54). It campaigns for mandatory disclosure of company payments, for example, through stock exchange listing rules, under a uniform global standard. Until recently, PWYP has had only modest success. However, the Dodd-Frank Wall Street Reform and Consumer Protection Act, enacted by the US Congress in July 2010, effects a fundamental change. The Act requires energy and mining firms registered with the US Securities and Exchange Commission to disclose how much they pay to foreign countries for oil, gas, and minerals. The measure covers hundreds of firms, including 90 per cent of the world's largest internationally operating oil and gas firms, and eight of the world's ten largest mining companies (Publish What You Pay 2010). The United States is the only country to require such disclosure.

2.4. Inter-governmental international CSR standards

From the 1970s, there was a movement within the United Nations for a binding code of conduct for transnational corporations. While this movement ultimately failed (Muchlinski 2000), it spawned two inter-governmental instruments establishing voluntary corporate standards with transnational effect: the International Labour Organisation's *Tripartite Declaration Concerning Multinational Enterprises and Social Policy* (MNE Declaration) and the Organisation for Economic Cooperation and Development's *Guidelines on Multinational Enterprises* (OECD Guidelines). The motives for their adoption were entirely different: the former to assist, and the latter to forestall, adoption of a binding UN Code of Conduct for Transnational Corporations (see below, at 3.1). The ILO Declaration is collaborative in its design and implementation since the ILO is itself a tripartite body representing member governments, peak trade union bodies and employer associations; the OECD Guidelines were framed by states alone but now involve business, trade unions and civil society representatives in advisory roles.

The ILO Governing Body adopted the MNE Declaration in 1977, initially on the expectation that it would become the 'social chapter' of the UN Code of Conduct. The result is a set of voluntary recommendations addressed to firms concerning labour conditions. The MNE Declaration enjoins compliance with the several ILO conventions regarding employment protection, the conditions of working life, occupational health and safety, and standards of industrial relations. There is a procedure permitting workers' and employers' organizations to bring requests for interpretation in specific cases; the confidential procedure is rarely invoked, however, since it does not judge the conduct of individual firms or provide a remedy for those affected (International Council on Human Rights Policy 2002: 102-03).

The OECD Guidelines form part of the OECD's Declaration on International Investment and Multinational Enterprises. The OECD Guidelines were first adopted in 1976 with the objective of facilitating direct investment among OECD members while also establishing the position of the capital exporting states as a draft Code of Conduct for transnational corporations was being discussed in the United Nations. The Guidelines are recommendations addressed directly to multinational enterprises operating in or from the 42 countries adhering to the Guidelines, and apply to their operations anywhere. They also apply to enterprises from a non-adhering state in relation to their operations in an adhering country, but not elsewhere (OECD 2000: 14). The Guidelines do not extend, therefore, to firms from non-adhering countries in relation to their operations outside OECD adhering countries, such as in developing countries. The Guidelines express voluntary principles and standards of responsible business conduct in areas such as human rights, employment and labour relations, environmental protection, information disclosure, combating bribery, consumer interests, science and technology, competition and taxation. Although the Guidelines are voluntary and not legally enforceable, National Contact Points in each adhering country provide a de facto grievance process for allegations of breach that leads to mediation but not adjudication. In the absence of other international remedy, there has been a resurgence of interest by NGOs in the OECD Guidelines and NCP process.

The OECD Guidelines are the only inter-governmental agreement on business standards of conduct endorsed by member states and the only multilaterally recognised framework that these developed country governments are committed to promoting (Norwegian Ministry of Foreign Affairs 2009: 64). It is the only international standard that covers workplace, environmental and consumer health. Although its NCP grievance mechanism is limited and uneven in national implementation, this is the only international CSR initiative with a compliance mechanism (Zerk 2006: 277). A revision of the OECD Guidelines was completed in 2011 with some strengthening of its human rights provisions and to be consistent with the new UN Framework and Guiding Principles.

2.5. Assessing CSR as global governance

The state is the natural source of regulatory authority. There are, however, significant obstacles to effective governmental response to the social and environment problems posed by transnational production and global business generally. These include differences in the policy preferences of states and in their disposition and capacity for effective regulation. This applies especially among developing country host states where negative externalities are most evident and the impulse to, or capacity for, regulatory action to enforce social standards is weakest: many developing countries prioritise national economic development over social protection and the competitive auction for inbound investment weakens state capacity to impose social and environmental standards. CSR is a response to the 'structural imbalance between the size and power of global firms, and the capacity and/or willingness of governments to adequately regulate them' (Vogel 2009: 160). CSR measures extend regulation to business practices in developing countries irrespective of the policy preferences of their governments or regulatory capacity.

Binding international regulation, by treaty or intergovernmental organisation, would 'better match the scope of transnational production' (Abbott and Snidal 2009a: 59). It would also offer consistent standards and protection against the threat of firm exit when the calculus of cost and benefit turns against CSR's voluntary commitments. There is, however, no political force for binding international regulation and, even if there were, problems of uncertain ratification and weak state enforcement would persist (see below, Part 4).

CSR compensates in some degree for failure to enact binding regulation and, through soft law, enables developed states to assume some responsibility for offshore activities of their firms (Vogel 2009: 185). In national contexts voluntary corporate action to meet social expectations acts as insurance against legal regulation and accountability; in the global context CSR flourishes precisely because of the weakness of much host state regulation and the absence of an international mechanism.

CSR has undoubtedly had some impact on business practices and ameliorated some of the negative consequences of globalisation and the liberalisation of trade and investment regimes even though its benefits defy easy assessment. How effective is CSR as a governance system setting, implementing and enforcing standards of business conduct in the global economy? What disciplinary power does it exert over firms? Is the international CSR movement a force that bears significant regulatory load and within what limits?

