1. The evolving nature of the transnational corporation in the 21st century

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INTRODUCTION

Two key events held in 2015 revealed just how significantly the nature and role of corporations as members of global society have developed and changed over the past 70 years.¹ In particular, global business, in the form of the transnational corporation (TNC), is no longer seen as operating outside of the rules of international relations; now they are seen as forming an integral part of global society. The first event was the 20–21 May Business and Climate Summit.² Held 200 days before the UN Climate Change Conference in Paris (COP21), the Business and Climate Summit provided a unique forum for business and government leaders to engage in dialogue on the future of global climate change strategies. The second event was the Fourth Annual United Nations Forum on Business and Human Rights held in Geneva 16–18 November, during which a prominent guest list of stakeholder representatives from business, government and civil society engaged in dialogue on the future of human rights in a world where TNCs can have just as much, if not more, impact on human rights as governments can.

This chapter seeks, first, to examine briefly the history of the modern TNC since the founding of the United Nations in 1945, and, second, to chart the gradual evolution of regulatory norms aimed at shaping TNC behavior – norms which have taken shape at corporate level, at industry sector level, at national level and in international forums. Finally, this chapter highlights three recent developments with important implications for the future direction of the TNC in global society: (1) the drafting of a new instrument on TNCs and human rights, (2) the move towards taxation accountability for TNCs indicated in the Organisation for Economic Co-operation and Development (OECD)’s Base Erosion

¹ For details, see: <<http://www.ohchr.org/EN/Issues/Business/Forum/Pages/2015/forumBHR.aspx>>. See also para. 12 of UN Human Rights Council 17/4 (UN Doc. A/HRC/RES/17/4 (6 July 2011)).

² For details, see: <<http://www.businessclimatesummit.com/about/>>.

and Profit Sharing (BEPS) initiatives, and (3) the ‘carving out’ of areas of national policy, including environment and health, to protect them from challenge under the Investor–State Dispute Settlement (ISDS) provisions of the recently agreed Trans-Pacific Partnership (TPP).

THE EVOLVING NATURE OF THE TNC

As national economies have become more open under the guidance of International Monetary Fund (IMF) and World Bank-led trade and investment guidelines (the so-called Washington Consensus), so also have firms adapted their behavior to benefit from the new world order. It has become much easier to shift assets of all kinds (financial, human, physical) across national borders, and companies, along with their shareholders, have taken full advantage of this increased flexibility. Intra-firm trade has accelerated, and cross-border direct and portfolio investments have mushroomed.³ In certain industrial sectors – including pharmaceuticals, semiconductors, telecommunications, accounting and financial services – cross-border mergers and acquisitions, strategic alliances and international redeployment of corporate resources suggest a qualitative change in the nature of transnational corporate behavior.⁴

The first notable feature of the qualitative change affecting corporations at the global level relates to sheer size and weight. Global corporations now have revenues that rival the entire GDP of many countries. Of the 100 largest economies, 50 are global corporations while 49 are countries. The combined sales of the world’s top 200 corporations account for over a quarter of world GDP. Sheer economic weight means that TNCs can and do exert a great deal of influence over decision makers and over peoples’ lives generally. This influence is compounded by close connections and communities of interest linking TNCs to each other.

A 2011 study conducted by complex systems theorists at the Swiss Federal Institute of Technology in Zurich combined the mathematics used to model natural systems with comprehensive corporate data to map ownership among the world’s TNCs.⁵ The authors’ analysis of the

³ OECD, *Action Plan on Base Erosion and Profit Shifting* (OECD Publishing, 2013) <<http://dx.doi.org/10.1787/9789264202719-en>> Chapter 1.

⁴ (n 3).

⁵ Stephania Vitali, James B. Glattfelder and Stefano Battiston, ‘The network of Global Corporate Control’ (2011) <<http://arxiv.org/pdf/1107.5728.pdf>>. For discussion, see Hugh Compston, ‘The Network of Global Corporate Control: Implications for Public Policy’ (2013) 15 *Business and Politics* 357.

relationships of control among 43,000 TNCs identified a relatively small group of companies, around 300, mainly banks and mutual funds, holding controlling interests in the majority of the world's corporate assets.

The Swiss Federal Institute study complements other recent studies which have also (though less comprehensively) examined changing patterns of corporate ownership in the United States and elsewhere. Armour and Gordon, for example, noted that ownership patterns in the United Kingdom and the United States have changed – and converged – quite dramatically over the past decades.⁶ The US stock market, previously notable for its widely dispersed ownership pattern, in the 21st century has shifted so that institutional investors are now the dominant owners of US stocks. Similar change has occurred in the UK, but this time the change has been away from the cohesive, clubby domestic institutions of 1980s London towards a much more eclectic and international mix of passive funds, activist investors, private equity and sovereign wealth funds – very similar to, indeed often the same as, those which dominate the US market.⁷ The number of TNCs from developing nations has also grown, and a large proportion of these are State-owned. The UNCTAD *World Investment Report 2014* noted that there were around 550 State-owned TNCs, from both developed and developing countries, in 2013, with more than 15,000 foreign affiliates and foreign assets of over \$2 trillion. Although their number constituted less than 1 per cent of all TNCs, State-owned TNCs accounted for around 11 per cent of global FDI flows in 2013, making them FDI heavyweights compared with their privately owned counterparts,⁸ though this trend has since declined.⁹

Along with changing patterns of ownership have come changing patterns of doing business. In particular, the formation of flexible and mobile global supply chains has now become a key aspect of success for some of the world's largest global corporations. What this has enabled, however, is the ability of firms to distance themselves from the least desirable, messier aspects of doing business – such as dealing with disappointed

⁶ John Armour, 'The Berle-Means Corporation in the 21st Century', public lecture delivered at the University of Leicester, 21 May 2010. John Armour and Jeffrey N. Gordon, 'The Berle-Means Corporation in the 21st Century' (2008) working paper <<http://www.law.upenn.edu>>.

⁷ Ibid, and see Gerald F. Davis, 'The Twilight of the Berle and Means Corporation' (2011) 34 *Seattle University Law Review* 1121.

⁸ UNCTAD, *World Investment Report 2014: Investing in the SDGs: An action plan*, ix, xvii–xvii, 20–21.

⁹ UNCTAD, *World Investment Report 2015: Reforming international investment governance*.

or injured farmers, miners, workers or local communities – while retaining within the global brand name the most desirable aspects of doing business. Greater flexibility of capital and business relationships has also enabled the separation of taxable income from the activities that generate it, to the advantage of corporate profits and to the overall disadvantage of national tax-funded spending.¹⁰

At national level there has been a rethink of what the growing power and influence of corporations means for local company law regimes. A series of major corporate collapses and financial crises in Asia (1997–1998) and globally (2001, 2008) has ensured that governments now take much more seriously the need for good corporate governance. Moreover, good corporate governance is now being defined much more broadly to include social and environmental aims.

The Socially Responsible Corporation

Globalization has had a number of implications for legal reasoning about the nature of the corporation at national level. First, global economic integration has facilitated, and been facilitated by, increasingly harmonized understandings about the nature of the corporation as a shared enterprise. A number of scholars have examined differences between the Anglo–US understanding of the corporation as an owners’ (shareholders’) enterprise, on the one hand, and the continental European–German model of the corporation as a ‘stakeholder’ enterprise, on the other.¹¹ Over the past few decades, however, there has been a convergence of these two models, with company law in common law systems becoming more attuned to the interests of non-shareholder stakeholder groups, while company law in civil law systems has become more open to assertions of shareholder rights and powers.¹²

These shifts have occurred in a number of different ways. First, common law systems have increasingly become open to interpreting the directors’ duty to make decisions ‘in the best interests of the company’ broadly to allow for stakeholder concerns. In 2006, the UK Companies Act was

¹⁰ OECD (n 3).

