

International Corporate Social Responsibility and International Law

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This paper seeks to assess how, to date, international law has embraced the concept of “International Corporate Social Responsibility” (ICSR). It is based on a number of publications written by the author.¹ As such it aims to bring together a number of themes that are central to the development of this new issue for international law. In particular, it seeks to consider what ICSR actually is, why this matter is on the agenda at all and what underlying principles does it work from. It then brings matters up to date with an examination of one aspect of the wider ICSR debate, namely, how are corporate responsibilities in the field of human rights being developed in the UN? This is pertinent as the UN Secretary-General’s Special Representative on Human Rights and Business, John Ruggie (the UN Special Representative), has challenged the system of international law to come up with a response to the demand that corporations act in accordance with international human rights standards in their operations. That said ICSR is a much wider concept than just human rights, as will be shown below. Nonetheless, a focus on human rights may be useful as it is in this area that direct legal obligations for corporate actors are most likely to develop.²

(1) The Meaning of “International Corporate Social Responsibility”

ICSR obligations may be seen as the *quid pro quo* for the protection of investors and investments under international investment protection agreements and international economic rules such as those of the WTO.³ Such obligations can be drawn rather

¹ See Peter Muchlinski “Corporate Social Responsibility” in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds) *The Oxford Handbook of International Investment Law* (Oxford, Oxford University Press, 2008); Peter T. Muchlinski *Multinational Enterprises and the Law* (Oxford, Oxford University Press, 2nd ed, 2007) at 100-104 and Part III “The Social Dimension”; Peter Muchlinski “International Business Regulation: An Ethical Discourse in the Making?” in Tom Campbell and Seumas Miller (eds) *Human Rights and Moral Responsibilities of Corporate and Public Sector Organisations* (The Hague, Kluwer Law International, 2004) 81; Peter Muchlinski “Human rights, social responsibility and the regulation of international business: The development of international standard by intergovernmental organizations” 3 *Non-States Actors and International Law* 123 (2003); Peter T. Muchlinski “Human Rights and Multinationals: is There a Problem?” 77 *International Affairs* 31 (2001); P.T.Muchlinski “The Social Dimension of International Investment Agreements” in J.Faundez, M.Footer and J.J.Norton, eds *Governance, Development and Globalisation* (London, Blackstone Press, 2000) 373.

² See Jennifer A. Zerk *Multinationals and Corporate Social Responsibility* (Cambridge, Cambridge University Press, 2006) at 310: “While it is important not to confuse CSR and human rights, it is likely that any *direct* obligations for multinationals will emerge primarily from human rights law.”

³ For a discussion of the concept of social responsibility and its implications for international standard setting and investment protection see UNCTAD *The Social Responsibility of Transnational Corporations*

widely.⁴ For instance, the Draft United Nations Code of Conduct on Transnational Corporations listed the obligations of transnational corporations (TNCs) across a wide range of issues including respect for the sovereignty of the host state and its political system, respect for human rights, abstention from corrupt practices, refraining from using the economic power of the TNC in a manner damaging to the economic well-being of the countries in which a firm operates, including observance of tax and anti-monopoly laws, and ensuring full disclosure concerning the activities of the firm.

Similarly, the OECD Guidelines for Multinational Enterprises contain a section on “General Policies” which is worth reproducing in full as it offers what appears to be an emerging consensus on the social obligations of MNEs:⁵

“Enterprises should take fully into account established policies in the countries in which they operate, and consider the views of other stakeholders. In this regard, enterprises should:

1. Contribute to economic, social and environmental progress with a view to achieving sustainable development.
2. Respect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments.
3. Encourage local capacity building through close co-operation with the local community, including business interests, as well as developing the enterprise’s activities in domestic and foreign markets, consistent with the need for sound commercial practice.
4. Encourage human capital formation, in particular by creating employment opportunities and facilitating training opportunities for employees.

(New York and Geneva, United Nations, 1999); UNCTAD *World Investment Report 1999* (New York and Geneva, United Nations, 1999) ch. XII; UNCTAD *World Investment Report 2003* above n.5. See too UNCTAD *Social Responsibility* UNCTAD Series on issues in international investment agreements (New York and Geneva, United Nations, 2001) all available online at www.unctad.org/jia.

⁴ See UNCTAD *International Investment Agreements: A Compendium* (New York and Geneva, United Nations, 1996) Vol.I.161.

⁵ The remaining chapters include: “Disclosure, Employment and Industrial Relations, Environment, Combating Bribery, Consumer Interests, Science and Technology, Competition and Taxation”.

5. Refrain from seeking or accepting exemptions not contemplated in the statutory or regulatory framework related to environmental, health, safety, labour, taxation, financial incentives, or other issues.
6. Support and uphold good corporate governance principles and develop and apply good corporate governance practices.
7. Develop and apply effective self-regulatory practices and management systems that foster a relationship of confidence and mutual trust between enterprises and the societies in which they operate.
8. Promote employee awareness of, and compliance with, company policies through appropriate dissemination of these policies, including through training programmes.
9. Refrain from discriminatory or disciplinary action against employees who make bona fide reports to management or, as appropriate, to the competent authorities, on practices that contravene the law, the Guidelines or the enterprise's policies.
10. Encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of corporate conduct compatible with the Guidelines.
11. Abstain from any improper involvement in local political activities".⁶

As may be apparent from this wide-ranging list of issues, the precise classification of ICSR standards is difficult as, potentially, the phrase could cover all aspects of corporate regulation. By contrast, the UN Global Compact contains a more specific set of standards. The Ten Principles on which the Global Compact is founded concern the areas of human rights, labour, the environment and anti-corruption. These are said to enjoy universal consensus and are derived from a number of significant international instruments.⁷ From the above, it is clear that social responsibility may take both an

⁶ OECD Guidelines for Multinational Enterprises, 27 June 2000, p.14.