The drivers of international CSR

Since international CSR commitments are not legally binding, their force depends on the incentives that underlie them. While the relationship between corporate social and corporate financial performance is clouded by methodological difficulties, the best generalisation that appears to be supported by research evidence is that corporate social responsibility *of itself* neither promotes nor detracts from superior financial performance (Orlitzky et al 2003, Vogel 2005: 16-45). Analysis of relative costs and benefits needs to be made at the level of the individual firm. Three categories of firms may be distinguished with respect to CSR's utility.

First, some firms, such as those in extractive industries, require government consent for projects and need engage in consultations with affected communities. For these firms, a reputation for responsible practices is often advantageous but not at any cost. Second, for some firms CSR represents a strategic marketing choice to differentiate them from competitors in consumer markets, a form of social entrepreneurialism that competes for consumers or investors through signalled respect for social values and standards. Of necessity, if this strategy is to set the firm apart, it makes sense only if pursued by a minority of firms in a market sector where consumer sentiment favours responsible production of goods and services. Both are significantly limiting factors.

However, for the great majority of large firms the business case for CSR expenditures rests on the threat or prospect of campaign advocacy brought against them by NGOs for corporate irresponsibility, using the media to 'name and shame' and putting at risk the reputation of the firm and its products. (The argument that CSR aids recruitment and retention of superior staff operates only within narrow limits (Vogel 2005: 56-60).) The threat rests on assumed consumer preference for responsibly made products and the risk of consumer boycott. For these firms, CSR acts as a form of insurance against opprobrium rather than as a source of competitive advantage. Most multi-stakeholder codes have their origins in NGO campaign advocacy around a particular issue, firm or industry. Firms that sell directly to consumer markets have the strongest incentives to commit to voluntary standards although many other Western firms are also susceptible to adverse media reporting and responsive to reputation and other non-financial risk management. In some developed countries code adoption may also reduce the risk of stronger mandatory domestic regulation although that risk is not significant in relation to global business practices and does not explain code proliferation and the scale of voluntary adoption. CSR also has the advantage relative to governmental action that any import or other trade restriction imposed for code breach does not engage WTO sanctions which apply only to the conduct of state parties. This is 'a major "loophole" in international trade law—one that civil regulation has exploited' (Vogel 2009: 167).

From another perspective, NGOs confer moral legitimacy upon firms who commit to CSR measures that they approve. Those measures provide some assurance that the firm's operations and values are consistent with the social norms and expectations of consumer, investor and other stakeholder communities. For NGOs the legitimacy of CSR measures depends upon the transparency of code commitments and accountability through implementation, monitoring and enforcement of undertakings. Concerns about either may result in the withdrawal of legitimacy and the perception that the CSR measure has merely a symbolic or appeasement function. The quality of CSR implementation, monitoring and enforcement is the weak point in much CSR and invites the continuing strategic judgment for NGOs as to when to confer, and to withdraw, legitimacy, returning to direct campaign advocacy (O'Dwyer and O'Sullivan 2010).

For the vast majority of firms, the scope of NGO power to confer or withdraw legitimacy determines the business case for CSR. Firms undertake CSR commitments if it makes business sense for them to do so. The business case for CSR rests on the argument that a firm's profits will be maximised, at least in the medium to long term, if it voluntarily commits to avoiding social and environmental harms from operations. The case for CSR rests on this utility calculus. CSR does not ask firms to sacrifice profit for social goals but asserts that profit is secured only by responsible conduct that respects those goals. What is the strength of this argument and to which firms does it apply? We shall see that there are formidable obstacles to CSR's efficacy as civil regulation of global business practice.

Limits on CSR as effective regulation of international business

The business case for CSR rests on the sanction of the threat of loss of firm value through the willingness of consumers to make the conditions of production a criterion in purchasing decisions (FitzGerald 2001: 14). However, consumer, investor and employee sentiment in favour of responsible production, and media interest in monitoring for and reporting corporate irresponsibility, are easily overstated. Media attention to corporate irresponsibility is the fulcrum of NGO campaign advocacy and appears to have waned since the 1990s interest in 'sweatshop' abuses (Vogel 2005: 109). Further, studies in several countries indicate that the proportion of socially conscious consumers is much lower than responses to consumer surveys suggest and that their commitment is not at heroic levels. CSR practices do not appear to have clearly demonstrated effects on the market share of a firm's products or its financial performance: 'of the myriad factors that affect corporate earnings, CSR remains, for most firms most of the time, of marginal importance' (Vogel 2005: 73, 47-53, 93). For adopting firms, the code is liable to be passed over when it is judged unnecessary for brand value assurance or for competitive market advantage over rivals. Indeed, there is a danger faced by firms that seek to chart 'a proactive course in enacting human and labor rights protections that it can never fully satisfy its ideals … [so that firms] that claim to set a higher standard often suffer the perverse result of becoming the targets of criticism' (Compa and Hinchliffe-Darricarrère 1995: 686). Competition in the marketplace remains the ultimate driver of firm conduct. The contest between code compliance and firm profits is not an equal one.

A second limit on CSR is that the range of firms who are vulnerable to NGO advocacy, and for whom the business case for CSR might possibly be compelling, is limited to a narrow sub-set of firms — those producing branded products sold into markets with consumer sensitivity to the conditions of their production. Effectively, only European and North American markets show such sensitivity. This sensitivity may, on the basis of current practice, be further limited to specific industries such as apparel, footwear, athletic equipment, rugs and toys: such production represents 'virtual "enclaves" in the global economy' (Vogel 2005: 106). Production of unbranded goods for European and North American markets, and for all other markets including domestic developing country markets, does not appear to engage CSR drivers.

