18 The Role of Corporate Social Responsibility in the Development of International Law

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18.1 Introduction

The business world and the corporations taking centre stage in this world have come under increased public scrutiny in the past decades, furthermore, they have become subject of intensifying debates regarding their nature, their role in society and certain questions pertaining to their social responsibility.[1] This public debate is made particularly timely, on the one hand, by the fact that the number[2] of transnational corporations (TNCs) and the volume[3] of their operations have grown exponentially in the past decades, which has led to a surge of their economic power and to an increase of their influence.[4] On the other hand, due to their increased international operations these corporations become important actors of the international economy and are thus ever more detached from the legal obligations of any particular state. This phenomenon springs, in particular, from the fact that the efficient and flexible business operations of TNCs are enabled by the simultaneous, joint yet complementary activities of legal entities registered in different countries, which means that more than often, their financing, production and plants, and respectively their commercial and marketing operations are all located in different countries.[5] Their different corporate identities, tied to certain coun-

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1 The social responsibility of ownership is also stipulated in the Hungarian constitution which came into power om January 1st, 2012. *See*: András Téglási, 'A tulajdon védelme Magyarország Alaptörvényében – különös tekintettel az alkotmánybírósági gyakorlat lehetséges változásaira', *Alkotmánybírósági Szemle*, Issue: 2012/2, pp. 121-122; For possible trajectories of responsible company creation in Hungary, *see*: Ádám Auer, 'A felelős társaságirányítás lehetséges útjai Magyarországon', in: Zoltán Csehi & Katalin Raffai (eds.), *Állam és magánjog: Törekvések és eredmények az Európai Unió joga, a nemzetközi magánjog, polgári jog és polgári eljárásjog keresztmetszetében*, Budapest, Pázmány Press, 2014, pp. 29-37.

2 *See*: http://unctad.org/en/Pages/DIAE/Transnational-Corporations-Statistics.aspx.

3 On the increase of foreign capital, *see*: http://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=1245.

4 *See*: Beth Stephens, 'The amorality of profit: Transnational Corporations and Human Rights', B*erkely Journal of International Law*, Vol. 20, 2002, p. 57.

5 Philip I. Blumberg, 'The corporate entity in an era of multinational corporations', *Delaware Journal of Corporate Law*, Vol. 15, No. 2, 1990, p. 325.

tries each, are thus actually reflecting only one economic and business entity.[6] As a result, individual countries can independently regulate only one slice of TNC operations at a time. International law has, however, been unable to keep up with the rapid pace of development of the international economy, therefore the legal obligations and responsibilities of TNCs have been left mostly unregulated.[7] It is this lack of benchmarking which is being addressed by corporations through their voluntary initiatives of social responsibility.

What has been the historical path of development of TNCs? When did voluntary social responsibility begin to appear, and what was its role? How is it connected to the internationally recognized human rights? What could be the importance of corporate social responsibility in international law? The current study seeks to find an answer to these novel questions of international law, at the same time striving to grasp the essence of the dilemma surrounding the social responsibility of TNCs and its relationship to internationally recognized human rights. The study provides firstly a succinct overview of the emergence of TNCs and the human rights dilemmas surrounding their operations. (1). Subsequently, the study tries to explore the reasons that led to the emergence of voluntary social responsibility initiatives as well as their main objectives. (2). Finally, the study outlines the possible connections between corporate social responsibility and international law along with its future perspectives (3).

The goal of the study is to provide a comprehensive picture on the emergence of voluntary corporate responsibility in the business world as well as on its relations to internationally recognized human rights, thus contributing to the systematization of the public debate surrounding the relationship of the business world and internationally recognized human rights.

18.2 The Emergence of Transnational Corporations in International Law

The roots of companies whose legal entity is separated from that of their owners to enable their economical operations can be found in Roman law, whereas the precursors to their counterparts present in the modern business world date back to 15th century British law.[8] In the era of intensifying industrialization it became obvious that given the revolutionized framework of business operations, the company, as an organizational unit, would step into the limelight as an efficient element of the economy. As a response to the ever expanding business environment and intensifying commercial transactions, and also to the era's technological advances, the principles of free establishment of companies,[9] of lim-