<http://www.oecd.org/dataoecd/56/36/1922428.pdf>

⁷ See further www.unglobalcompact.org. These are: The Universal Declaration of Human Rights; The International Labour Organization's Declaration on Fundamental Principles and Rights at Work; The Rio Declaration on Environment and Development and The United Nations Convention Against Corruption. The Global Compact asks companies to embrace, support and enact, within their sphere of influence, a set

economic, social and ethical dimension in that MNEs are expected to conduct their economic affairs in good faith and in accordance with proper standards of economic activity, while also observing fundamental principles of good social and ethical conduct.

The OECD Guidelines mention good corporate governance as a general policy to be respected by TNCs. However, ICSR should be distinguished from corporate governance as a concept. The latter is a specific term of art used to denote the organisation of ownership, participation, disclosure and decision-making in corporations rather than a general term that concerns the conduct of wider relationships between the corporation and various social actors. That said the interaction of the two concepts is significant from the perspective of putting ICSR aims into operation. For example one way to ensure corporate responsibility in the field of employment rights or health and safety might be to have adequate worker participation and consultation within the firm. Thus the law may require the setting up of works councils or the placing of worker representatives on the company board. In this way the ICSR goal of observance of workers rights is given real force through corporate governance laws.⁸ Equally the observance of human rights by the firm might entail the institution of a human rights impact assessment system within the managerial decision-making structure of the firm.⁹

These two examples assume a major policy priority in ICSR, namely, that it advocates a “stakeholder” model of corporate governance. Such a model is apparently espoused by the OECD Guidelines, which, as noted above, assert that, “[e]nterprises should take fully into

of core values in the areas of human rights, labour standards, the environment, and anti-corruption: “Human Rights: Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights; and Principle 2: make sure that they are not complicit in human rights abuses. Labour Standards: Principle 3: Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining; Principle 4: the elimination of all forms of forced and compulsory labour; Principle 5: the effective abolition of child labour; and Principle 6: the elimination of discrimination in respect of employment and occupation. Environment: Principle 7: Businesses should support a precautionary approach to environmental challenges; Principle 8: undertake initiatives to promote greater environmental responsibility; and Principle 9: encourage the development and diffusion of environmentally friendly technologies. Anti-Corruption: Principle 10: Businesses should work against all forms of corruption, including extortion and bribery.”

⁸ See further Muchlinski above n.1 at 354ff on European rules on worker participation in MNEs

⁹ See further Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises *Human rights impact assessments - resolving key methodological questions* (UN Doc A/HRC/4/74, 5 February 2007).

account established policies in the countries in which they operate, and consider the views of other stakeholders...” Traditionally the main stakeholders that have been protected by legal rules on corporate governance are shareholders. Such an approach to corporate governance leads to a narrow economic model of the corporation which is seen as a vehicle for enhancing “shareholder value”. However a modern “stakeholder” approach requires that other groups – workers, suppliers and distributors the local community and society as a whole – are considered in the decision-making structures of the company. It creates a more social conception of the company.¹⁰ While the OECD Guidelines modestly advocate this approach the OECD Principles of Corporate Governance have been said to follow a shareholder oriented model.¹¹ This is not entirely the case as the OECD Principles leave this issue to national law. Where national laws include wider stakeholder obligations then companies are obliged to follow these and to answer to legal remedies for illegal acts.

In addition the UN Special Representative’s work shows a clear preference for a stakeholder approach. In his 2008 Report to the Human Rights Council, the UN Special Representative made clear that the failure of companies to meet their responsibility to respect human rights,

“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 defined by social expectations - as part of what is sometimes called a company’s social licence to operate.”¹²

¹⁰ On which see further Simon Zadek *The Civil Corporation* (London, Earthscan, revised ed, 2007)

¹¹ OECD *Principles of Corporate Governance* (Paris, OECD, 2004) available at <http://www.oecd.org/dataoecd/32/18/31557724.pdf> For this position see Paddy Ireland and Renginee Pillay “Corporate Social Responsibility and the New Constitutionalism” in Peter Utting (ed). *Corporate Social Responsibility and Regulatory Governance: Towards Inclusive Development?* (UNRISD/Palgrave-Macmillan forthcoming) available at <http://kar.kent.ac.uk/11696/>

¹² John Ruggie *Protect, Respect and Remedy: a Framework for Business and Human Rights* UN Doc. A/HRC/8/5 7 April 2008 para.54

Though not expressly directed at issues of corporate governance, the implication of this approach is to place a wider stakeholder perspective at the heart of the duty to respect human rights. Indeed it is hard to see how any such duty could exist if this approach were not taken. A pure “shareholder value” approach would put into question the very notion of human rights responsibilities for companies.