Third, the problem of the free rider weakens CSR's effectiveness as civil regulation. Where a CSR code's benefits accrue to the industry as a whole, the competitive cost advantage accruing to 'free riders' who share the benefits but not the costs of compliance undermines incentives for firms to commit. Where the nature of a business sector is such that the industry sinks or swims together in its response to some demonstrated governance failure, there may be strong incentives for full and enforced compliance with a voluntary industry response. This was evident in the threat posed to diamond producers and retailers by adverse consumer sentiment to 'blood diamonds' in the late 1990s. Commonality of interest in this highly concentrated industry ensured support from the principal firms and importing and exporting countries for the Kimberley Process and its certification scheme to assure against conflict zone sourcing. However, in situations where the industry is not so concentrated, as with the extractives industry, initiatives such as PWYP have attracted much less support. Where competitor firms are not subject to the same stakeholder incentives, the free rider problem weighs against code effectiveness. Thus, for firms from countries where domestic social and market norms do not drive CSR principles, for example, the growing number of transnationals from developing countries and state-owned enterprises operating transnationally, the incentives, and vulnerability to NGO advocacy, are fundamentally different to those of Western firms selling branded products. The problem of uneven incentives remains CSR's Achilles heel. Pressure to rein in the free rider and level the playing field sometimes prompts firms to seek mandatory regulation so that all competitors are bound to the same degree (Abbott and Snidal 2009a: 60). These instances, however, are rare. More commonly, firms most exposed to civil society advocacy seek to deflect NGO criticism by setting a standard of conduct and seeking to impose it on all industry members. Thus, banks with a strong retail banking presence, and therefore greater vulnerability to negative consumer sentiment, played a leading role in creating the Equator Principles on private bank project financing and succeeded in attracting competitor support. However, with the later refusal of participating banks to create effective accountability measures, the initial appeasement of NGO concerns unravelled and NGOs attempted to withdraw the legitimacy initially conferred on the Principles and adherents (O'Dwyer and O'Sullivan 2010).

Fourth, it is a measure of the poverty of the incentives for CSR that implementation — the monitoring, enforcement and external verification — of CSR measures is generally weak and 'represents a serious structural weakness' of CSR regulation (Vogel 2009: 184). Surveys of CSR codes report the general absence of 'credible monitoring and verification processes' (Calder and Culverwell 1995: 7). Few firms integrate voluntary codes into their core business and report upon performance against the standard, even for codes containing human rights commitments (Ruggie 2007: [77], [78], [81]). Indeed, the SA8000 labour standard for contractors is the only certifiable standard that includes international human rights and labour rights. The structure of global production poses particular problems for effective monitoring. Firms that source from factories that they own or from a small number of suppliers have greater monitoring capacity than those who use many scattered independent suppliers. For these latter suppliers especially, CSR certification is a burden since its benefits accrue to buyer firms but none of the costs since certification rarely commands a price premium in retail markets. Until responsibly made products command a price premium, the incentives for suppliers and buyers to invest in costly monitoring and verification of compliance will remain weak.

Fifth, the proliferation of voluntary codes — the 'almost bewildering array' of voluntary measures (Calder and Culverwell 1995: 7) shaped only by the individual producer or collective industry interest — inhibits consensus on standards of conduct for international business. Multi-stakeholder codes do not presently fill this gap. Many are ad hoc collaborations in response to particular problems. The closest to a comprehensive statement of corporate responsibility are the OECD and Global Compact principles although these are expressed at very high level of generality and fall short of clear guidance to firms.

Sixth, CSR is largely driven by NGOs from developed countries and depends upon their capacity to engage media and wider social interest in corporate practices. Their priorities and capacity to attract media interest determine the contours of civil regulation through CSR. The adventitious quality of their concerns is revealed in the regulatory gaps such as environmental supply chain management; in contrast, the use of child labour in developing countries is an issue that is much easier for NGOs to pursue in advocacy and has been a constant focus (Vogel 2005: 138).

Weighing up CSR as global regulation

New forms of transnational private governance such as CSR are undoubtedly a constructive attempt to fill regulatory gaps at the global level. However, CSR also exposes the limits of the market system in promoting responsiveness to social norms. That should not surprise because it is not the purpose of corporate activity to do so. There is an endemic conflict between the goals of profit maximization and social protection. Corporate action to advance the latter is likely to aid profit maximization only in the long-term and even then at the broad systemic level apart from immediate marketing gains that individual firms might capture. The appeal of voluntary codes at the international level reflects the complexity of international lawmaking and enforcement, especially that directed at global actors not easily amenable to national or international controls. CSR compensates to some degree for the lack of an international mechanism for corporate responsibility. It needs be assessed by reference not to a ideal model of effective governmental authority but to the limited regulatory options realistically available. CSR codes have raised labour, human rights and environmental standards in many developing countries; indeed, they sometimes provide the only effective form of business regulation (Vogel 2009: 184-85). For developed states and inter-governmental organisations, soft law measures such as the Global Compact, OECD and ILO standards and the

International Finance Corporation's Performance Standards avoid the more difficult challenge of legally binding regulation.

Private regulation of business works best when the state is involved: it is the participation of developed states that marks the most successful collaborative CSR initiatives such as the Kimberley Process, the Voluntary Principles and the resource transparency initiatives. CSR initiatives that rely solely upon market forces such as social labels have had much less success. The OECD Guidelines assume special significance because of the state-provided grievance mechanism. It is difficult not to agree with the UN Secretary-General's Special Representative on business and human rights that voluntary approaches 'show some potential, despite obvious weaknesses. The biggest challenge is bringing such efforts to a scale where they become truly systemic interventions. For that to occur, states need to more proactively structure business incentives and disincentives, while accountability practices must be more deeply embedded within market mechanisms themselves' (Ruggie 2007: [85]).

3. Business Standard-Setting Within the International Human Rights Framework

Are the gaps and weaknesses of CSR solved by looking at corporate responsibility through the human rights lens? Respect for human rights is part of many CSR codes and policies and respecting human rights is clearly seen as integral to a firm's social responsibility. The European Commission stresses that 'CSR has a strong international human rights dimension, particularly in relation to international operations and global supply chains' (European Commission 2001: 52). However, while CSR and human rights overlap, there are significant differences between the two domains, including difference in origins and purposes. Thus, international CSR is broader in the range of its concerns than human rights law — the OECD Guidelines, for example, include protection of consumer interests, science and technology, competition and taxation; nonetheless, core CSR concerns such as labour, environment and corruption are shared with human rights. Second, when states assume international human rights obligations, they also assume the duty to protect against breaches by firms and individuals (see above, at 1.1). Entry into CSR commitments is voluntary and there is no international CSR mechanism outside of international human rights law for legal enforcement of standards. However, the forces undermining host state (especially developing country) capacity and incentive to protect human rights against foreign firms weaken these formal differences (see above, at 1.2).