6 As argued by India in the so-called Bhopal case, see: Stephens 2002, 45.

7 John Gerard Ruggie, *Just Business,* New York W.W. Norton & Company Ltd., 2013, pp. 19-36.

8 Stephens 2002, p. 5.

9 In the beginning, companies were set up through legislative acts, the possibility of general company creation was granted for the first time in New York State, in 1811. N.Y. Act of Mar. 22, 1811.

ited liability and of the tradability of ownership became widespread phenomena at the beginning of the 19th century, and those enabling companies to further establish their own companies, in other words, to create subsidiaries, towards the end of the same century.[10] Such an expansion of rights was in tune with the widely accepted principle according to which the enabling of corporate operations is one of the most important tenets of economic growth.[11] The emergence and expansion of these corporate rights led to the creation of so called 'multi-layer companies', whose main trait is that, whereas on the market they appear as one single enterprise, they are however made up of several companies built onto, and owning each other.[12] Economically they form a single unit, nevertheless their legal identity is manifold, as a result of which traditional corporate law and legal approaches have constantly veered away from the realities of the business environment in the course of the past century. This is particularly applicable to the conglomerates dominating the economic and business life of the modern world, in the case of which the holding companies are not present simply as investors, but, as the active managers of their subsidiaries. They play a central role in defining the business approaches and strategies which impact the entire group of companies.[13] It thus ensues that one of the greatest challenges of modern corporate law is the functioning of companies as integrated groups and its consequences, that is to say, the question of how it can adjust its concepts and basic regulations to the realities of the economy.

In parallel to this ubiquitous challenge of corporate law, and along similar considerations, the past half a century has also brought about a multiplication[14] of corporate conglomerates working across borders.[15] These conglomerates are characterized by the fact that their functions, for example production, financial planning, trading or marketing are hosted by different countries. This economic phenomenon is well highlighted by the fact that the development of investment protection regulations is considered by many authors to be one of the great successes of international law,[16] as both the number of

10 Blumberg 1990, p. 286.
11 Blumberg 1990, p. 287.
12 In this phase of corporate evolution, some licenses were already granting additional rights, for example, the institution of limited liability, which in its primary form was meant to safeguard the rights of investors and not the corporation as a whole.
13 Blumberg 1990, p. 327.
14 The first company to become a transnational corporation was the American *Singer* sowing machine factory, when it built its Glasgow assembly plant in 1882, *see*: Peter Muschlinski, *Multinational Enterprises and the Law,* Blackwell Publishers, 1995, p. 21.
15 According to UNCTAD surveys, the volume of foreign capital investment has always fluctuated in accordance with the trends of the global economy, but, on average, it has grown constantly in the past half a century, reaching 1.23 billion US dollars in 2014. Further to this, both the operating volumes and the number of foreign assets owned by TNCs have grown constantly. For further information, *see*: World Investment Report 2015, United Nations 2015.
16 Jeswald W. Salacuse, 'The Emerging Global Regime for Investment', *Harvard International Law Journal*, Vol. 51, No. 2, 2010, p. 428.

investment protection agreements, and the volume of investment transactions facilitated by these agreements has shown a consistent, almost yearly, increase since WWII. This growth was then further multiplied at the beginning of the 1990s with the collapse of the alternative offered by the planned and command economies.[17] According to the UN special rapporteur of this area, there are approximately 80,000 TNCs operating globally, and about ten times as many subsidiaries.[18] Similarly to companies regulated by domestic legislation, TNCs are also characterized by having integrated operations and organizing their activities along one central business strategy. As a result, branches operating in certain countries will not necessarily work towards their own interest and competitiveness, but rather towards that of the overseeing TNC.

It is primarily due to the above that individual states cannot regulate the entirety of a corporation's operations anymore but need to restrict themselves to one segment at a time.[19] While many of the existing companies switched over to a transnational economic and operational model, the corporate law regulating their functioning remained stuck in a 19th century framework, which led to the dissociation of business structures from legislation. As a result, the two characteristics of the constantly increasing international trade of the last century are, on the one hand, the dependence of countries on each other, and, on the other, the substantial and constantly increasing role of TNCs. In this environment, TNCs have come on the radar of international law primarily due to the lack of domestic regulations and standards and have become subject of increased scrutiny both in the academic debates regarding the development of international law and in the regulations of international organizations.