¹¹ Louis W. Pauly and Simon Reich, ‘National structures and multinational corporate behavior: Enduring differences in the age of globalization’ (1997) 51(1) *International Organization* 1. See also Michael Spisto, ‘Stakeholder interests in corporate governance: Is a new model of governance a change for the better for South Africa: Part 1’ (2005) 18 *Australian Journal of Corporate Law* 129.

¹² Christine A. Mallin (ed.), *Handbook on International Corporate Governance* (Edward Elgar, 2006).

specifically amended to provide that, when considering what would be 'most likely to promote the success of the company' a director should have regard, *inter alia*, to:

- (a) the likely consequences of any decision in the long term;
- (b) the interests of the company's employees,
- (c) the need to foster the company's business relationships with suppliers, customers and others,
- (d) the impact of the company's operations on the community and the environment,
- (e) the desirability of the company maintaining a reputation for high standards of business conduct.¹³

The UK government has also confirmed that pension fund trustees are not prohibited from considering social, environmental and ethical issues in their investment decisions, provided they act in the fund's best interests. Similarly, the Australian Parliamentary Joint Committee on Corporations and Financial Services has also stated that the Australian Corporations Act of 2001 'permits directors to have regard for the interests of stakeholders other than shareholders'.

As well as new understandings of what 'good' corporate governance encompasses, new understandings of what constitutes a 'viable' and 'worthwhile' enterprise are also emerging and being recognized as having legal validity. Social enterprises and Benefit or 'B' Corporations have now been recognized in a number of American, South American and European jurisdictions. In other cases, the law, as is not uncommon, still lags behind some of the more advanced and 'disruptive' technological innovations and enterprise forms, most noticeably in the case of the sharing economy. While these newer and more innovative enterprise formats remain, as yet, local variations on the traditional corporation, and so are beyond the scope of a volume on TNCs, their implications for the future of TNCs are unknown and could well be transformative.

Within civil law jurisdictions, including those in continental Europe, Japan and, to a lesser extent, mainland China, internationalization has

¹³ Companies Act (2006) UK, section 172. For discussion, see Igor Filatotchev, Howard Gospel and Gregory Jackson, 'Key Drivers of "Good" Corporate Governance and the Appropriateness of UK Policy Responses' (January 2007) Final Report to the Department of Trade and Industry <<http://ssrn.com/abstract=961369>>. See also Amita Chohan, 'Is Section 172 of the Companies Act 2006 Capable of Delivering for all Stakeholders?' <<http://ssrn.com/abstract=2139528>>.

been combined with deregulation and greater shareholder orientation – and a shift away from network-oriented governance practices to more market-oriented practices.¹⁴ In the Netherlands, for example, an increasing number of foreign professional investors, an expanding shareholder base and pressures exercised by institutional investors to limit the use of anti-takeover devices, have all led to a shift in power in favor of shareholders.¹⁵ A new Law on Large Companies, which came into effect on 1 January 2013, allows large Dutch companies to choose either a one-tier or two-tier corporate structure, abolishing the previously compulsory requirement for all companies to have a supervisory board in addition to a management board, and thereby rendering Dutch corporate structures much more familiar to Anglo-US investors.¹⁶ Large Dutch companies listed internationally in London or New York have long been able to escape stakeholder requirements of Dutch law and began to abolish stakeholder institutions such as the works council, a civil-law institution designed to give employees a voice in company decision-making.¹⁷

In addition to new thinking about corporate accountability, in many nations there has also been a re-think of corporate liability, both criminal and civil, associated with evolving notions of corporate responsibility.

New Thinking about Corporate Criminal Liability

The concept of criminal liability and its application to corporations has been a particular focus of reform, as states have examined whether – and how – corporations can be held liable for wrongful conduct. Many countries, including Brazil, Bulgaria, Luxembourg and the Slovak Republic, still do not recognize any form of corporate criminal liability. Other countries, including Germany, Greece, Hungary, Mexico and Sweden, while not providing for criminal liability, nevertheless have in place regimes whereby

¹⁴ Jeffrey N. Gordon and Mark J. Roe (eds), *Convergence and Persistence in Corporate Governance* (Cambridge University Press, 2004). See also Cagman Palmer, 'Has the Worldwide Convergence on the Anglo-American Style Shareholder Model of Corporate Law Yet Been Assured?' (2011) 11 *Opticon* 1826 1.

¹⁵ Steven Schult and Henk Arnold Sijnja, Allen & Overy LLP, Netherlands <http://globalcorporategovernance.com/n_europe/217_223.htm>.

¹⁶ Baker & McKenzie, 'Doing Business in the Netherlands 2015' <<http://www.bakermckenzie.com/en/insight/publications/2015/03/doing-business-in-the-netherlands-2015/>>.

¹⁷ R.H. van het Kaar, 'The Dutch System of Enterprise-level Participation', *SEEurope Country Report*, November 2004.

administrative penalties may be imposed on corporations for the criminal acts of certain employees.¹⁸

Traditionally, countries where criminal liability does extend to corporations have adopted a 'derivative' liability approach, whereby the corporation is held liable for the acts of one or more individual offenders. Under the vicarious liability or *respondeat superior* approach, used in US federal criminal law and in South Africa, the offenses of individual employees or agents are imputed to the corporation where the offense was committed in the course of their duties and intended, at least in part, to benefit the corporation. Another variant is the 'identification' model found in the United Kingdom and other British Commonwealth nations. Under this model, the offenses of individual senior officers and employees are imputed to the corporation on the basis that the state of mind of these senior officers and employees is that of the corporation. An expanded version of this approach, found primarily in continental Europe, retains the focus on the actions of high-level officers and employees, but also incorporates a duty of supervision, although whether that duty is owed by the corporation or its officers individually varies from country to country.¹⁹

More recently, experts have adopted a more sophisticated, alternative understanding of corporate criminal liability, focused on the acts or omissions of the corporation itself. Under this model, rather than the corporation being liable for the acts of individual offenders, a corporation is liable because its 'culture', policies, practices, management or other characteristics encouraged or permitted the commission of the offense. Australia is a prime example of this 'organizational liability' approach.²⁰

Extra-territorial and Transnational Accountability of TNCs

As noted above, globalization has resulted in a shift from country-specific operating models to global models of corporate operation, based on matrix management and integrated supply chains. Governments have been forced to recognize the challenges these shifts represent to national legal systems. If corporations can simply evade the coverage of national laws by shifting

¹⁸ "“Corporate Culture” as a Basis for the Criminal Liability of Corporations” (February 2008) Report prepared by Allens Arthur Robinson for the United Nations Special Representative of the Secretary-General on Human Rights and Business.

¹⁹ (n 18).

²⁰ (n 18). See Part 2.5 of the Australian Commonwealth Criminal Code. See also art 102(2) of the Swiss Penal Code.

the relevant component of their existence to a different jurisdiction,²¹ then national governments must either seek to expand the coverage of national laws through extra-territorial legislation, and/or they must cooperate with other nations in creating transnational regulatory frameworks that operate without regard to national boundaries. Both of these things have occurred.

Extra-territorial Civil Liability

The US Alien Tort Claims Act (1789) (ATCA) is possibly the most well-known example of extra-territorial legislation used by plaintiffs in claims against TNCs. The ATCA essentially gives US federal courts jurisdiction over claims by aliens (foreign nationals) for torts committed in violation of the law of nations.²²

By 2010, the ATCA had resulted in only three jury trials in cases involving TNCs, resulting in two verdicts for the defendants,²³ plus one in favour of the plaintiffs.²⁴ But these were just part of a series of legal decisions raising expectations that the ATCA could provide an avenue through which foreign plaintiffs could seek relief against TNCs. Until September 2010, when, in a 2–1 decision, the US Court of Appeals for the Second Circuit held that corporations cannot be held liable for violations of (customary) international law, essentially on the grounds that international law does not recognize corporate liability.