From the above ICSR can be seen as an overarching concept that covers the general social and economic obligations of corporations that together can be said to define “good corporate citizenship” and includes best managerial practice in corporate governance to achieve this end. What remains unclear, however, is the precise model of corporate governance that ought to inform this concept.¹³ That said the trend appears to be towards a wider stakeholder model. In addition there is pressure to evolve a comprehensive system of corporate accountability that ensures ICSR leads to effective change in corporate behaviour.¹⁴ In this connection the legal status of the various instruments that contain ICSR standards becomes significant.

Historically, business groups have been wary of any attempts to extend greater international legal accountability for the social consequences of their activities. Corporate responsibility was seen as little more than the making of profits and the protection of shareholder value¹⁵ This approach dominated corporate responses to early attempts, in the 1970s, to extend social responsibility norms for MNEs into international law. Thus, in relation to the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (The Tripartite Declaration) the employer’s representatives argued for non-mandatory guidelines and got their way. The Tripartite Declaration would not have been passed had a mandatory code been sought.¹⁶ Equally the adoption of the

¹³ It is interesting to note that John Ruggie has commissioned research on the relationship between corporate governance under company law and the corporate duty to respect human rights: John Ruggie *Business and human rights: Towards operationalizing the “protect, respect and remedy” framework* UN Doc. A/HRC/11/13 22 April 2009 at paras.24-27.

¹⁴ See Ireland and Pillay, above n.11 and see generally Peter Utting and Jennifer Clapp *Corporate Accountability and Sustainable Development: Ecological Economics and Human Well-Being* (New Delhi, Oxford University Press, 2008).

¹⁵ See for a statement of this position David Henderson *Misguided Virtue: False Notions of Corporate Social Responsibility* (Wellington, New Zealand Business Roundtable, 2001).

¹⁶ See further John Robinson *Multinationals and Political Control* (Aldershot, Gower, 1983) at 172.

voluntary OECD Guidelines on Multinational Enterprises in 1976 was an attempt to preempt a more intrusive UN Code on Transnational Corporations, which itself was never adopted.¹⁷ However, this attitude of resistance could not last indefinitely. More recently, corporations have come to accept that some kind of accountability for the social consequences of their actions may be inevitable under international law and they have sought to influence the resulting framework.¹⁸ This change in attitude can be illustrated by reference to the emergence of a sense that firms should respect and observe human rights standards in the course of their operations, which will be discussed below.

A major characteristic of this change is the contrast in the legal status of norms relating to investor protection and corporate accountability. The former, being located mainly in binding International Investment Agreements (IIAs), create a regime of protective rules by which host countries should treat foreign investors, thereby reducing investment risk. The latter are located mainly in “soft law” instruments of a non-binding nature and create a “best efforts” guide to good corporate practice. It is arguable that this is not a balanced regime as it favours binding investor protection without reciprocal binding norms. That this should be so arises out of the very process of international law making in the field of corporations and foreign investment. The starting point is the positivist assertion that corporations are not subjects of international law and so no international law relating to them can exist. International law can only exist in relation to states. And yet there is a growing body of international norms that do deal with corporations and their investments.

As noted, some of these norms seek to impose standards of good behaviour on corporations. In this respect, international law is seeking to develop regulatory standards below which corporate behaviour should not fall. That these standards are mainly non-binding comes not from the fact that corporations are not subjects of international law but from the role that corporate interests play in the evolution of this system. How firms lobby home and host states and intergovernmental organisations (IGOs) is a key element here. Equally the binding nature of norms relating to investor protection also arises out of

¹⁷ See further Muchlinski *Multinational Enterprises* above n.1 at 660-62

¹⁸ See generally Jennifer Zerk above n.2 at 23-25 and see Muchlinski *Multinational Enterprises* above n.1 at 100-104.

this process. Thus in this regard corporate actors can be seen as “law makers” even though the traditional law making process of international law does not formally accord any status to such entities in that process.¹⁹

(2) Why ICSR and Who Wants It?²⁰

To date, a predominant concern of international law in relation to business has been the development of rules and procedures to promote and protect foreign investment both by individuals and corporations. It grew out of the belief that uncontrolled state power was a potential obstacle to the security of such investments, which could not always be adequately protected by national laws and procedures. This was particularly the case in newly independent post-colonial states, emerging from foreign control and administration during the decades after the Second World War. In such states an understandable hostility to foreign domination, a necessary spur to the independence struggle, might be combined with highly state centric policy instruments and practices, inspired by the model of the Soviet Union and its satellites, to create an administrative climate that was heedless to notions of respect for contractual obligations, or private property rights, when faced with the immediate needs of national reconstruction and development. Such policy responses took place in the context of the Cold War between the East and West, exacerbating the perception that foreign investors and their investments were not safe in the wider post-war world.²¹ Yet the post-colonial states offered major investment opportunities whether as sources of natural resources or potential new markets for goods and services. In order to seek a solution to the confidence problem that investing in these states had created Western governments responded by introducing bilateral investment protection and promotion treaties (BITs).

¹⁹ See further Peter Muchlinski “Multinational Enterprises as Actors in International Law: The Law Making Function” paper presented at the ILA Committee on Non-State Actors in International Law First Seminar Leuven 26-28 March 2009.

²⁰ This section is adapted from Muchlinski “Corporate Social Responsibility” above n.1 at 638-642.

²¹ See further M. Sornarajah *The International Law on Foreign Investment* (Cambridge, Cambridge University Press, 2nd ed, 2004) ch.1.