International law has considered foreign investment as a token of progress, and in the past half a century has in consequence defined the relationship between the state of incorporation and the host state, the degree of the host state's obligations with regards to investors, and furthermore each state's human rights obligations with regards to their own citizens. However, it did not regulate on the relationship between the TNCs and the local population and on the relationships between individuals.[20] Numerous authors agree that the questions surrounding the international legal obligations and responsibilities of TNCs touch on similar dilemmas as the questions surrounding the responsibilities of sovereign states with regards to human rights did, questions which have defined and

17 Seymour J. Rubin, 'Transnational Corporation and International Codes of Conduct: A Study of the Relationship Between International Legal Cooperation and Economic Development', A*merican University International Law Review*, Vol. 10, No. 4, 1995, p. 1276.

18 Olivier De Schutter, 'Towards a New Treaty on Business and Human Rights', *Business and Human Rights Journal*, Vol. 1, No. 1, 2016, p. 58.

19 Jonathan I. Charney, 'Transnational Corporations and Developing Public International Law', *Duke Law Journal*, 1983, p. 749.

20 Steven R. Ratner, 'Corporations and human rigths: a theory of legal responsibility', *Yale Law Journal,* Vol. 111, 2001, p. 460.

revolutionized one of the main developmental directions of international law in the period after WWII.[21] On the one hand, it has been established that the increase of economic power and thus the influence and actual decision making power of TNCs can be considered to be similar to the historical conditions which brought about the creation of a framework for the protection of human rights in the period following WWII.[22] One of the main reasons behind this argument is that TNCs have substantial and direct influence on individuals, and thus the fulfillment of a wide array of human rights, and therefore they impact employees, consumers and the living conditions of local communities within the boundaries of which they lead their business operations.[23] At the same time, there is a lack in the most basic, universal legal guarantees of their operations, as domestic regulations can only encompass individual fractions from the full spectrum of their activities. On the other hand, in the period following WWII the number of international organizations which, through their operation and scope aimed to regulate areas which states themselves could not control or could not reach agreements upon, grew exponentially. One of these areas was the development and adoption of standards and rules to regulate the functioning and operations of TNCs. This clearly shows that there is a need to establish a framework for the activities of TNCs with regards to human rights, environmental protection and labour law but at the same time also points to the fact that international legislation based on the sovereignty of individual states is lacking in this area.[24] Accordingly, it was the Organization for Economic Co-operation and Development (hereinafter OECD) which, in 1976 adopted a number of guidelines,[25] which defined, with a recommendatory nature, the general framework for the domestic and international behaviour of TNCs. They thus set a standard, among others, for the labour relations of TNCs, as well as for their operations that have impacts on the environment and human health. During an overall review that took place in 2000, they, on the one hand, emphasized the need for the host state to comply with human rights regulations and, on the other hand, they extended the scope of the guidelines to business partners as well, including contrac-

21 Douglas Cassel, 'Corporate Initiatives: A Second Human Rights Revolution?', *Fordham International Law Journal*, Vol. 19, No. 5, 1995.

22 The economic dominance of TNCs became one of the most important topics of of public debate from the 1960s onwards.

23 Ruggie 2013, XXV – XXVIII.

24 The departure from the conventional view on international law, built around the concept of consensus of the concerned states, is obvious with the emergence of non-state actors and the gradual increase of their role in the second half of the 20th Century. This is closely connected to the increase of common international goals and to the interdependence of states. These novel challenges posed by international relations proved difficult to tackle for the traditional forms of international legislaton, as a result new channels are being sought, which could provide flexible and quick answers to these challenges. *Further reading*: Andrew Clapham, *Human Rights Obligations of Non-State Actors*, Oxford University Press, 2006, pp. 29-32; Armin von Bogdandy, 'Globalisation and Europe: How to Square Democracy, Globalisation and International Law', *European Journal of International Law*, Vol. 15, No. 5, 2004, p. 902.

25 OECD Guidelines for Multinational Enterprises, 15 I.L.M. 969 (1976), http://www.oecd.org/corporate/mne/.

tors and suppliers. These OECD guidelines were also espoused by the International Labour Organization (hereinafter: ILO) in their so called 'Tripartite Declaration'[26] of 1977, which encompasses a large spectrum of questions that relate to labour regulations with the explicit purpose of aiding TNCs to contribute to the economic and social development of their host communities.[27] Another extension of the principles was to be found in the 'Restrictive Business Practice Set'[28] put forward by the United Nations Conference on Trade and Development (hereinafter: UNCTAD) in 1980.