Although the plaintiffs were granted review of the Second Circuit's decision,²⁵ the appeal was not successful. In 2013, the US Supreme Court

²¹ For discussion of examples, see Robin F. Hansen, 'Multinational Enterprise Pursuit of Minimized Liability: Law, International Business Theory and the Prestige Oil Spill' (2008) 26 *Berkeley Journal of International Law* 410 <<http://scholarship.law.berkeley.edu/bjil/vol26/iss2/4>>.

²² 28 US Code para 1350, provides that 'The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.'

²³ *Bowoto v. Chevron* No. 3: 99-cv-02506 (ND Cal) 1 December 2008; *Estate of Rodriguez v. Drummond* No. cv-03-be-0575 (ND Ala) 26 July 2007.

²⁴ *Nayeem Mehtab Chowdhury Chowdhury et al. v. WorldTel Bangladesh Holding Ltd and Amjad Hossain Khan* (2009) 1:08-cv-01659-bmc (US District Court for the Eastern District of New York, King County) August 2009. Another dispute involving Unocal and plaintiff claims, arising from Unocal pipeline operations in Myanmar, was settled in March 2005 for an undisclosed sum.

²⁵ *Kiobel v. Royal Dutch Petroleum Co.*, 132 S. Ct. 1738 (2012) (order directing re-argument on the question [w]hether and under what circumstances the Alien Tort Statute 28 U.S.C. 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States).

held that the presumption against extraterritoriality applies to claims under the ATCA and that nothing in the ATCA rebuts that presumption.²⁶ At least for the time being, therefore, the ATCA remains closed to claims against TNCs.

International Enterprise Liability (Multinational Group Liability)

Within the context of civil liability, the international enterprise liability approach recognizes that when a parent and its subsidiaries are part of an economically integrated enterprise, there is, in effect, a single corporate actor – the multinational group. In doing so, this model of liability allows courts to overcome the fiction of the ‘corporate veil’ that deems each separately incorporated subsidiary as a separate legal person, so that liability is imposed on the parent firm for the conduct of the group. At least in common law jurisdictions, however, there are as yet only limited signs that the concept of international enterprise liability is being accepted.²⁷ In Canada, the international enterprise liability approach has been recognized in contaminated-sites legislation.²⁸ In the United States, the milestone cases of *Kiobel v. Royal Dutch Petroleum Co.* and *Daimler AG v. Bauman*²⁹ appear to have closed off many jurisdictional avenues for holding TNCs accountable. At the same time, however, they have given rise to new thinking, and new approaches to TNC liability for abuses committed by subsidiaries abroad are being explored – including approaches which seek to ‘pierce the corporate veil’ using arguments akin to international enterprise liability.³⁰ The fact remains, however, that the current legal landscape

²⁶ *Kiobel v. Royal Dutch Petroleum Co.*, 569 US (2013). For discussion, see Anthony J. Colangelo, ‘The Alien Tort Statute and the Law of Nations in *Kiobel* and Beyond’ (2013) 44 *Georgetown Journal of International Law* 1329.

²⁷ See Draft Code of Private International Law, Argentina (1985) 24 ILM 269, article 10. For discussion, see Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (Hart Publishing, 2004) chapter 3.

²⁸ ‘Submission to the Canadian Democracy and Corporate Accountability Commission’ (17 June 2001) Aurora Institute <<http://www.aurora.ca/docs/AccountabilityCommSubmission.pdf>>.

²⁹ 134 S. Ct. 746 (2014). *Daimler* essentially held that a corporation is only ‘at home’ – and therefore subject to general jurisdiction – in, at most, two places: its state of incorporation and its principal place of business.

³⁰ For discussion of the doctrinal pressures on alternative bases of jurisdiction to fill the void left by *Daimler*, see Tanya J. Monestier, ‘Where is Home Depot “At Home”?’: *Daimler v Bauman* and the End of Doing Business Jurisdiction’ (2014) 66 *Hastings Law Journal* 233. See also Ma Ji, ‘Multinational Enterprises’ Liability for the Acts of their Offshore Subsidiaries: The Aftermath of *Kiobel* and *Daimler*’ (2015) 23 *Michigan State International Law Review* 397.

which frames TNC activities facilitates strategies, including outsourcing and the operation of the corporate veil, which serve to minimize or exclude legal liability exposure in the event of claims.³¹

Extra-territorial Legislation against Corruption, Money Laundering and Terrorist Financing

Possibly the most successful examples of an internationally coordinated network of legislation targeting TNCs (and individuals) acting illegally is in the (mostly) criminal law area of combating corruption, money-laundering and terrorist financing. The UN Convention Against Corruption (CAC) entered into force in December 2005 and obliges member nations to take anti-corruption measures in the public and private sectors, including measures against bribery of foreign officials, trading in influence and the concealment and laundering of the proceeds of crime.

The US Foreign Corrupt Practices Act (FCPA) of 1977 is the most widely enforced anti-corruption law. It was the first to introduce corporate liability and extraterritoriality for corruption offenses. Following the US precedent and the coming into force of the CAC, the UK Bribery Act of 2010 established company liability for corrupt acts committed by persons acting on behalf of the company anywhere in the world. The Act prohibits both bribery of public officials and business-to-business bribery. Article 13.3 of Russia's Federal Anti-Corruption Law No. 273 requires companies operating in the country to implement anti-corruption compliance programmes containing specific anti-corruption measures. By April 2015, there were 177 Parties to the UN CAC, making it one of the most widely ratified of all UN Conventions.³² Its significance here is that the network of anti-corruption legislation and mutual obligations to assist in anti-corruption enforcement measures established under the convention is something that no TNC can ignore.

The 1988 United Nations Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances was the first international convention to criminalize money-laundering by organizations, including TNCs. In 2005, the scope of the money-laundering offense was widened by the UN Convention Against Transnational Organized Crime, which

³¹ For discussion, see Robin F. Hansen, 'Multinational Enterprise Pursuit of Minimized Liability: Law, International Business Theory and the Prestige Oil Spill' (2008) 26 *Berkeley Journal of International Law* 410.

³² For details, see <<http://www.unodc.org/unodc/en/treaties/CAC/signatories.html>>. For details of country-level legislation against corruption, see the Business Anti-Corruption Portal <<http://www.business-anti-corruption.com/>>.

states that the offense applies to the proceeds of all serious crime, not just drug trafficking. The International Convention for the Suppression of the Financing of Terrorism came into force in April 2002 and requires member states to take measures to prevent their financial systems from being used by persons planning or engaged in terrorist activities. The Convention is supported by UN Security Council Resolution 1373 and the United Nations Global Counter-Terrorism Strategy adopted in 2006.³³ Each of these international law initiatives has resulted in the passing of domestic criminal law legislation in jurisdictions around the world with extra-territorial impacts.

The SRSG's 'Extraterritoriality Matrix'

In nearly all cases of litigation against TNCs with transnational cross-border implications, plaintiffs have faced one or more of a number of barriers to success. Most of these barriers are based on principles of private international law which establish limits to the exercise of state jurisdiction recognized by courts around the world. These principles include:

- The principle of *forum non conveniens*, which seeks to direct legal actions to the most appropriate forum;
- The principle of sovereign immunity;
- The act of state doctrine which prevents a court from inquiring into the legitimacy of a public act by a recognized foreign sovereign within that sovereign's own territory;
- The political act doctrine which, in a similar fashion to the act of state doctrine, prevents courts from investigating acts or omissions in foreign lands where doing so would have political implications;
- The doctrine of international comity, which has been defined as 'the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation'.³⁴

The importance ascribed in international relations to the concepts of sovereign equality, territorial integrity and non-interference (the idea that no state should be interfering, through the instrument of legislation, with the right of another state to determine the legal standards applying within its own boundaries) means that extra-territorial legislation is often controversial. The potential for diplomatic, legal, economic and other

³³ Adopted on 8 September 2006 in the form of a Resolution (A/RES/60/288) and a Plan of Action.