There have been several attempts within the United Nations to frame specific human rights standards of responsibility and accountability for business. However, the first successful attempt was in 2008 when the Human Rights Council approved the 'Protect, Respect and Remedy' framework for the duties and responsibilities of states and firms with respect to human rights. The framework includes as one of its pillars the corporate responsibility to respect human rights. This Part examines that responsibility and its relation with corporate social responsibility. It commences by looking briefly at unsuccessful antecedents.

3.1. Attempts at a prescriptive international code for business

In 1975 the United Nations established the Commission on Transnational Corporations to produce a draft Code of Conduct for Transnational Corporations. Developing countries were then concerned that the global organisation, economic power and technological capacity of transnational firms posed an economic threat to host states and a potential source of political interference in their domestic affairs; capital-exporting states were concerned with the protection of investments from expropriation and discriminatory treatment (Redmond 2003: 96-7). However, by the 1980s both the political and economic tides had turned against those seeking strong international regulation of business. With the scarcity of investment capital following the economic downturn that followed the debt crisis of the early 1980s, developing state priorities shifted from regulating foreign investment to attracting it. These competitive pressures for FDI were accentuated by trade and investment liberalisation. Impetus for the draft Code had subsided well before the formal suspension of negotiations for the Code in 1992.

Another initiative within a UN subsidiary body, the *Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights*, offered a set of principles for business responsibility for human rights impacts of operations and relationships. Although the Norms were expressed not to be a treaty, they were declared to be 'non-voluntary' — no opt-in was required, and no opt out was possible (Weissbrodt 2008: 398). Although the Norms were, and still are, strongly supported by many civil society organisations, they were opposed by business and failed to attract political support within the UN (Weissbrodt 2008: 383). They have no formal legal authority and represent a counterpoint model to the 'Protect, Respect and Remedy' framework. Indeed, opposition to the Norms led to the appointment by the UN Secretary-General in 2005 of John Ruggie as his special representative with a mandate to identify and clarify standards of corporate responsibility and accountability with regard to human rights. Ruggie had earlier been the principal architect of the UN Global Compact.

3.2. The 'Protect, Respect and Remedy' framework for business and human rights

Ruggie characterises the task of standard-setting as one arising from systemic global governance failure: 'the root cause of the business and human rights predicament today lies in the governance gaps created by globalization - between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation. How to narrow and ultimately bridge the gaps in relation to human rights is our fundamental challenge' (Ruggie 2008: [3]). The project of realigning economic forces and governance capacity is to be secured by '[e]mbedding global markets in shared values and institutional practices' (Ruggie 2006: [18]). These governance gaps should be addressed by states themselves within their own jurisdictions or by cooperation between them. His solution in the 'Protect, Respect and Remedy' framework rests on the 'bedrock' of strengthened state capacity to protect against corporate-related human rights abuse and strengthened voluntary corporate responsibility measures (Ruggie 2008: [50]). The Human Rights Council approved the framework and extended his mandate to develop guiding principles on the implementation of the framework. Ruggie submitted these Guiding Principles to the Human Rights Council in March 2011; they do not create any new international law obligations (Ruggie 2011: 6).

The first of the framework's three complementary principles is the duty of state parties to human rights instruments to protect against human rights abuses by third parties, including business: 'this requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication' (Guiding Principle 1). This is the traditional statement of state responsibility; this duty to protect is not shared by business. Ruggie proposes several strategies to strengthen state capacity to discharge the duty to protect (see below, at 4.2).

Second, the responsibility (*not* duty) of firms is to respect human rights, that is, to avoid infringing on the human rights of others through their activities and value chain relationships, address adverse impacts with which they are involved and provide for appropriate prevention, mitigation and remediation (Guiding Principles 11, 13, 21). This responsibility, where it is not grounded in legal obligation, rests only upon social expectation.

The third principle requires states, as part of their duty to protect, to ensure an effective remedy is available for human rights abuses with their territory (Guiding Principle 25). The present 'incomplete and flawed' patchwork of remedies includes judicial, state-based non-judicial (such as national human rights institutions), company-level and multi-stakeholder, industry, and financier-sponsored mechanisms (Ruggie 2008: [87]). Firms should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted by their operations (Guiding Principle 30). Non-judicial remedies should meet criteria of legitimacy, accessibility, predictability, equity, rights-compatibility and transparency (Guiding Principle 31).

3.3. The corporate responsibility to respect human rights

Responsibility, not duty

The corporate responsibility approved by the Human Rights Council is to respect the human rights of those affected by the firm's activities. The responsibility rests on a social norm that is said to have acquired 'near-universal recognition by all stakeholders, including business … not [to] infringe on the rights of others. The responsibility to respect is the baseline norm for all companies in all situations' (Ruggie 2009a: 48). The responsibility to respect includes both legal obligations and social norms and expectations: 'failure to meet this responsibility can subject companies to the courts of public opinion — comprising employees, communities, consumers, civil society, as well as investors — and occasionally to charges in actual courts. Whereas governments define the scope of legal compliance, the broader scope of the responsibility to respect is also defined by social expectations — as part of what is sometimes called a company's social license to operate' (Ruggie 2008b).

In contrast to the state *duty* to protect, the corporate *responsibility* to respect human rights does not derive directly from international law, whether in its customary form or from the terms of treaties. Rather, Ruggie asserts that the responsibility derives from the recognition and assumption of the responsibility by business itself, expressed through the ILO Declaration, OECD Guidelines, Global Compact and in company codes (Ruggie 2008: [23]). Indeed, Ruggie says that the notion that companies possess human rights responsibilities is 'not today seriously demurred from' (Ruggie 2008a).