The responsibility borne by TNCs with regards to human rights infringements is divided by legal experts into three typical categories. The first situation covers developing, capital importing countries which, especially due to economic need, are unable or unwilling to impose domestic and international human rights standards on their investors. Accordingly, they do not double-check the business policies, practices, contracts and operations of TNCs either. Further to this, they occasionally give complete control of certain areas to the investing companies[29] and in certain cases they actively participate in the human rights infringements. The second situation concerns host states which do not obey by basic human rights standards themselves, and who use the resources and the help of the investors to further this approach.[30] Finally, the third situation concerns the activities of companies who have a global production network which is not regulated by the host country, and this role is not

fulfilled by the incorporation country either due to the prohibition to intervene in matters which are essentially domestic affairs.[31]

Despite the fact that the risks associated with the possible infringements of internationally recognized human rights by TNCs have been identified in a timely manner,[32] international legislation does not recognize either the legal personality of these companies, or their responsibility under international law. The UN has attempted on several occasions to draw up a universal international agreement which would provide a legal framework for the operations of TNCs. The first step was taken in 1975, not long after the conclusions of the first universal human rights covenants, by the initiative of the UN Economic and Social Council with the establishment of the '*Commission on Transnational Corporations*'. One of the commission's goals was to draw up a corporate code of conduct aimed at promoting international human rights.[33] During the preparations, the principles of

26 http://www.ilo.org/empent/Publications/WCMS_094386/lang--en/index.htm.
27 Clapham 2006, pp. 211-212.
28 Http://unctad.org/en/Pages/Meetings/Restrictive-Business-Practices.aspx.
29 Such an example is the the situaton of the western Indonesia Irian-Jaya region, which, in the 70s and 80s was ruled, de facto, by the Freeport-McoRan corporation. *See*: Ratner 2001, p. 462.
30 A recent example is the discriminatory legislation of South Africa, or the current example of China with relation to the freedom of opinion and the freedom of the press. *See*: Ruggie 2013, pp. 14-19.
31 Ratner 2001, pp. 462-463.
32 Stephens 2002, p. 49.
33 UN Economic and Social Council resolution 1721 (LIII) of 28 July 1972.

investment protection were discussed together with the obligations of TNCs. Due mostly to the collapse of planned and command economies there was ultimately no consensus on the final draft that was completed by the early 1990s.[34] The next step in the development of a binding international standard was marked by the work started under the auspices of the UN Human Rights Council in August 1998.[35] The resulting document was presented in August 2003, specifying the human rights norms applicable to transnational and other business enterprises. Among its most important innovations were the recognition of TNCs as legal persons, that it expanded the requirements to the entire supply chain and the introduction of an independent and transparent control mechanism.[36] However, due to the opposition from the business comminity along with a significant number of countries, the UN Human Rights Council specified in its decision that the document is not binding as per international law, so, despite the initial legislative intention, they could not go beyond a *soft law* type of solution.[37] However, at the initiative of several developing countries, the Human Rights Council decided, in June 2014, to set up an intergovernmental expert group aiming to draw up the international legal standards concerning the operations of TNCs.[38]

18.3 The Emergency of Corporate Social Responsibility, Its Framework and Functioning

There is no consensus among economists with regards to the effects and consequences of the operations of TNCs. On the one hand, a significant number of authors considers TNCs to be extremely efficient economic and business units, which, through their internal co-ordinational capabilities are more competitive than enterprises operating in one state only.[39] On the other hand criticism can be summed up as rooted in the fact that the separate elements of TNCs do not necessarily strengthen the economy or the market of the host country, but rather increase the competitiveness of the controlling enterprise, as their operations are dictated by it. However, there is agreement on the fact that the experience of the past half century has shown that the standards and regulations of international legislation with regards to TNCs are lacking and unsatisfactory, and these gaps

34 Karl P. Sauvant, 'The negotiation of the United Nations Code of Conduct on Transnational Corporation', *The Journal of World Investment and Trade*, 2015, pp. 56-62. Following the unsuccessful attempt, the scope of the UNCTC was taken over, in 1994 by the UNCTAD.