³⁴ *Hilton v. Guyot*, 159 US 113, 164 (1895).

tensions mitigates against the introduction of extraterritorial legislation and threatens its effectiveness when it is enacted. This is much less likely to occur where an international framework for such legislation, such as the CAC, exists. Recognizing the need for an agreed set of principles on the legitimacy, usefulness and acceptability of extra-territorial legislation, the Special Representative of the Secretary-General on Business and Human Rights (SRSG) has developed a matrix for assessment of extra-territorial initiatives.

In August 2010, the SRSG presented his third report on the implementation of his mandate to operationalize the 'Protect, Respect and Remedy' Framework for Business and Human Rights adopted by the UN Human Rights Council in 2008. Part III of the August 2010 report discusses the issue of extra-territoriality in the business and human rights context. While recognizing that extra-territorial legislation has often been controversial, the report also recognizes that global movements of goods, capital and people, and the global impacts of transnational corruption, climate change, bio-diversity depletion and terrorism have increased the potential for overlapping and/or conflicting jurisdictional claims. States have also recognized that effective regulation over local actors and events sometimes requires legislation that extends beyond national boundaries.

States have made use of domestic measures with extra-territorial implications to help influence the behavior of private actors abroad without the direct use of extra-territorial jurisdiction. Examples include asking locally incorporated parent companies to take certain steps in relation to the management of foreign subsidiaries. Other methods involve the use of reporting obligations, import or export controls, and taking steps to monitor and reduce risks associated with projects requiring export assistance. These measures can be highly influential in relation to private foreign conduct. They also often seem to attract less controversy than assertions of direct extra-territorial jurisdiction, presumably because they focus on acts or persons at home.

In addition, states are increasingly prepared to use direct extra-territorial jurisdiction in relation to criminal activity such as terrorism, money laundering, corruption and grave human-rights breaches. Often such legislation depends on the nationality of the perpetrator to justify the exercise of the enacting state's jurisdictions. In competition law and securities law, states have made more extensive jurisdictional claims over foreign companies and conduct, sometimes extending beyond 'territorial' or 'nationality' based claims to jurisdictional validity and based on previously contested legal theories (such as the 'passive personality' principle) or the universality principle when it comes to internationally recognized crimes.

The reactions of states – both to domestic measures with extra-territorial implications and to direct extra-territorial jurisdiction over private actors or activities abroad – depend greatly on regulatory motives and modes, and on

Table 1.1 The SRSG's 'Extraterritoriality' Matrix

	Public policies relating to TNCs	Regulation	Enforcement actions
Domestic measures with extra-territorial implications applicable to TNCs	Examples: corporate social responsibility policies relating to overseas subsidiaries; public procurement policies.	Examples: company laws; stock-exchange listing rules and guidelines; import-export regulations and controls.	Adjudicating alleged breaches of domestic legislation. Enforcing executive and judicial decisions against domestically located assets.
Direct extra-territorial jurisdiction over TNC actors or activities	Export-credit agency criteria: monitoring of overseas projects requiring financial assistance. Provision of consular support to overseas branches/subsidiaries.	Anti-corruption and anti-money laundering legislation with extra-territorial application. Anti-terrorism, drug-trafficking and other criminal-law legislation with overseas application.	Not accepted Requires assistance from local agencies in the overseas jurisdiction of enforcement.

the potential for inter-state regulatory conflicts. To facilitate a more nuanced discussion of extra-territoriality, the SRSG has constructed a heuristic 'extra-territoriality matrix' with two rows and three columns. The matrix shows that extra-territoriality is not a binary matter, but encompasses a wide range of possible regulatory actions, not all of which are equally likely to trigger objections. The matrix begins with two rows, representing a distinction between (a) domestic measures with extra-territorial implications; and (b) direct extra-territorial jurisdiction over actors or activities abroad. Its three columns represent a range of regulatory approaches, from policy based to regulation and enforcement actions. It seems that policy based or 'principles based' and 'outcomes oriented' regulation is less problematic for TNCs and their home states than more prescriptive legislation.³⁵

³⁵ Jennifer A. Zerk, 'Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas' (June 2010) Corporate Social Responsibility Initiative Working Paper No. 59.

Much of recent debate about the use of direct extra-territorial jurisdiction, and its implications for state sovereignty, has focused on its use in the antitrust (competition law) field. Certainly the use of direct extra-territorial jurisdiction here, especially where based on the ‘effects doctrine’, has contributed to inter-state tensions. While there now appears to be greater acceptance of this jurisdictional basis, problems remain, including inconsistent standards between states, which can create compliance challenges and uncertainties for companies. On the other hand, states have exhibited greater consistency and cooperation regarding conduct that they can agree is pernicious or immoral, such as participation in illegal cartels, highlighting the importance of international dialogue and soft law standards in building greater convergence of standards and approaches. When it comes to extra-territorial regulation, concerns about certainty, legitimacy, efficiency and competitiveness are nearly always expressed in relation to unilateral rather than collective actions. For business, as for states, extra-territorial measures remain much more acceptable and effective if they are based upon collective measures, and it is to such measures that this chapter now turns.

BRINGING TNCs INTO THE GLOBAL ACCOUNTABILITY SPHERE

Globally, a number of multinational efforts have been made to build regulatory structures designed to guide TNC behavior and, to a lesser extent, to render TNCs accountable for breaches of accepted standards. Some of these multinational regimes are limited to TNCs, while others (like the Global Compact) extend their coverage to other (business and non-business) organizations as well. These measures are similar to state regulatory measures based on internationally agreed standards, such as the CAC, but different in that they rely upon TNC action, rather than government action, for their implementation and effectiveness. As with voluntary codes at corporate, sector and national levels, such efforts have typically brought about meaningful results only to the extent that the relevant regime establishes standards which are measured, monitored and (rarely) enforced.

Measuring: The Global Reporting Initiative

The lack of global standards for measuring and reporting on the environmental and other impacts of TNC activities has long been a weakness in global systems of TNC accountability. The Global Reporting Initiative (GRI) goes some way to remedying this weakness by establishing a

comprehensive reporting framework for all business organizations. The GRI, first established in 1998, was formally inaugurated as a United Nations Environment Programme (UNEP) collaborating organization in 2002, the same year that the Sustainable Reporting Guidelines were unveiled at the World Summit on Sustainable Development in Johannesburg. The Sustainability Reporting Guidelines, now in their 4th generation (G4),³⁶ are supported by Sector Guidance principles applicable to different industry sectors, and other resources all aimed at facilitating greater transparency and accountability. As more and more jurisdictions work to strengthen and expand their corporate reporting requirements, the GRI is increasingly being used as a reference point. For example, all companies listed on the Johannesburg Stock Exchange have been required to report in accordance with the GRI Guidelines since 2003. Use of the GRI Guidelines is also promoted through cooperative engagement with other multinational initiatives including the OECD's Guidelines for Multinational Enterprises and the Global Compact. For most companies, though, subscribing to the GRI Guidelines remains entirely voluntary, and there is no independent body able to monitor, compare and verify reports that are issued by TNC. Nor is there any independent tribunal to which those aggrieved or harmed by TNC activities can have recourse.

The UN Draft Code for TNCs and the ILO Tripartite Declaration: Neither Measuring Nor Reporting?