Despite the multiple connotations of the term 'responsibility' in different legal contexts, it is clear that the corporate responsibility to respect is not grounded in legal obligation beyond that arising from the domestic laws of the countries in which firms operate but 'refers to moral obligations and social expectations—not binding law' (Millstein et al 2008). Despite the governing term 'corporate', the responsibility is expressed to apply to all 'business enterprises', regardless of size, sector, country of origin, ownership and structure; however, these factors and the severity of adverse human rights impacts may determine the 'scale and complexity' of the means by which the responsibility is discharged (Guiding Principle 14).

Ruggie does not explicitly address the relationship between the corporate responsibility to respect human rights and corporate social responsibility generally, except to distinguish the former from corporate philanthropy. However, the corporate responsibility to respect is seen as a specific, non-discretionary norm to be distinguished from voluntary initiatives subsumed under the broad umbrella of CSR. This distinction ensures that firms do not attempt to substitute charitable contributions for human rights compliance; there is no trade off: respect all human rights (Guiding Principle 11, Commentary). The two concepts share a foundation in sensitivity to social expectation and, from an investor perspective, long-term risk management. The UK Joint Committee on Human Rights considered that greater clarity is needed on the distinction between them to 'reinforce the baseline [corporate] responsibility' with respect to human rights (Joint Committee on Human Rights 2009: [124]).

The responsibility enjoins firms to 'respect' human rights: '[this] essentially means not to infringe on the rights of others – put simply, to do no harm' (Ruggie 2008: [24]). Unlike the state duty, the corporate responsibility does not require firms to *protect* or *fulfil* human rights, only to *respect* them; the responsibility is to avoid harm from its own conduct, and does not extend, as the state duty does, to protect against third party breaches or seek the progressive realization of rights. Thus, firms have no responsibility for abuses of human rights committed by others unless they are complicit in them. Ruggie contemplates that more than respect may, however, be required in particular contexts, for example, where firms perform public functions or operate in conflict zones that impose obligations to protect employees and perhaps communities affected by their operations (Ruggie 2008: [24]; Ruggie 2009: [61]-[64]). There are particular challenges and dilemmas for firms operating in countries without adequate governance, and weak enforcement.

The content of the corporate responsibility

Ruggie set his face against a dedicated statement of corporate-related human rights standards on the grounds that are 'few if any internationally recognized rights business cannot impact', and that any such statement would inevitably be incomplete and shortly outdated; instead, he asserts the corporate responsibility is to respect internationally recognised human rights understood, 'at a minimum', as those expressed in the International Covenant of Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the ILO's Declaration on Fundamental Principles and Rights at Work (Ruggie 2008: [53], [24], [52]; Guiding Principle 12). The responsibility applies independently of the host state's particular human rights commitments.

The remaining element of the corporate responsibility to respect involves the internal systems by which firms are able to assure themselves and others of their compliance with the responsibility. To 'manage the risk of human rights harm with a view to avoiding it', firms need a due diligence process with distinct elements — an explicit human rights policy, assessment of the human rights impacts of company operations, integration of human rights values and risk assessments into company culture and management systems, and tracking and reporting of performance (Guiding Principles 15-20; Ruggie 2008: [56]-[64]).

3.4. Evaluating the corporate responsibility to respect as civil regulation

Does the corporate responsibility to respect human rights repair deficiencies noted in civil regulation through corporate social responsibility? While the corporate responsibility possesses clarity in theory, its practical implications are uncertain. A United Kingdom Parliamentary committee commented that the responsibility 'requires a culture change' in the way that businesses think about their responsibilities: '[w]e see merit in the argument that business-led initiatives may achieve a credible and lasting change, but this is hampered by the perception that some businesses regard addressing human rights as little more than an exercise in "good PR"' (Joint Committee on Human Rights 2009: [119]).

Corporate human rights policies are of recent origin. Many firms have adopted codes of conduct that include human rights elements although it is not clear how many have done so and in what terms. The Business and Human Rights Resource Centre website lists over 270 firms with a formal policy statement explicitly referring to human rights. A survey of the Fortune Global 500 companies, the world's largest firms, found that 90 per cent of responding firms had an explicit set of human rights principles or management practices in place (Ruggie 2006a). The 8,000 firms participating in the UN Global Compact subscribe to two principles relating to human rights but that commitment does not require an explicit human rights policy or other assurance mechanism.

If the corporate responsibility to respect is to become normative and prescriptive, to be engraved in corporate culture it requires a clear corporate standard to which firms can be held accountable. The absence of such a standard is problematic.

4. Assuring Corporate Responsibility in Global Business: Regulatory Options

Despite their limitations, the new forms of transnational private governance are undoubtedly a constructive attempt to fill the major gap in regulation of business practices at the global level. There are dangers, however, in the creation of transnational obligations through private codes that operate independently of host states or in the face of their decision not to ratify or enforce the international standard applied by the voluntary code. Whether code content is driven by perceptions of consumer sentiment, civil society pressure or unaided corporate judgment, its legitimacy to determine appropriate levels of social, labour and environmental standards in host developing countries is contestable. The power that codes have to extend the reach of international standards would rest more securely and legitimately if grounded in international participation and consent: '[s]tandards that are intended to operate internationally should be multilaterally agreed, monitored and applied through procedures that are themselves transparent, accountable and socially responsible' (United Nations Conference on Trade and Development 2001: 54). Addressing the problems of voluntary code implementation will not 'provide an adequate substitute for establishing a framework of accountability that extends across and beyond the corporate body' (Zadek 2001: 211). What then are the other regulatory options available and their prospects of success?