It has been argued that the protective standards contained in BITs display one overarching protection standard based on the investor's legitimate expectations.²² If so then this indicates an entry point for reconsideration of the balance between the protection of investor's rights and their wider social responsibilities. The protection of the investor's legitimate expectations requires an understanding of what those expectations are and how they come about. Clearly, such expectations will be conditioned by a number of factors. These will include, most obviously, the need for a stable and predictable investment environment free from arbitrary and capricious decision-making by the host state and its agencies. Thus far, existing BITs can serve to provide a useful function in protecting this class of expectations. However, the investor's expectations are not only tied up with preferences for certain types of governmental conduct. They arise out of the wider environment in which the investment is being made. They cannot, therefore, arise in some a-social context. It is what John Ruggie has termed the "social licence to operate".²³

Investors cannot enter a country as if there was no society or community there, upon which their activities will impact, whether for good or ill. Equally, the security and profitability of the investment will be closely linked with the investor's assessment of its feasibility within the context of the society that it enters. Good investment decisions are made in this light. It is also a major motivation behind increasing corporate concern about the social impact of their investments. The long term stability of an investment will be enhanced if it is able to bring tangible benefits to the society in which it is located. Accordingly, corporations may build in a social responsibility component into their project plans to further this goal.²⁴ Equally they will not be surprised by, or seek to change, regulatory regimes that can ensure a good social return on the investment.²⁵ The

²² See Todd Grierson-Weiler and Ian Laird, "Standards of Treatment" in Muchlinski, Ortino and Schreuer (eds) above n.1 ch.8.

²³ See text at n.12 above and see too Ruggie 2009 above n.13 at para.46.

²⁴ See further Christopher Bartlett, Sumantra Ghoshal and Paul Beamish *Transnational Management, Text cases and Readings in Cross Border Management* (Boston, McGraw-Hill, International Edition, 5th Ed, 2008) at 94-5 citing Shell and BP's commitments to sustainable development as an example of how multinational enterprises might seek to articulate the benefits they bring to less developed countries.

²⁵ See in this connection *Methanex v United States* Award of 3 August 2005 available at <http://www.state.gov/documents/organization/51052.pdf> or 44 ILM 1345 (2005) where the tribunal held that investors should be aware of the regulatory environment and the possibility of regulatory change in the

consequences of not doing so may be too costly in the changing environment of global business activity, set as it is in a new order of social and political expectations of business. Whether BITs in their current form can respond to these aspects of investor's expectations is open to discussion. For now the reasons behind the new expectations of business conduct will be briefly examined.

The "international corporate social responsibility" of multinational enterprises (MNEs) as the main type of foreign investor, can be seen as a response to popular perceptions concerning the loss of corporate accountability as an effect of economic globalisation.²⁶ It may be said to rest on the obligations that corporations owe to the societies in which they operate. This may be justified philosophically by appeals to a "social contract" and to the need of all actors, including non-state actors, to observe the preservation of human dignity through adherence to fundamental human rights.²⁷ There remains a great deal of disagreement over the precise extent of this issue. Indeed, there are equally strong voices arguing that the whole question of ICSR is much exaggerated and may well lead to policies that will harm the beneficial effects of international business activity.²⁸

Such opposition has existed through out time. Calls for corporate responsibility are as old as business itself. Indeed when one thinks of the campaign to emancipate slaves in the

absence of assurances to the contrary by the host country. In this case, the issue concerned environmental regulation. Such regulation can help to stimulate positive environmental performance from firms and to enhance their competitive position in this area. That in turn may result in calls for *regulation* not for deregulation.

²⁶ See Ruggie 2008 above n.12 at para.3: "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." See further David Korten *When Corporations Rule the World* (West Hartford, Conn, Kumarian Press, 1995) ch.11 "Marketing the World" and Naomi Klein *No Logo* (London, Flamingo Harper-Collins, 2000). For a more alarmist account see Noreena Hertz *The Silent Takeover: Global Capitalism and the Death of Democracy* (Arrow Books, 2002).

²⁷ See further Thomas Donaldson *The Ethics of International Business* (Oxford, Oxford University Press, UK Paperback Ed, 1992) and Peter Muchlinski "International Business Regulation: An Ethical Discourse in the Making" above n.1; Muchlinski *Multinational Enterprises* n.1 above ch.13.

²⁸ See from a neo-liberal perspective David Henderson *Misguided Virtue: False Notions of Corporate Social Responsibility* (Wellington, New Zealand Business Roundtable, 2001). For a critical development perspective see Michael Blowfield and Jędrzej George Frynas (eds) "Critical Perspectives on Corporate Social Responsibility" 81 *International Affairs* No.3 May 2005.

Eighteenth and Nineteenth centuries is this not a call for the social and moral responsibility of commercial actors?²⁹ Equally, calls for ICSR can be viewed as no more than the extension, to the international arena, of standards of regulation that are well known and highly entrenched in national laws, regulations and practices. They are the result of centuries of reform towards a more civilised performance of commercial activities and a recognition that, in the absence of regulation, human nature can direct itself to the commission of evil for personal gain.³⁰ This belief is also apparent in the most recent position taken by the UN Special Representative when he equates the need to protect against corporate wrongdoing in relation to human rights with the types of governance gaps and failures that produced the current economic crisis and which led to a permissive environment for corporate wrongdoing in general.³¹