The 1970s was the era of the 'new international economic order' and saw a number of initiatives aimed at bringing TNCs into the international legal order. A Commission on Transnational Corporations established by the UN Economic and Social Council in 1974 was charged with developing a multinational code of conduct for TNCs, and it produced a number of draft codes over the next two decades before the process was abandoned in 1994. Although never finalized as a legal instrument, the experience of drafting a Code of Conduct for TNCs has normative value and provides a valuable store of experience for current and future international lawyers to draw upon. It is particularly valuable for the lessons it teaches about the pitfalls of attempting to set binding legal rules and boundaries in the broad and ill-defined area of TNC responsibility.

³⁶ GRI Sustainability Reporting Standards, G4. For Discussion, see 'Linking G4 and the UN Guiding Principles: Comply with the UN Guiding Principles on Business and Human Rights through G4 Reporting' (GRI, 2014).

The 1970s also saw the emergence of the International Labour Organisation's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration). The MNE Declaration is a voluntary set of principles regarding employment and labor relations adopted by the ILO Governing Body in 1977. It has a lesser legal status than ILO Conventions adopted by the ILO Annual Conference, and its wording reflects its voluntary nature. While 'requests for interpretation' of Tripartite Declaration are specifically provided for, there is no dispute resolution mechanism as such built into the Declaration. A main achievement of the MNE Declaration was to generate a follow-up mechanism that asks governments, workers' and employers' organizations to respond at regular intervals to a survey questionnaire investigating aspects of national implementation of MNE Declaration principles. Unfortunately, response rates have not been high, amounting to less than 50 per cent of total ILO country membership, and when results of the regular survey are published, they are made anonymous, such that breaches of the principles by MNEs cannot be attributed.

Following a review of the follow-up mechanism of the MNE Declaration begun in 2010, the universal periodic survey has been replaced by a greater emphasis on promotional activities, capacity building and consultation, and the compilation of relevant data from different countries into a web portal known as the ILO Knowledge Information Gateway.³⁷

Reporting with (a Limited Degree of) Accountability: The Global Compact

Formally launched in 2000, the Global Compact allows not just TNCs and business organizations, but also public sector bodies, cities, academic institutions, NGOs and labor organizations, to sign up to a set of ten universally accepted principles in the areas of human rights, labor standards, the environment and, since early 2005, anti-corruption. The ten principles are drawn from four of the most widely ratified international legal instruments:

- the Universal Declaration of Human Rights;
- the International Labour Organisation's Declaration on Fundamental Principles and Rights at Work;

³⁷ ILO Governing Body, 320th Session, Geneva, 13–27 March 2014, Tenth item on the Agenda: Implementation strategy for the follow-up mechanism of and promotional activities on the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration), ILO Doc. GB.320/POL/10 (14 February 2014).

- the Rio Declaration on Environment and Development; and
- the United Nations Convention Against Corruption.

By November 2015, the Global Compact had grown to include over 12,000 signatories, including around 8,000 business participants. In November 2015, business participants included 3,447 companies with active participant (communicating) status. One of the most important commitments that a participant makes when joining the Global Compact is to submit annually a Communication on Progress (COP) using reporting indicators such as the GRI Guidelines. So far as TNCs are concerned, the COP must be placed on the UN Global Compact website and shared widely with company stakeholders. Failure to submit an annual COP results in a change in the participant's status from 'Active' to 'Non-Communicating'. Participants who do not communicate progress for two years in a row are delisted. As of November 2015, 2,063 companies were recorded as having 'Delisted' status on the Global Compact website.

The COP public reporting requirement was introduced in 2005 as one of a number of new 'Integrity Measures' developed in response to criticisms of the Compact as 'toothless' – allowing companies to associate themselves with a 'feel-good' UN initiative with no need to change their operations on the ground at all. Other measures introduced in 2005 included strict rules on the use of UN and Global Compact logos and a new complaints mechanism. Section 4 of the 2005 Integrity Measures creates a dialogue process for handling 'credible allegations of systematic or egregious abuse of the Global Compact's overall aims and principles by a participating organization'. The purpose of the dialogue is to 'assist participants in aligning their actions with the commitments they have undertaken with regard to the Global Compact principles'. If the participating company concerned refuses to engage in dialogue on the matter within two months of first being contacted by the Global Compact Office in regard to a credible allegation, it may be regarded as 'non-communicating' and identified as such on the Global Compact website until dialogue commences. If as a result of the dialogue process and based on a review of the nature of the matter submitted and the responses by the participating company, the continued listing of the participating company on the Global Compact website 'is considered to be detrimental to the reputation and integrity of the Global Compact, the Global Compact Office reserves the right to remove that company from the list of participants and to so indicate on the Global Compact website'.

An important achievement of the Global Compact is to facilitate dialogue and exchange between the language of human rights and the language of business management. The Global Compact's *Guide*

for *Integrating Human Rights into Business Management*, for example, presents human rights protection in management-friendly language, rather than the language of international law. Other guidance material includes the Good Practice Notes developed in areas as diverse as ‘Setting up a Multi-Stakeholder Panel as a Tool for Effective Stakeholder Dialogue’, and, ‘How Business Can Encourage Governments to Fulfil their Human Rights Obligations’.

The proportion of all TNCs that have signed up to be Global Compact participants remains low at less than 10 per cent. Country-wise, the highest number of actively communicating corporate participants comes from France (368 active corporate participants as of November 2015). Japan (164), Germany (144), the United States (123), Sweden (104) and the United Kingdom (90) each had around the same number of national companies actively participating in the Global Compact in November 2015.

A Limited Network of Accountability: The OECD Guidelines for Multinational Enterprises

The 1970s also saw the drafting by the OECD of its first set of Guidelines for Multinational Companies (1976). These have been developed, strengthened and updated on five occasions since 1976. The latest version of the Guidelines dates from May 2011³⁸ and describes itself as a set of ‘recommendations jointly addressed by governments to multinational enterprises’. While ‘Observance of the Guidelines by enterprises is voluntary and not legally enforceable’, the Guidelines do serve as a statement of the standards expected by adhering home nations of their corporations operating abroad in areas such as employment and industrial relations, human rights, environment, information disclosure, combatting bribery, consumer interests, competition and taxation.

Since 2000, the OECD Guidelines have incorporated and been supported by a unique implementation mechanism of National Contact Points (NCPs) – agencies established by adhering governments to promote and implement the guidelines. By 2015, there were national contact points established in each of the 35 OECD nations, mostly located within national ministries or departmental bureaus. As part of their role in assisting enterprises and their stakeholders with further implementation of the Guidelines, the NCPs receive and consider complaints (known as ‘specific instances’) lodged against any corporation operating within the national

³⁸ *OECD Guidelines for Multinational Enterprises* (OECD Publishing, 2011) <<http://dx.doi.org/10.1787/9789264115415-en>>.

jurisdiction of that NCP. The NCP's role upon receiving a specific instance is to investigate and, if necessary, provide a mediation and conciliation platform for resolving practical issues that arise. Under the relevant procedural guidance, NCPs issue a statement and notify the OECD Investment Committee of the results of any specific instance they receive, while at the same time 'protecting sensitive business and other information'. By 2015, approximately 330 specific instances had been considered by country NCPs, more than half relating to employment and industrial relations matters. In 2013 the Investment Committee established a Working Party on Responsible Business Conduct with a mandate to foster NCP functional equivalence across national differences, promote engagement with non-adhering countries, partner organisations and stakeholders, and to serve as a central point of information on the Guidelines.

Towards a Shared Understanding of Social Responsibility: ISO and Other Standards Organizations

The International Organization for Standardization (ISO) is an independent, non-governmental membership organization and the world's largest developer of voluntary International Standards. It essentially comprises a network of the national standards bodies of 162 ISO member countries. ISO standards include standards relating to occupational health and safety (ISO 45001), food safety (ISO 22000), sustainable events (ISO 20121) and environmental management systems (ISO 14000). By 2004, the ISO and its stakeholders had recognized the importance of, and the need to define, recognize and implement the roles and responsibilities of business in a social context. The ISO Working Group on Social Responsibility was established in 2004, and by 2009 its 91 member nations and 42 liaison organizations had developed a Draft International Guidance on Social Responsibility.