35 Resolution E/CN.4/SUB.2/RES/1998/8; http://ap.ohchr.org/documents/alldocs.aspx?doc_id=8140.

36 David Weissbrodt et al, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', *The American Journal of International Law*, Vol. 97, 2003, pp. 910-911.

37 Commission on Human Rights Resolution 116/2004, E/CN.4./2004/L.73/Rev.1 (16 Apr. 2004).

38 A/HRC Res. 26/9, Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights.

39 Detlev F. Vagts, 'The Multinational Enterprise: A New Challange for Transnational Law', *Harvard Law Review*, Vol. 83, 1970, p. 756.

lead to unwelcome consequences. These shortcomings are evident in the limitations of international legal personality and in the lack of minimal standards similar to those of international human rights, and the further lack of standardization with regards to environmental issues and sustainable development. The concept of the social responsibility of TNCs was born in this transnational business environment in the 1970s,[40] its root cause being the lack of international legislation and its negative consequences.

The first company to endorse a number of principles, six in total, with regards to social responsibility was General Motors, in 1977, aiming to provide a minimal standard to the company's overseas operations. The principles were named after a board member who was instrumental in their elaboration, the reverend *Leon Sullivan*. They are thus known as 'Sullivan principles' and were mainly intended to offer solutions and remedies to the controversies posed by operating on the South African market under apartheid conditions. In accordance with this, the main goal of the principles was to eliminate discrimination both in the field of labour, by introducing a fair compensation policy and other healthcare, housing and travel allowances, and in the field of managerial promotions and educations as well. Adherence to these principles was audited by an external entity. The seeming success of the 'Sullivan principles' is proven by the fact that by the mid-1980s they were accepted by around 200 foreign enterprises operating in South Africa.[41] And albeit these principles by themselves were not sufficient to topple the apartheid regime, nevertheless, they did considerably contribute to the gradual dismantling of workplace segregation by fracturing the coherence of governmental policies. The importance of the 'Sullivan principles' lies in the fact that they proved to be a turning point in the public debate around the expectations surrounding corporate social responsibility, suggesting that companies are accountable not only towards their owners, but also towards the community within which they operate. The 'Sullivan principles' were soon followed, in the mid-1980s, by the so-called 'McBride principles', enacted in the Protestant dominated Northern Ireland with the purpose of safeguarding the equal opportunities of Catholics in the labor market. Their success is proven by the fact that they were accepted and enforced by almost half of the American companies operating in Northern Ireland.[42]

40 The roots of social responsibility initiatives go gurther back, all the way to the 1930s, when the International Chamber of Commerce set up the *Code of Standards of Advertising Practice. See*: Helen Keller, *Corporate Codes of Conduct and their implementation: the question of legitimacy;* available: www.yale.edu/macmillan/Heken_Keller_Paper.pdf.

41 Cassel 1995, p. 1970.

42 Id., pp. 1971-1972.

The 1990s showed an important upturn in corporate social responsibility initiatives, driven on the one hand by the failure to reach an agreement on the creation of a document regulating the responsibilities of TNCs under international law,[43] and on the other hand, the sudden increase in the number and volume of foreign investments, furthermore, by the neoliberal economic policies which became dominant throughout the 1980s requiring limited governmental market intervention.[44] This latter often led to such transnational corporate operations that did not comply even with the most fundamental internationally accepted standards of labour law, environmental protection and human rights,[45] and as a result, it became increasingly evident that there are serious gaps in the international legislation, especially with regards to the legal personality, the obligations and responsibilities of TNCs. These circumstances justified the adoption of a set of global corporate social responsibility principles,[46] and their acceptance by the business community has been driven by several factors. On the one hand, accepting ethical and human rights principles is in the company's own, rational, economic and business interest. The conflict between the advocates of corporate responsibility and those of the rationality of the business world seems to be currently on the vane.[47] The reason behind this is primarily the acknowledgement of the economic importance of a good reputation, as, beyond the fact that a good reputation has market value in itself, it also directly influences the overall value of the company and the decisions of investors, which in turn influences the future growth and strategic opportunities of the company.[48] On the other hand, by accepting voluntary principles, the TNCs tried to avert the creation of domestic extraterritorial, or international legislation which certainly would have had a greater financial impact on the

43 The starting point of social responsibility initiatives were often the UN Draft Codes on TNC, *see*: Helen Keller, *Corporate Codes of Conduct and their implementation: the question of legitimacy;* available: www.yale.edu/macmillan/Heken_Keller_Paper.pdf.