The principal movers for reform on the international level are non governmental organisations (NGOs) campaigning for the increased regulation of corporate foreign investors, mainly from an environmental and developmental perspective, with observance of human rights also becoming an increasingly important topic. Their impact in the investment field was first strongly felt in the course of the negotiations for the Multilateral Agreement on Investment (MAI), where they sought to highlight the absence of any social responsibility provisions for MNEs, leading them to the view that the draft MAI was too one-sided and cared only for the protection of investors. Indeed, the MAI went further than many existing IIAs in that it not only covered post-entry treatment of investors and their investments but gave positive rights of non-discriminatory entry to them, as well as rights to delocalise disputes and take them to international arbitration.³² In the result the NGOs succeeded in placing environmental protection and labour rights

²⁹ On the issue of the abolition of slavery as an early campaign for commercial social responsibility (used to denote the fact that most slave owners were individual plantation owners not companies) see further the history of what may be the world's first campaigning international human rights NGO, Anti-Slavery International (Originally the Anti-Slavery Society) available at <http://www.antislavery.org/homepage/antislavery/history.pdf>. The fact that this campaign led to the eventual outlawing of slavery and, indirectly, to its later condemnation as an international crime, points to the possibility for international law to reform, by regulation, corporate and other business practices that are seen as anti-social or criminal.

³⁰ See further Jennifer Zerk above n.2 at 15-29.

³¹ See Ruggie 2009 above n.13 at paras.7-11 and 119.

³² See further Zerk above n.2 at 18-21 and P.Muchlinski "The Rise and Fall of the Multilateral Agreement on Investment: Where Now?" 34 Int'l. Law. 1033 (2000).

issues into the draft negotiating text, though this was never adopted as the negotiations broke down in 1998. In addition, NGO campaigning has highlighted numerous cases of abuse of human rights by or with the complicity of corporations. Perhaps the most important example has been the sustained campaign against the use of baby milk substitutes in developing countries, which has resulted in international codes of conduct,³³ and the campaigns for justice for the victims of the Bhopal accident³⁴ as well as more recent human rights campaigns in a range of areas.³⁵

Thus from the above it can be seen that appeals to ICSR in international law arise out of a concern for greater balance in the legal regime affecting corporate actors placed against the backdrop of an apparent accountability deficit arising out of the globalisation of international business through the operations of MNEs and from the existence of regulatory gaps which create a permissive environment for corporate wrongdoing. Taking into account how this legal regime is arising, the influence of corporate lobbying appears to be being countered by NGO lobbying and influence. Concerned NGOs can, through the use of alternative policy models, shift the debate away from industry specific concerns towards a more socially responsive agenda which can remain a powerful source of opinion even where national and parliamentary sovereignties may be weakened by globalisation.³⁶

In addition, the corporate lobbying of States and IGOs will not always bear fruit. The power of MNEs to set regulatory agendas should not be overestimated. Though they can act as powerful and influential lobbyists, MNEs do not possess anything like the power of states.³⁷ They lack diplomatic and military power, and their economic power, though

³³ See the World Health Organization *International Code on the Marketing of Breast Milk Substitutes* (Geneva, WHO, 1981) at http://www.who.int/nutrition/publications/code_english.pdf. See further Baby Milk Action website at <http://www.babymilkaction.org/pages/boycott.html> and the International Baby Food Action Network at <http://www.ibfan.org/site2005/Pages/index2.php?iui=1>

³⁴ See further the International Campaign for Justice in Bhopal at <http://www.bhopal.net/index1.html>

³⁵ See further the highly informative Business and Human Rights Resource Centre website at <http://www.business-humanrights.org/Home>

³⁶ Muchlinski *Multinational Enterprises* above n.1 at 109. See further John Braithwaite and Peter Drahos *Global Business Regulation* (Cambridge, Cambridge University press, 2000) ch.26.

³⁷ For a discussion of how MNEs have lobbied for changes in international investment law and policy see further Peter T. Muchlinski “ ‘Global Bukowina’ Examined: Viewing the Multinational Enterprise as a

considerable, is highly contingent.³⁸ Much depends on the general strength, and competitive conditions, of the market or sector in which firms operate, the overall state of the economy, and the degree of unique competitive advantage possessed by the firm. In effect only the most important firms will have the ability to lobby effectively. This tends to be the most financially powerful firms that can afford to spend the most on lobbying activities.³⁹

Equally the lobbying power of MNEs will be constrained by the fact that they are dependent to a significant degree on their home state to protect their capacity to do business transnationally. Furthermore, home states are unlikely to sacrifice wider foreign policy goals to the protection of the special interests of particular corporations or industries located in the home country.⁴⁰ But where state and corporate interests intersect then business friendly regimes may be sought at the international level. Therefore, it would be wrong to say that corporate influence exists in a uniformly favourable environment. States will not always prioritise corporate concerns and other non-state actors with an interest in the content of corporate regulation under international law will also have an input.

(3) The Case of Human Rights and Corporations⁴¹

Turning to human rights obligations of corporate actors, as noted earlier there appears to have been an acceptance of the need to observe certain international standards in corporate operations, but with an emphasis on self-regulatory approaches backed up by enforcement sanctions at national level. The initial position was that corporate actors

Transnational Law-making Community” in Gunther Teubner (ed) *Global Law Without a State* (Aldershot, Dartmouth Publishing, 1997) 79 at 90-97.

³⁸ In this regard the oft cited idea that the capital output of leading MNEs is greater than the GDP of certain nation states is quite misleading. The bases upon which the profits and losses of MNEs are calculated differ so greatly from the methods by which the GDP of states is calculated as to make such a comparison meaningless.