ISO 26000 Guidance on Social Responsibility was launched in 2010 following five years of negotiations among representatives from government, NGOs, industry, consumer groups and labor organizations around the world. Like the Global Compact before it, ISO 26000 is not limited to corporations, but is intended for use by public and private organizations of all types. ISO 26000 is not a formal ISO management system standard, and it is not intended for certification purposes. Rather, it comprises a consolidation of best practice social responsibility advice and guidance in seven core subject areas:

- Organizational governance;
- Human rights;
- Labor practices;

- The environment;
- Fair operating practices;
- Consumer issues; and
- Community involvement and development.

ISO 26000 is voluntary and is meant to complement and support, not supplant, other internationally recognized social responsibility standards. These include the SAI SA8000 standard for decent work.

In 1997, a multi-stakeholder NGO, Social Accountability International (SAI), was founded to develop the first globally recognized accreditation standard relating to socially responsible employment practices. The most recent version of SAI's SA8000 standard for decent work dates from 2014, and is the fourth issue of SA8000. It operates as a voluntary standard setting out the requirements to be met by organizations, including workplace conditions and effective management systems, at each specific work-site for which audited third-party certification is sought. The foundational elements of SA8000 2014 are based on internationally recognized human rights norms and key conventions of the ILO. The normative SA8000 certification audit reference documents are the SA8000: 2014 Standard and the SA8000 Performance Indicator Annex which sets out the minimum performance expectations of an SA8000 certified organization. Additionally, the SA8000 Guidance Document facilitates compliance with the Standard by providing interpretations of SA8000, examples of how to implement its requirements and examples of methods for verifying compliance.

Protect, Respect and Remedy: Towards a Globally Recognized Framework for Business and Human Rights

Attempts throughout the 1970s and 1980s to draft a globally recognized Code of Conduct for TNCs under the auspices of the UN Economic and Social Council (ECOSOC) failed, for reasons examined in depth elsewhere.³⁹ Attempts to obtain ECOSOC adoption of a 1990 Draft Code of Conduct for TNCs were abandoned by 1994. It was just over a decade later before the next serious attempt at UN level to explore the idea of a globally recognized set of human rights principles for TNCs was initiated in 2005, with the creation of a mandate for a Special Representative of the Secretary-General on the Issue of Human Rights

³⁹ D. Kinley and J. Tadaki, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law' (2004) 44(4) *Virginia Journal of International Law* 931–1023.

and Transnational Corporations and Other Business Organizations (the SRSO).

At its June 2008 session, the UN Human Rights Council was unanimous in welcoming the 'Protect, Respect and Remedy' framework for business and human rights, which was developed by the SRSO after widespread stakeholder consultations, and his mandate was extended for a second time to run until 2011. The SRSO's 'Protect, Respect and Remedy' framework is built around three basic principles: the state duty to protect human rights, the corporate responsibility to respect human rights and the need to build effective public and private avenues to access remedies for human rights harms.

States routinely provide support and assistance to their corporate nationals in their global trade and investment ventures. While states may not intend to allow corporate nationals to violate human rights in their extra-territorial operations, by their actions or omissions, states may facilitate or otherwise contribute to a situation in which such violations by a TNC occur. Extra-territorial activities of a TNC that violate international human rights law can give rise to state responsibility under customary international law if a relevant causal act or omission can be attributed to one or more states. Relevant customary international law principles have been codified in the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts. An act or omission of a TNC can be attributed to a state if the TNC is empowered by that state to exercise elements of public authority, and/or if the TNC acts on the 'instructions of, or under the direction or control of' the state. In addition, where a state, through aiding or assisting corporate activity, is complicit in the commission of an internationally wrongful act committed by another state or by the company itself, then the state will be internationally responsible.

So far as the corporate responsibility to respect human rights is concerned, the SRSO explains that in order to fulfill this responsibility not to infringe on the rights of others – to do no harm – corporations must engage in a process of 'due diligence'. For TNCs, human rights due diligence means first and foremost assessing the country context in which their activities take place and identifying any associated human rights challenges. Second, TNCs should consider what human rights impacts their own activities may have within the relevant country context within which they occur. The TNC should analyze the actual and potential impacts arising from its activities on employees, consumers, local communities and other affected groups. The production process, the products or services the company supplies, its labor and employment practices, the provision of security for personnel and assets, and the company's lobbying or political

activities, all need to be scrutinized for their human rights impacts and adjusted if necessary to prevent human rights harms.

The third principle that TNCs should consider is whether they might contribute to human rights harms through the relationships connected to their activities, such as with state agencies, business partners, suppliers and other non-state actors. How far or how deep this consideration should go will depend on the circumstances. The aim is to ensure that the TNC does not become implicated in third-party harm through its relationships with these other parties. According to the SMSG, the possibility of complicity:

can arise from a company's business activities, including the provision or contracting of goods, services and even non-business activities, such as lending equipment or vehicles. Therefore, a company needs to understand the track records of those entities with which it deals in order to assess whether it might contribute to or be associated with harm caused by entities with which it conducts, or is considering conducting, business or other activities.

Human rights due diligence thus involves both country-context risk assessment and supply-chain assessment. In terms of country-context risk assessment, the OECD has developed a Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones, as well as a Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas.

Outside of the minerals sector, TNCs have developed a number of approaches to address the many human rights gaps and challenges presented by 21st century supply chain systems and arrangements. These include setting clear expectations with suppliers for responsible business conduct through codes of supplier conduct – currently the most common application of the MNE Guidelines to supply chain relationships.⁴⁰ Consequences for non-compliance with codes can vary significantly – from limited or no action taken by the TNC to requirements to participate in monitoring and remediation, to consequences with direct impact on the business relationship such as suspension of new orders or contract cancellation.

⁴⁰ C. Sisco et al., 'Supply Chains and the OECD Guidelines for Multinational Enterprises' (2010) BSR discussion paper on responsible supply chain management. Presented at the 10th OECD Roundtable on Corporate Responsibility, OECD HQ, Paris, 30 June 2010.

RECENT TRENDS: THE FUTURE OF TNCs IN GLOBAL SOCIETY

A Legally Binding Global Framework for TNCs?

As the result of a September 2013 proposal bringing the issue of a 'legally binding framework to regulate the work of transnational corporations' back to the UN agenda, a vote was taken at the Human Rights Council on 26 June 2014. Two relevant resolutions were tabled at the 26th session of the Human Rights Council in Geneva in 2014. One, signed by Ecuador, South Africa, Bolivia, Cuba and Venezuela, and supported by 20 countries in a vote,⁴¹ proposed the establishment of 'an open-ended intergovernmental working group with the mandate to elaborate an internationally legally binding instrument on Transnational Corporations and Other Business Enterprises with respect to human rights' (resolution 26/9). The other (resolution 26/22), drafted by Norway, supported by 44 co-sponsors, and adopted by consensus by all regions, does not support a binding legal instrument, but opts instead to continue the mandate of the UN Working Group on Business and Human Rights for another three years.⁴² While including a request that the UN Working Group prepare a report considering, among other things, the benefits and limitations of legally binding instruments,⁴³ its main thrust is to reaffirm the normative content of the UN Guiding Principles on Business and Human Rights (UNGPs), focusing on improved domestic measures to implement the UNGPs, and improved access to remedies for victims of business-related abuses.