4.1. Binding international regulation

One option is expand the scope and effectiveness of international regulation. As noted, there is no conceptual barrier to states holding firms directly responsible for violations of international law by imposing human rights obligations directly on firms and establishing some form of international enforcement regime. The political barriers, however, are formidable among both developed and developing countries as well as business. Such instruments would depend upon sufficient state ratification for commencement and effectiveness. The experience with the failed UN Code of Conduct for Transnational Corporations and UN Norms proposals is indicative of the obstacles and prospects of success (see above, at 3.1). Intermediate steps towards international oversight include greater focus on corporate-related breaches by the UN treaty monitoring bodies overseeing the discharge of state duties under human rights instruments.

4.2. Strengthening host state capacity to protect against corporate-related human rights abuses

Strengthening host state capacity to discharge the duty to protect against breach of human rights instruments ratified by the state is one of the three limbs of the Ruggie framework. He has proposed strategies to this end including greater guidance and support for states through cooperation and assistance at the international level, addressing deficiencies in the OECD Guidelines and aligning state investment and human rights policies which often operate independently of each other to the detriment of the latter (Ruggie 2008: [46], [48]; Guiding Principles 8-9). Each of these strategies is desirable. But is there any reason to believe that they would cure the core problem of weak host state capacity where ‘states are so weak or unwilling to protect human rights and corporations are so comparatively strong or conveniently transnational to evade human rights responsibilities’ (Joint Committee on Human Rights 2009: [94], quoting Ruggie’s oral evidence; Ruggie 2008: [14])? The strategy appears to underestimate the core problem of host state capacity and incentive to discharge the duty to protect. In the endemic conflict between human rights and commercial claims and imperatives, when firms are pushed by powerful internal and external incentives to act in their commercial interests, the task of imposing other obligations upon them is poetically described as ‘like painting on clouds’ (Kinley 2009: 178). In the major emerging economies such as the PRC, India, Russia and Brazil, the challenge is more egregious both with respect to protecting inbound investment and with the offshore accountability of their own large transnational firms.

4.3. Increased home state effort to impose standards of off-shore business conduct

There is disagreement as to whether international law *requires* home states to help prevent human rights abuses abroad by firms which they have incorporated or which are headquartered there or listed on their securities exchanges; there appears greater clarity around their *right* to do so although the scope of the right is subject to an overall reasonableness test and does not involve intervention in the internal affairs of other states (Ruggie 2008: [19]). Ruggie has noted that home states of transnational firms are ‘reluctant to regulate against overseas harm by [their] firms because the permissible scope of national regulation with extraterritorial effect remains poorly understood, or out of concern that those firms might lose investment opportunities or relocate their headquarters’ (Ruggie 2008: [14]). Developing countries are often hostile to such regulation because of concern about the impairment of their sovereignty. Ruggie has left the issue of extended scope of the extraterritorial dimension unresolved — the Guiding Principles are silent with respect to the specific responsibilities of home states and reference to home states in the commentary is exiguous.

There is a powerful precedent for uniform home state regulation for the worst corporate-related human rights abuses in the regulation of bribery and corruption by OECD countries. The OECD Anti-Bribery Convention establishes legally binding standards criminalising bribery of foreign public officials in international business transactions. Adoption of the Convention, effected through national legislation, followed unilateral action by the United States in enacting the Foreign Corrupt Practices Act 1977. The Convention effectively assures a uniform regulatory environment between OECD countries in respect of competition by their firms for international business although questions remain with respect to the quality of national enforcement. There are other instances of unilateral state action to regulate overseas activities of nationals, for example, in relation to sex tourism. In the corporate area, the other important remedy is the United States *Alien Tort Claims Act* 1789 which permits US courts to hear damages claims by aliens for violations of international law wherever committed.

Finally, Ruggie observes that the implications of corporate and securities laws for human rights ‘remain poorly understood’ (Guiding Principle 3, Commentary). He proposes that states foster domestic corporate cultures in which respecting rights is an integral part of doing business. This proposal would require changes to most national corporate law and governance systems by encouraging sustainability reporting, redefining fiduciary duties of company directors and managers, and through increased shareholder engagement especially through shareholder proposals to empower investors responsive to human rights and reputational impacts (Ruggie 2008: [30]). This strategy reflects the decisive contribution that state involvement has made to the success of civil regulation initiatives (see above, at 2.5 and 3.4)

5. Conclusion

The global economy is populated by 80,000 transnational firms with ten times that number of subsidiaries and millions of suppliers, and countless millions of national firms, mostly small to medium sized enterprises. In this new global age, the dissolving national barriers to trade, investment and currency flow under regulatory liberalisation have profoundly changed the balance of power between nation state and firm, weakening one and empowering the other. Globalisation integrates along the economic axis while simultaneously fragmenting along the political (Reinicke and Witte 2000: 82). In this fragmented political realm, no legal mechanism regulates business activities that cross national boundaries and challenge the regulatory capacity and will of national governments. The OECD Guidelines are the only international standard that applies to cross-border transactions; its grievance mechanism is, however, a voluntary process and, if we apply the Ruggie criteria for remedies, the OECD Guidelines clearly fail (see above, at 3.2).

In this governance gap created by globalisation, two related bodies of voluntary civil regulation attempt to restore balance between the power of economic actors and the social institutions and communities they affect — the international corporate social responsibility movement and the development of norms of responsibility of firms for the human rights impacts of business operations and relationships. Both rely upon business self-restraint grounded in enlightened self-interest. There are, however, significant limits on the capacity of each to move markets and affect the balance of power between market and society in the global economy.

The international CSR movement consists of a plethora of codes and standards of responsible conduct that span most business sectors. They range from individual company and industry codes to a range of multi-stakeholder codes that reflect the collaborative governance of civil society, firms and states. The most successful initiatives are those with some government participation. CSR is now ubiquitous, ‘the tribute that capitalism everywhere pays to virtue’ (Crook 2005: 3). Yet, *as regulation* that tribute suffers the weakness of all voluntary offerings — the threat of discarding when its exactions are judged onerous or inconvenient. Its drivers lie in self-interest, and the weak power of underlying incentives and sanctions is reflected in the weak monitoring and enforcement that characterize most CSR schemes.