³⁹ See further Hui Chen, David Parsley, Ya-Wen Yang, “Corporate Lobbying and Financial Performance” June 2008 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1014264 who base their findings on publicly available data on the lobbying expenditures of leading US firms in the period 1998-2005. See too Dale D. Murphy *The Structure of Regulatory Competition: Corporations and Public Policies in a Global Economy* (Oxford, Oxford University Press, 2004).

⁴⁰ See John H. Dunning and Sarianna M. Lundan *Multinational Enterprises and the Global Economy* (Cheltenham, Edward Elgar, 2nd ed, 2008) at 693-4.

⁴¹ This section is taken from Muchlinski above n.19.

could not be held responsible for human rights violations which were exclusively the responsibility of states. Indeed the original version of the OECD Guidelines on Multinational Enterprises is silent on human rights in general.⁴² The only human rights related issues were those found in the Guideline on Employment and Industrial Relations which required only that employers follow national standards in employment relations and encouraged MNEs to respect the freedom of association and non-discrimination in employment. It was not until the 2000 revision of the Guidelines than an express reference to human rights was made.⁴³

By contrast the Draft UN Code of Conduct for Transnational Corporations contained a provision on human rights:

“Transnational corporations should/shall respect human rights and fundamental freedoms in countries in which they operate. In their social and industrial relations, transnational corporations should/shall not discriminate on the basis of race, colour, sex, religion, language, social, national and ethnic origin or political or other opinion. Transnational corporations should/shall conform to government policies designed to extend equality of opportunity and treatment.”⁴⁴

The main disagreement was not upon the need to include such a provision in the UN Draft Code but as to its legal force, as seen by the “should/shall” options. In this the Draft Code lays down what has since become the most contentious issue in the debate over the extension of human rights obligations to MNEs and other business enterprises, namely, whether a legally binding obligation in this regard is possible under international law. Here again the influence of corporate actors is seen in the vigorous initiatives taken to develop self-regulatory responses and to avoid legally binding obligations. In order to

⁴² OECD *Guidelines for Multinational Enterprises*, 21 June 1976, 15 ILM 977 (1976)

⁴³ Ibid, revision of 27 June 2000, II General Policies 2 “enterprises should...Respect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments.” Available at <http://www.oecd.org/dataoecd/56/36/1922428.pdf>

⁴⁴ UNCTC *The United Nations Code of Conduct on Transnational Corporations* (UNCTC Current Studies Series A No.4, New York, United nations, 1986) para.13 at 31.

explain this development it is first necessary briefly to trace the more recent discussions of the issue before UN human rights bodies.

During the late 1990s the UN Sub-Commission on Human Rights took an interest in the role of human rights obligations for TNCs. The approach was one of concern about the possibly deleterious effects of profit oriented business activities on the observance of human rights especially in the case of developing countries.⁴⁵ The response was to establish a Sessional Working Group whose task was to examine the possibility of drawing up a set of Norms for the human rights responsibilities of TNCs and other business enterprises. In 2003 this process resulted in the adoption, by the Sub-Commission of the *UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* (UN Norms).⁴⁶ The UN Norms sought to establish a normative “top-down” approach to the extension of human rights obligations to business actors. They would do so through the use of the corporate “sphere of influence” to require firms to include observance of the UN Norms as a condition of contracts with suppliers and distributors, and to observe the UN Norms internally in their dealings with employees and with the wider community. This self-regulatory approach would be backed up by monitoring and supervision by civil society groups intergovernmental organisations and others, while states would be expected to provide

⁴⁵ See further David Weissbrodt and Muria Kruger “Human Rights Responsibilities of Business as Non-State Actors” in Phillip Alston (ed) *Non-State Actors and Human Rights* (Oxford, Oxford University Press, 2005) 315 at 322-28; Larry Cata Backer “Multinational Corporations, Transnational Law: The United Nations Norms and the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social responsibility in International Law” 37 *Columbia HRLR* 287 at 321-32 (2006).

⁴⁶ *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* (hereafter *UN Norms*). (UN Doc. E/CN.4/Sub.2/2003/12/Rev.2(2003) 13 August 2003, available at <http://www1.umn.edu/humanrts/links/norms-Aug2003.html>, or www.business-humanrights.org. See too *Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* (hereafter *Commentary*) (UN Doc.E/CN.4/Sub.2/2003/38.Rev.2(2003) available at <http://www1.umn.edu/humanrts/links/commentary-Aug2003.html> or www.business-humanrights.org. See further for a summary and analysis of the principal provisions of the Norms Muchlinski *Multinational Enterprises* above n.1 at 519-24, David Weissbrodt and Muria Kruger “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights” 97 *AJIL* 901 (2003), Amnesty International *The UN Human Rights Norms for Business: Towards Legal Accountability* (London, Amnesty International, 2004); Rebecca M.M. Wallace and Olga Martin-Ortega “The UN Norms: A First Step to Universal Regulation of Transnational Corporations’ Responsibilities for Human Rights?” 26 *Dublin Univ. LJ* 304 (2004) and Backer above n.45 at 333-55.

legal remedies through which business actors could compensate those who had been exposed to human rights infringements.