The first session of the open-ended intergovernmental working group took place from 6 to 10 July 2015 in Geneva and reflected the contentious nature of the debate between those who argue in support of

⁴¹ The vote was taken, and the resolution adopted, on 26 June 2014. Those in favor were Algeria, Benin, Burkina Faso, China, Congo, Cote d'Ivoire, Cuba, Ethiopia, India, Indonesia, Kazakhstan, Kenya, Morocco, Namibia, Pakistan, Philippines, Russia, South Africa, Venezuela, Vietnam. Countries which voted against were Austria, Czech Republic, Estonia, France, Germany, Ireland, Italy, Japan, Montenegro, South Korea, Romania, Macedonia, UK and USA. There were 13 abstentions (Argentina, Botswana, Brazil, Chile, Costa Rica, Gabon, Kuwait, Maldives, Mexico, Peru, Saudi Arabia, Sierra Leone, UAE).

⁴² For discussion, see Nicole R. Tuttle, 'Human Rights Council Resolutions 26/9 and 26/22: Towards Corporate Accountability?' *ASIL Insights* 3 September 2015 <<https://www.asil.org/insights/volume/19/issue/20/human-rights-council-resolutions-269-and-2622-towards-corporate>>.

⁴³ Human Rights Council, 26th Session, Agenda item 3, draft resolution. UN Doc A/HRC/26/L.1 23 June 2014. Adopted by consensus on 27 June 2014.

binding mechanisms to address business and human rights, and those who prefer pursuing the more voluntaristic path laid out by the UN Guiding Principles on Business and Human Rights.⁴⁴ Those in favor of a binding instrument argue that the Guiding Principles, while widely accepted, have proven insufficient and have not provided accountability or real remedies for corporate abuses. Those against a binding instrument maintain that the Guiding Principles need more time and effort to fully develop their potential and that the pursuit of a treaty may obstruct this goal and become an excuse not to implement the Guiding Principles.⁴⁵

Ultimately, it is likely to depend very largely on TNCs themselves, whether they pressure governments not to cooperate with any treaty-drafting process or whether, as in the case of the Global Compact, they become actively involved as participants. For unless TNCs themselves are actively involved in the drafting and ‘maintenance’ of a binding treaty, they are unlikely to either ‘own’ it or to recognize its legitimacy. So far, signs are that the Working Group set up to draft the treaty has yet to gain any convincing amount of support for its work from either governments or business. This does not necessarily mean that its work should cease, simply that energy should not be taken away from continued pursuit of the Guiding Principles. In other words, the debate should not be about a ‘Guiding Principles’ path versus a ‘treaty path’.

One of the main reasons for the success of the Global Compact has been that businesses actively decide for themselves when and how to sign up, implement and further the Global Compact agenda. Engagement can be minimal or fully activist. While it can be argued that the Global Compact contains no mechanism through which victims of TNC human rights abuses can obtain remedies, its transparency mechanisms – in particular its regular reporting requirements – do provide for accountability. More important, the Global Compact continues to demonstrate a promising capacity for self-strengthening. The Global Compact Integrity Measures, including the introduction of public reporting requirements and a complaints mechanism, were added in 2005; largely in response to criticisms of the Compact as ineffective and toothless. If the complaints mechanisms could be built upon and strengthened to include access to remedies, then

⁴⁴ For discussion, see Olga Fernandez Sixto, ‘Business and human rights: A study on the implications of the proposed binding treaty’ (October 2015) (unpublished LLM thesis, University of Essex).

⁴⁵ For discussion, see Anita Ramasastry and Doug Cassei, ‘White Paper: Options for a Treaty on Business and Human Rights’ (2015) 6 (1) *Notre Dame Journal of International & Comparative Law* i–x, 1–50.

the Global Compact could become a key part of integrating TNCs (as well as other organizations) into the global regulatory order.

Responsible Fulfilment of Taxation Obligations

Taxation is at the core of countries' sovereignty, but the interaction of domestic tax rules in some cases leads to gaps and frictions. The existing regime of domestic rules and over 3,800 bilateral double-taxation treaty regimes has, over time, developed weaknesses and gaps that create opportunities for base erosion and profit shifting (BEPS).⁴⁶ In particular, the spread of the digital economy has given rise to fundamental questions about how to determine residence and/or the jurisdiction where value creation occurs for tax assessment purposes. BEPS relates chiefly to instances where the interaction of different tax rules leads to double non-taxation or less than single taxation. It also relates to arrangements that achieve no or low taxation by shifting profits away from the jurisdiction where the activities creating those profits take place. No or low taxation is not *per se* a cause of concern, but it becomes so when it is associated with practices that artificially segregate taxable income from the activities that generate it.⁴⁷ The concern is that rapidly increasing amounts of income generated by an increasing number of cross-border transactions and a volume of cross-border activity may go untaxed.

In the changing international tax environment, countries have expressed concern about how international standards on which bilateral tax treaties are based allocate taxing rights between source and residence states.⁴⁸ At the urging of G20 finance ministers, the first version of an OECD action plan to address BEPS issues in a coordinated and comprehensive manner was issued in 2013. In October 2015, the OECD released its final BEPS Package. The Package includes reports on 15 'actions', ranging from countering harmful tax practices and treaty shopping to addressing transfer pricing, interest deductibility and transparency, to exploring the tax

⁴⁶ Itai Grinberg and Joost Pauwelyn, 'The Emergence of a New International Tax Regime: The OECD's Package on Base Erosion and Profit Shifting (BEPS)' *ASIL Insights* 28 October 2015 <<https://www.asil.org/insights/volume/19/issue/24/emergence-new-international-tax-regime-oecd%E2%80%99s-package-base-erosion-and>>.

⁴⁷ OECD, *Action Plan on Base Erosion and Profit Shifting* (OECD Publishing 2013) <<http://dx.doi.org/10.1787/9789264202719-en>>.

⁴⁸ Stephen E. Shay, J. Clifton Fleming and Robert J. Peroni, 'Designing a 21st Century Corporate Tax – An Advance U.S. Minimum Tax on Foreign Income and Other Measures to Protect the Base' (2015) 17 *Florida Tax Review* <<http://ssrn.com/abstract=2651928>>.

implications of the digital economy.⁴⁹ The end result of the BEPS Package should be an increase in the density of the global network of transparency, monitoring and accountability rules to which TNCs are subjected, at least in respect of their financial transactions.

The BEPS Package marks the first time that real progress has been made towards a multinational tax regime. Its successful approval by G20 leaders at a summit in Antalya, Turkey, on 15 November 2015 has been attributed to good political timing (following the global financial crisis and at a time when international tax issues were the focus of global political attention), and the voluntary, soft-law nature of (most of) the commitments involved.⁵⁰ The challenge will now be to expand consensus on BEPS measures beyond the 34 OECD and eight non-OECD members of the G20 and to establish a viable and enduring third-party dispute-resolution regime,⁵¹ possibly by linking in to trade and investment-related dispute resolution mechanisms.

Trade and Investment and Social Responsibility

The Ruggie process found a lack of integration between regular government agencies with economic, commercial and trade mandates, and those with human rights mandates. Yet it identified considerable scope for trade and investment frameworks to become vectors for manifesting state duties to respect and protect human rights from adverse impacts by business actors. On the one hand, investor protection clauses, particularly investor-state dispute settlement clauses in bilateral and multilateral investment treaties, are seen to constrain host governments' abilities to regulate for social or environmental aims that potentially impact upon investor activities. Stabilization-clauses in investor-host-state agreements have a similar effect.

However, considerable precedent exists for using trade policy to promote governance improvements in partner states, though these have mostly been effective in regard to preventing reductions in labor rights. EU trade agreements, for example, have long contained human rights clauses enabling Brussels, in effect, to use trade-related actions to shape the political governance of emerging market and developing country partners. Since 1995, the

⁴⁹ 2015 BEPS Final Reports <<http://www.oecd.org/ctp/beps-2015-final-reports.htm>>.