The ‘Protect, Respect and Remedy’ framework for business and human rights approved by the Human Rights Council asserts the corporate responsibility to respect human rights. That responsibility has greater normative force as part of the international human rights system and sharper definition in its norms of responsibility. Like CSR, however, that responsibility rests principally on social rather than enforceable legal norms. There is an air of unreality around the asserted norms of the corporate responsibility to respect human rights and the state duty to protect in view of the evident gap between the norms, the reality of firm and state practice and the lived experience of many affected communities. The corporate responsibility to respect ‘requires a culture change’ in the way that businesses think about their responsibilities, and business-led initiatives may well achieve over time a credible and lasting change; yet, the perception remains, however, as with CSR, that ‘some businesses regard addressing human rights as little more than an exercise in “good PR”’ (Joint Committee on Human Rights 2009: [119]).

6. References

Alston, P. (2009) ‘Putting Economic, Social, and Cultural Rights Back on the Agenda of the United States’ NYU School of Law, Public Law Research Paper No. 09-35. Available at SSRN: http://ssrn.com/abstract=1397703 ‘

Abbott, K. and Snidal, D. (2009) ‘Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit’, 42 *Vanderbilt Law Review* 501

Abbott, K. and Snidal, D. (2009a) ‘The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State’ in Mattli W. and Woods, N. (2009) *The Politics of Global Regulation*, Princeton and Oxford, Princeton UP, 44-88

Baghwati, J. (2004) *In Defence of Globalization*, Oxford, Oxford UP

Bartley, T. and Child, C. (2010) “Shaming the Corporation: Social Movement Pressure and Corporate Social Responsibility” at http://businessinnovation.berkeley.edu/WilliamsonSeminar/bartley021810.pdf

Calder, F. and Culverwell, M. (2005) *Following up the World Summit on Sustainable Development Commitments on Corporate Social Responsibility: Options for action by governments, Final Report*, Royal Institute for International Affairs, London: Chatham House

Commission of the European Communities (2001) *Green paper - Promoting a European framework for corporate social responsibility*. /* COM/2001/0366 final */

Compa, L. and Hinchliffe-Darricarrère, T. (1995) ‘Enforcing International Labor Rights through Corporate Codes of Conduct’, 33 Colum J Transnat’l Law 686

Crook, J. (2005) ‘The Good Company’, *The Economist*, 22 January 2005

Ferguson, N. (2005) “Sinking Globalization” *Foreign Affairs*, v 84, 64-77

FitzGerald, E.V.K. (2001) *Regulating Large International Firms*, available at http://www.unrisd.org/unrisd/website/document.nsf/240da49ca467a53f80256b4f005ef245/5750d0dd9a373c8d8$IILE/fitzgera.pdf (United Nations Research Institute for Social Development, Technology, Business and Society Program Paper No. 5)

Gereffi, G., Garcia-Johnson, R. and Sasser, E. (2001) ‘The NGO-Industrial Complex’ *Foreign Policy*, Jul/Aug 2001, 56-65

Hummels, D. (2007) ‘Transportation Costs and International Trade in the Second Era of Globalization’ *Journal of Economic Perspectives*, Vol 21, No 3, 131–154

ICISS, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*, 2001

Institute for Human Rights and Business (2009) *Setting Boundaries: Clarifying the Scope and Content of the Corporate Responsibility to Respect Human Rights*, Submission by the Institute for Human rights and Business to John Ruggie, available at http://www.institutehrb.org/pdf/InstituteHRB.org_Setting_Boundaries-Clarifying_Scope_and_Content_of_Corporate_Responsibility_to_Respect_Human_Rights.pdf

International Council on Human Rights Policy (2002) *Beyond Voluntarism: Human rights and the developing international legal obligations of companies*

Joint Committee on Human Rights (UK) (2009), *Any of our business? Human rights and the UK private sector* Vol 1

Keck, M. E. and Sikkink, K. (1998) *Activists beyond borders : advocacy networks in international politics*, Ithaca, N.Y, and London, Cornell University Press

Kinley, D. (2009) *Civilising Globalisation: Human Rights and the Global Economy* Cambridge University Press

Khan, I. (2009) *The Unheard Truth: Poverty and Human Rights*, WW Norton

Kozul-Wright, R. (1995) ‘Transnational corporations and the nation state’ in Michie J. and Grieve Smith, J. (eds), *Managing the Global Economy*, Oxford, Oxford UP, 135-171

Lang, A. (2010) ‘Trade Agreements, Business and Human Rights: The case of export processing zones’, Working Paper No 57, Corporate Social Responsibility Initiative, Harvard Kennedy School of Government

Mattli W. and Woods, N. (2009) ‘In whose benefit? Explaining regulatory change in global politics’ in Mattli W. and Woods, N. (2009) *The Politics of Global Regulation*, Princeton and Oxford, Princeton UP, 1-43

McBeth, A. (2004) ‘A Look at Corporate Code of Conduct Legislation’ 33 Common Law World Rev 222

McCorquodale, R. and Simons, P. (2007) ‘Responsibility beyond borders: State responsibility for extraterritorial violations by corporations of international human rights law” 70 Modern Law Review 598

Millstein I. M., Veasey, E. N, Goldschmid, H., Reiss, S. A., Gregory, H. J. and Altschuler, A. A. (Weil, Gotshal & Manges LLP) (2008) *Corporate Social Responsibility for Human Rights: Comments on the UN Special Representative’s Report Entitled “Protect, Respect and Remedy: a Framework for Business and Human Rights”* available at http://www.reports-and-materials.org/Weil-Gotshal-legal-commentary-on-Ruggie-report-22-May-2008.pdf

Muchlinski, P. T. (2000) ‘Attempts to Extend the Accountability of Transnational Corporations: The Role of UNCTAD’ in Kamminga, M. T. and Zia-Zarifi, S. (eds), *Liability of Multinational Corporations Under International Law* 97