Specifically, the UN Norms state

“Transnational corporations and other business enterprises shall provide prompt, effective and adequate reparation to those persons, entities, and communities that have been adversely affected by failures to comply with these Norms through, inter alia, reparations, restitution, compensation and rehabilitation for any damage done or property taken.”⁴⁷

The UN Norms also introduced some clarification of where such reparation is to be determined. In the words of paragraph 18 of the UN Norms: “In connection with determining damages, in regard to criminal sanctions, and in all other respects, these Norms shall be applied by national courts and/or international tribunals, pursuant to national and international law.” By taking this approach, the UN Norms envisaged a binding enforcement mechanism, centred on national courts and/or international tribunals, which offered directly effective rights of reparation for the individuals or groups affected as a consequence of a violation of the instrument.⁴⁸

This was a problematic position that gave rise to strong criticism of the UN Norms. In particular, although the UN Norms contained many binding norms of international human rights law some of the rights that were included may not have such a legal status.⁴⁹ Therefore, if the reparation mechanism was to be real and effective it required the adoption of an instrument that had the force of law within the legal orders of the signatory states, and which recognised the legal effectiveness of all the norms that it contained. Such an instrument will not be forthcoming from the UN Human Rights

⁴⁷ *UN Norms* ibid Section H para.18.

⁴⁸ Muchlinski *Multinational Enterprises* above n.1 at 533

⁴⁹ See further “In the Matter of the Draft “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights” Opinion of Professor Emeritus Maurice Mendelson QC (4 April 2004).

Council, the successor to the UN Human Rights Commission, or any other UN body, for the time being.

Furthermore, the traditional positivist argument that human rights obligations can only be carried by states has been repeated against the UN Norms. Thus the United States argued that, “human rights obligations apply to states, not non-state actors, and it is incumbent on states when they deem necessary to adopt national laws that address the obligations of private actors.”⁵⁰ In addition, as the UN Special Representative asserts, “preliminary research has not identified the emergence of uniform and consistent State practice establishing corporate responsibilities under customary international law.”⁵¹ This reality could not be side-stepped by the use, in the UN Norms, of an allocation of “primary” responsibility for states and “secondary” responsibility for business actors. According to Paragraph 1 of the UN Norms:

“States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognised in international as well as national law, including ensuring that transnational corporations and other business enterprises respect human rights. Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognised in international as well as national law, including the rights of indigenous peoples and other vulnerable groups.”

This provision places states over TNCs and other business enterprises as the principal regulators of human rights observance. In addition, it recognises that states and businesses operate in different fields and so each has a specific set of responsibilities in their particular field of operations, thereby obviating the possibility that business

⁵⁰ United States Statement on Item 17 of the Sixty First Session of the UN Human Rights Commission, 20 April 2005 available from www.business-humanrights.org. See too opposition from the UK, Saudi Arabia, Egypt and India “Company norms ‘must be on UN rights agenda’” *Financial Times* 8 April 2004 at 9. The International Chamber of Commerce was the foremost business group opposed to the UN Norms.

⁵¹ See John Ruggie *Business and human rights: mapping international standards of responsibility and accountability for corporate acts* UN Doc. A/HRC/4/35 19 February 2007 at Para.34. citing Zerk, above n.2 and State survey in A/HRC/4/35/Add.3.

enterprises could supplant the state in its obligations to uphold and observe human rights, or that the state could use the Norms as an excuse for not taking action to protect human rights.⁵² In response the UN Special Representative has stated that,

“...the norms would have extended to companies essentially the entire range of duties that States have, separated only by the undefined concepts of “primary” versus “secondary” obligations and “corporate sphere of influence”. This formula emphasizes precisely the wrong side of the equation: defining a limited list of rights linked to imprecise and expansive responsibilities, rather than defining the specific responsibilities of companies with regard to all rights.”⁵³

This is a direct change in approach from the UN Norms. It takes the establishment of human rights obligations for corporate actors away from a normative, compliance based approach, with all its attendant technical legal problems, towards an even more self regulatory approach, encapsulated in the idea of the corporate “duty to respect” human rights. This is a distinctive duty that seeks to determine what precise responsibilities companies have in relation to rights.

In this connection the UN Special Representative emphasizes that while corporations can be considered “organs of society”,

“they are specialized economic organs, not democratic public interest institutions. As such, their responsibilities cannot and should not simply mirror the duties of States. Accordingly, the Special Representative has focused on identifying the distinctive responsibilities of companies in relation to human rights.”⁵⁴

Thus the UN Special Representative rejects the notion central to the UN Norms, that corporate entities do have human rights responsibilities on the basis of their social

⁵² See *Commentary* above n.46 at paragraph 2(b).

⁵³ See Ruggie 2008 above n.12 at para.51.

⁵⁴ *Ibid* at para.53. The reference to “organs of society” alludes to the use of this phrase in the UN Norms which is taken from the Universal Declaration on Human Rights.

existence, and returns to their economic functions as the starting point for the “duty to respect”.⁵⁵ This concept is developed by the UN Special Representative to explain the limits of human rights obligations of corporate actors in what he would see as a more realistic framework, avoiding what he terms “strategic gaming” over who is responsible for what. This is not a return to some kind of “enhanced shareholder value” concept of corporate governance. It is, rather, an attempt to differentiate, as a matter of international law, between state obligations to protect human rights and corporate obligations to respect human rights. These can only be carried out by way of self-regulatory processes of corporate governance backed up by national legal sanctions, given the current state of international law. Equally, this approach does not exclude binding legal duties on corporations under international law for all time. It is a response to the legal realities of today based on existing systems of corporate risk assessment.