⁵⁰ Grinberg and Pauwelyn (n 45).

⁵¹ For discussion, see Grinberg and Pauwelyn (n 45), noting that Action 14 of the Package identifies mainly non-binding ways to make dispute resolution mechanisms under bilateral tax treaties (the so-called Mutual Agreement Procedure or MAP) more effective. But it falls short of imposing binding arbitration.

EU has required all trade agreements to contain provisions linking trade and other preferences to the fulfillment of human rights commitments in beneficiary countries. Under the EU's Generalized Scheme of Preferences (GSP) the EU offers developing states preferential access to the EU market subject to certain conditions. In addition to the core GSP tariff preferences, the EU also operates a system of positive conditionality: GSP+. Under GSP+, eligible states which commit themselves to key, universal obligations relating to human and labor rights, environment and good governance may apply for additional preferences. Under a third tier of the scheme, 'everything but arms', least-developed states (as defined by the UN) can benefit from free market access for all products, except for arms and ammunitions.

Much of the debate during recent negotiations over the TPP centered on how best to balance the free trade and investment-promoting economic aims of the treaty with the need to preserve state sovereignty in policy areas such as environmental protection and health. This balance was achieved through a number of carve-out provisions, ostensibly aimed at limiting the potential for TNCs to seek redress from host governments in the event of regulatory measures impacting on company profits. In reality, however, the wording of the relevant provisions in the TPP reflects a minimal compromise inserted to satisfy Australian demands that certain health measures, such as cigarette plain-packaging laws and the Pharmaceutical Benefits Scheme (PBS) could not be the subject of ISDS procedures.

TPP Article 9.15, titled 'Investment and Environmental, Health and other Regulatory Objectives', ostensibly seeks to ensure that 'Nothing in [Chapter 9] shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives'. Article 9.15 does not so much specifically allow TPP parties to enact environmental and/or health-related regulatory measures as it seeks to ensure that Chapter 9 itself is not used to limit the capacity of TPP Parties to enact such measures. Similarly, the wording of Article 9.16 in no way represents any sort of 'carve out' for 'Corporate Social Responsibility' measures that a TPP Party might seek to impose upon investors. Rather, its language expresses a sentiment without any legal effect at all:

The Parties reaffirm the importance of each Party encouraging enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognised standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that Party.

The whole effect is compounded by the wording in the TPP Annex which purports to list what are and are not understood to be measures amounting to ‘expropriation’ – wording which leaves so much leeway for different definitions as to be almost entirely meaningless:

Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations, except in rare circumstances.

This wording only protects from litigious attack public health and environment measures that are designed and applied for ‘legitimate’ public health, safety and/or environmental objectives; measures which even then, in ‘rare circumstances’ (which remain undefined), can still be deemed as an ‘indirect expropriation’.

The only clear, hard-and-fast carve-out relates to tobacco control, which is explicitly and definitely removed from possible ISDS litigation – although governments *themselves* can still challenge other governments on tobacco, as part of inter-state dispute settlement provisions.

The TPP also compares poorly to the European Union’s proposals to impose procedural and accountability discipline on ISDS in response to concerns expressed about ISDS provisions in draft treaties being negotiated by the EU. A 2015 EU concept paper notes a ‘new approach’ to the negotiation of ISDS in investment protection treaties, both in terms of substance (investment protection rules) and procedure (ISDS mechanism), found in the recent (2014) EU–Canada and EU–Singapore free trade agreements.⁵² The new approach is reflected in a number of different provisions designed to preserve and protect the legitimate policy-making and associated regulatory space of states parties to the relevant FTA. These include:

- The preamble in the Canada–European Union Comprehensive Economic and Trade Agreement (CETA) which makes clear that the EU and Canada preserve their right to regulate and to achieve legitimate policy objectives, including public health, safety, environment, public morals and the promotion and protection of cultural diversity;⁵³

⁵² European Commission, ‘Concept Paper: Investment in TTIP and beyond – the path for reform. Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court’ (May 2015) <http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF> (accessed 4 February 2016).

⁵³ Canada–European Union Comprehensive Economic and Trade Agreement (CETA), text agreed as at August 2014, Published on 26 September 2014;

- A clear, precise and closed-text definition of ‘fair and equitable treatment’, designed to clarify the content of the standard without leaving unwelcome discretion to arbitrators. Similarly detailed language has been used to define what constitutes indirect expropriate, specifically excluding claims against public policy measures;⁵⁴
- Preventing forum shopping by specifically prohibiting the making of an investment or business re-organization for the purpose of bringing a case against a host government (as is alleged Philip Morris did to bring its case against Australia). No other ISDS contains such a provision. Moreover, ‘mailbox’ companies are unable to bring cases to arbitration under the CETA. Only companies with real business operations in the territory of one of the Parties will be covered by the investment protection provisions;
- The CETA also incorporates the *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration*, which are designed to ensure full mandatory transparency of the arbitration process. All documents (submissions of the disputing parties, decisions of the tribunal) will be made publicly available. All hearings will be open to the public. Interested parties (NGOs, trade unions) will be able to make submissions;⁵⁵
- Under CETA, the EU and Canada can issue binding interpretations on how its provisions are to be interpreted, and the ISDS tribunal is obliged to respect those interpretations. Governments, not tribunals, are thus given control over interpretation of the rules;⁵⁶
- The CETA also includes a code of conduct for arbitrators, aimed at ensuring impartiality and high ethical and professional standards;⁵⁷
- There is a fast-track system allowing for the speedy rejection of unfounded, frivolous or vexatious claims;⁵⁸
- The CETA introduces a ‘loser pays principle’ meaning that investors who bring a case and lose pay for the entire legal costs of the proceedings;⁵⁹

not in effect as of February 2016, <<http://ec.europa.eu/trade/policy/in-focus/ceta/>>.

⁵⁴ CETA Section 4: Investment Protection. Article X.9 Treatment of Investors and of Covered Investments.

⁵⁵ CETA, Article X.33: Transparency of Proceedings.

⁵⁶ Declaration to Investment Chapter Article X.11 Paragraph 6.

⁵⁷ CETA, Chapter 14. Rules of Procedure and Code of Conduct: Annex 1: Rules of Procedure for Arbitration.

⁵⁸ CETA, Article X.29: Claims Manifestly Without Legal Merit; Article X.30: Claims Unfounded as a Matter of Law.

⁵⁹ CETA, Chapter 10. Investment; Article X.36.

- Parties to the CETA have expressly agreed to work towards creating a future appeals mechanism aimed at ensuring consistency and predictability of the system;
- Also aimed at avoiding divergent verdicts and possible double compensation is the provision in the CETA which prohibits parallel proceedings so that investors are obliged to drop cases in national courts if they want to pursue ISDS.⁶⁰

CONCLUSION

Three themes running throughout this chapter characterize the evolution of the modern concept of corporate social responsibility, and thus of the modern TNC. These are: (1) an evolving understanding and acceptance of increased *transparency*; (2) an evolving understanding and (sometimes reluctant) acceptance of increased levels of *accountability*; and (3) a move towards greater acceptance of the need for TNCs to be involved in providing more effective *remedies* for individuals and groups harmed as the result of TNC behavior. These three themes form a constant motif throughout the concerns of an expanding network of stakeholders impacted by – and seeking to influence – TNC behavior, and throughout the various layers of an emerging global regulatory framework for TNCs. Transparency, accountability and access to effective remedies are also concerns at the forefront of recent developments in international tax negotiations and trade and investment treaty negotiations. These concerns reflect and demonstrate the public and social nature of the modern TNC in the 21st century.

⁶⁰ CETA, Chapter 10. Investment; Article X.23: Proceedings under different international agreements. See also Chapter 14. Dispute Resolution, Article 14.3: Choice of Forum.