Mutua, M. (2001) ‘Savages, Victims, and Saviours: The Metaphor of Human Rights’ 42 Harv Int’l L J 217

Norwegian Ministry of Foreign Affairs (2009) *Corporate Social Responsibility in a Global Economy*, Report No. 10 (2008-2009) to the Storting

Oppenheim, L. (1920) *International Law*

O'Dwyer, B. and O'Sullivan, N. (2010) ‘Stakeholder Perspectives on a Financial Sector Legitimation Process: The Case of NGOs and the Equator Principles’. Accounting, Auditing & Accountability Journal, Forthcoming . Available at SSRN: http://ssrn.com/abstract=1687146

OECD (2000) *Codes of Conduct – An Expanded Review of Their Contents* (Working Party of the Trade Committee, TD/TC/WP(99)56/FINAL) <http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=TD/TC/WP(99)56/FINAL&docLanguage=En>

Orlitzky, M., Schmidt, F. and Rynes, S. (2003) “Corporate social and financial performance: A meta-analysis” Organisation Studies, 24, no. 2, 426

Prince of Wales Int’l Bus. Leaders Forum & Amnesty Int’l (2000), *Human Rights – Is It Any of Your Business?*

Publish What You Pay (2010) ‘U.S. legislation shines light on billions in oil and mineral payments’ Press Release 15/07/2010, available at http://www.publishwhatyoupay.org/en/resources/us-legislation-shines-light-billions-oil-and-mineral-payments

Ratner, S. R. (2002) ‘Corporations and Human Rights: A Theory of Legal Responsibility’ 111 Yale Law Journal 443

Redmond, P. (2003) ‘Transnational enterprise and human rights: Options for standard-setting and compliance’ 37 *International Lawyer* 69-102

Reinicke, W. H. and Witte, J. M. (2000) ‘Interdependence, Globalization and Sovereignty: The Role of Non-Binding International Legal Accords’ in Shelton, D (ed) (2000) *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* 77-78

Ruggie, J. (2006) ‘Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises’, UN Doc E/CN.4/2006/97

Ruggie, J. (2006a) *Human Rights Policies and Management Practices of Fortune Global 500 Firms: Results of a Survey*, available at http://www.business-humanrights.org/SpecialRepPortal/Home/BriefingDiscussionReferencepapers/Briefingpapers/2006

Ruggie, J. (2007) 'Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts', Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN Doc A/HRC/4/035

Ruggie, J. (2007a) 'State responsibilities to regulate and adjudicate corporate activities under the United Nations core human rights treaties: an overview
of treaty body commentaries', Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations
and other business enterprises, Addendum, UN Doc A/HRC/4/35/Add.1

Ruggie, J. (2008) '"Protect, Respect and Remedy": a Framework for Business and Human Rights', Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN Doc A/HRC/8/5

Ruggie, J. G. (2008a) 'Business and Human Rights: A Political Scientist's Guide to Survival in a Domain where Lawyers and Activists Reign', International Law Association (British Branch), London, 17 May 2008

Ruggie, J. (2008b) *Preliminary Work Plan*, Mandate of the Special Representative on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, 1 September 2008 - 30 June 2011 (10 October 2008) available at http://198.170.85.29/Ruggie-preliminary-work-plan-2008-2011.pdf

Ruggie, J. (2009) 'Business and human rights: Towards operationalizing the "Protect, Respect and Remedy" framework', Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations
and other business enterprises, UN Doc A/HRC/11/13

Ruggie, J. (2009a) SRSG statement of 16 April 2009 to Sub-Committee on Human Rights of European Parliament

Ruggie, J. (2011) 'Guiding principles on business and human rights: Implementing the United Nations "Protect, Respect and Remedy" framework', Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN Doc A/HRC/17/31

Seck, S. L. (2008) 'Unilateral Home Regulation: Imperialism or Tool for Subaltern Resistance?' 46 Osgoode Hall Law Journal 565

Seck, S. L. (2008a) 'Home State Responsibility and Local Communities: The Case of Global Mining" 11 Yale Human Rights & Development Law Journal 177

Steinhardt, R. G. (2001) 'Litigating Corporate Responsibility', 1 (Global Dimensions Seminar, Human Rights and Corporate Responsibility, June 2001, New York) (ww.lse.ac.uk/collections/globalDimensions/seminars/humanRightsAndCorporateResponsibility/steinhardtTranscript.htm)

Stephens, B. (2002) 'Translating *Filártiga*: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations' 27 Yale Journal Int'l Law 1

Tapiola, K. (2001) 'UN Global Compact and other ILO Instruments', *OECD Roundtable on Global Instruments for Corporate Responsibility*, available at http://www.oecd.org/dataoecd/37/29/2348714.pdf

United Nations Conference on Trade and Development (2001) *Social Responsibility*, (UNCTAD/ITE/IIT/22)

van Oranje, M. and Parham, H. (2009) *Publishing What We Learned: An Assessment of the Publish What You Pay Coalition* (http://eiti.org/files/Publishing%20What%20We%20Learned.pdf)

Vogel, D. (2005) *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility* Washington, DC, Brookings Institution Press

Vogel, D. (2009) "The Private Regulation of Global Corporate Conduct" in Mattli W. and Woods, N. (2009) *The Politics of Global Regulation*, Princeton and Oxford, Princeton UP, 151-188

Weissbrodt, D. (2008) 'Realizing The Potential: Global Corporations And Human Rights' (2008) 26 Berkeley J Int'l L 373

Wright, M. and Lehr, A. (2006) 'Business Recognition of Human Rights: Global Patterns, Regional and Sectoral Variations', Corporate Social Responsibility Initiative, Working Paper No 31, John F. Kennedy School of Government (available at http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_31_wright_lehr.pdf)

Zadek, S. (2001) *The Civil Corporation* (London, Earthscan)