Central to the “duty to respect” is corporate “due diligence” a process that is already well known to firms as a method for assessing risks. In relation to human rights obligations this should require the development of a corporate human rights policy, the use of human rights impact assessments, the integration of human rights policies throughout the company and the tracking of performance.⁵⁶ The proper exercise of due diligence would avoid corporate complicity in human rights violations.⁵⁷ However the UN Special Representative’s approach is not devoid of mandatory regulation. The self-regulatory approach is backed up by legal enforcement mechanisms at the level of the state which retains the duty to protect human rights. Indeed the UN Special Representative is positive in his view that national legal remedies should be strengthened and made more accessible to claimants.⁵⁸

More recently, in the light of discussions with stakeholder groups a number of further questions concerning due diligence have emerged.⁵⁹ First, the concept is not used in

⁵⁵ On the social perspective of the UN Norms and their challenge to established notions of corporate governance see further Backer above n.45 at 357-74

⁵⁶ Ruggie 2008 above n.12 at paras 59-64.

⁵⁷ Ibid at paras 73-81.

⁵⁸ Ibid at paras.83-91.

⁵⁹ See Ruggie 2009 above n.13 at paras.71-84 on which this paragraph is based.

strictly transactional terms by the UN Special Representative but is a wider concept which focuses on the entire life cycle of a project or business activity aimed at avoiding and mitigating human rights risks. Secondly, not only the primary investor but also the bank or other lender financing the investment would have to undertake due diligence, though how this differs from the due diligence of the primary investor requires further clarification. Thirdly small and medium sized enterprises and members of supply chains will also have to undertake due diligence although the precise scope and extent of this is yet to be determined. A fourth issue is how to integrate human rights concerns into the decision-making processes of the firm: if it is a free-standing procedure the firm may not achieve sufficient connection between corporate decisions and human rights concerns while a fully integrated procedure may devalue the special qualities of human rights risk assessment. Finally, the issue of the relationship between due diligence and liability remains open to concern. Some fear that this process could create the risk of new liabilities by providing otherwise unavailable information against the company. This concern is rejected by the UN Special Representative who feels that, to the contrary, a well managed due diligence assessment could avoid liability as it encourages a robust risk assessment, encourages positive action to mitigate known risks and transparency about the state of the company's knowledge of the risk, avoiding accusations of misrepresentations and cover-ups.

From the above it is clear that while there are no longer any major doubts that corporate responsibility is a proper issue for international law to consider much still remains uncertain as to how this should be put into operation. In the human rights field there appears to have been an initial opposition to any standards being imposed on corporate non-state actors, followed by an acceptance that some level of international regulation might be needed in view of the complex transnational nature of corporate activities, which in turn gave rise to lobbying processes aimed at controlling the degree to which active regulation would emerge. The major home states of firms affected by proposed developments such as the UN Norms have sought to avoid any strong regulatory system from evolving, preferring to support a self-regulatory approach backed by national enforcement mechanisms. In this the work of the UN Special Representative has been

key and his approach firmly lies within the position favoured by international business, which itself is actively developing the kinds of due diligence mechanisms that the UN Special Representative favours.⁶⁰ It represents a significant policy shift from that which informed the UN Norms and one which may well have more enduring results for enhancing corporate accountability in this field, despite the absence of mandatory international legal obligations.

Concluding Remarks

This paper has sought to give an overview of the state of ICSR in international law. The very fact that this topic is being discussed before IGOs, and has resulted in numerous “soft law” instruments, is in itself a remarkable achievement, given the outright hostility to any discussion of these issues in the past. It shows that corporate opinion in these matters is open to change and that corporate influence over regulatory agendas, though undoubtedly considerable, is also open to change where it is co-ordinated by lobbying from other interest groups, notably civil society groups, and also states that may seek a better balance between corporate rights as investors under international law and corporate obligations. It is clear, however, that corporate interests favour a more self-regulatory approach and that in relation to human rights obligations this is what the UN Special Representative accepts. He does so not because of “industry capture” but because, in the current state of international law, little else may be possible for now. Significantly he does not rule out future developments, including some type of international institutional innovation, which might lead to improved effective remedies against corporate wrongdoing in relation to human rights.⁶¹ Thus the state of ICSR is as yet an emerging and experimental concept of international law but one which may well evolve into a fully developed system of hard law and hard liabilities. Whether that will be necessary depends

⁶⁰ See further John Ruggie *Human rights impact assessments - resolving key methodological questions* UN Doc. A/HRC/4/74 5 February 2007. The best example of such a reaction is that of Shell Oil which, in response to alleged complicity in human rights abuses in the Niger Delta region, revised its social responsibility policy and included human rights impact assessment into its business planning. See further Royal Dutch Shell *Shell General Business Principles* available at http://www-static.shell.com/static/aboutshell/downloads/who_we_are/sgbps/sgbp_english.pdf. see too Business Leaders Initiative on Human Rights *Human Rights Matrix* at <http://www.blihr.org/>.

⁶¹ Ruggie 2009 above n.13 at paras.106-114.

to a great extent on the ability of national legal and non legal remedies to offer effective redress for corporate wrongs. Ultimately time will tell, but the fact that national regulation has failed to avert economic crisis suggests that corporate governance and corporate responsibility may need to be enhanced through international law as well. Such a development would have to include ICSR on its agenda.