44 These policies were espoused both by the Reagan administration, and British prime minister Margaret Thatcher. *See*: Kenneth J. Vandevelde, 'A brief history of international investment agreements', *University of California,* Vol. 12, 2005, p. 178.

45 Such examples are the Bhopal industrial catastrophe, or the environmental and human rights abuses connected to the Peruvian Yanacocha gold exploitation. These cases made it clear that neither international law, nor the legislation of the country of registration were able to provide satisfactory solutions for the prevention or prosecution of these abuses.

46 As opposed to global social responsibility initiatives, prior to 1990 the principles were often focused on individual countries or regions the legislation of which did not comply with generally accepted human rights standards, such as South Africa or Northern Ireland.

47 According to the principles advocated by US economists Milton Fredman and William Saffire the only responsibility of enterprises operating in the market is to be profitable. However, the current market and business environment, with its focus on cost reduction, poses much more complex expectations. At the same time, the development of telecommunications and the global presence and rapid strengthening of civil rights groups is capable of shining the spotlight on human rights abuses which can be linked to the behaviour of business actors. Accordingly, resorting to child or forced labour, or environmentally damaging behaviour could lead to a public backlash seriously impacting the reputation of the company, which in turn leads to a decrease in competitiveness.

48 As a result, FTSE and Dow Jones companies are also quoted by the FTSE4GOOD and Dow Jones Sustainability Index, which measure the social responsibility involvement of each company.

operations of TNCs than the voluntarily accepted principles. Besides the fundamentally cost oriented aspects, such as brand name and maintaining company reputation, and the desire to avert public legislation, corporate responsibility engagements also hold legitimizing power, that is, companies initiate them as they consider them a guiding tenet of their functioning. The rapid spread and popularity of corporate responsibility initiatives is shown by the fact that while at the beginning of the 1990s only a little over 10% of the world's most influential 250 companies issued public reports in the area, these days this ratio is around 90-95%.[49] Given their diversity they do not have one shared definition, but their generally accepted, morally based point of departure is that a company's operations should serve not only the strict interests of its shareholders, but also those of the community in which it conducts its operations.[50]

Due to their popularity and rapid proliferation, corporate social responsibility initiatives are multi-layered and can be categorized according to different systems. One such system categorizes them based on their origin, whether it is a company, industry, or it includes principles devised by several stakeholders, for example with the inclusion of NGOs or trade unions (so called multistakeholder principles). This categorization also indicates their development, the timing of their creation. The first to emerge were principles drawn up unilaterally by individual companies, which influenced only their own operations, or those of their contracted partners, such as their suppliers. After the emergence of individual principles, the next phase was the emergence of principles devised by several companies belonging to the same branch of an industry. One of the first such initiatives was the 'Responsible Care' programme devised by the International Council of Chemical Associations.[51] One of their great advantages is that they are neutral from a competitive point of view, that is, they apply in equal measure to companies acting as each other's competitors and do not favour any over the others. The so-called multistakeholder initiatives which have become widespread in recent years have raised the legitimacy of corporate responsibility initiatives through the plurality of their participation and thus also try to bridge the credibility gap created by initiatives which have but one single stakeholder.[52] Especially, the Global Compact is worth mentioning among this latter

49 KPMG, International Survey on Corporate Sustainability Reporting (2015), https://home.kpmg.com/xx/en/home.html. This spectacular increase is linked to the fact that a growing number of domestic corporate legislations require that, besides the yearly financial report companies also prepare and render public a report about social responsibility achievements.

50 Ilias Bantekas, 'Corporate Social Responsibility in International Law', *Boston University International Law Journal*, Vol. 22, 2004, p. 322.

51 *See*: http://www.icca-chem.org/en/Home/Responsible-care/.

52 Helen Keller, *Corporate Codes of Conduct and their implementation: the question of legitimacy;* www.yale.edu/macmillan/Heken_Keller_Paper.pdf. Examples of such initiatives: Ethical Trading Initiatives (ETI), http://www.ethicaltrade.org/; or Social Accountability (SA8000), http://www.sa-intl.org/index.cfm?fuseaction=Page.ViewPage&PageID=937; or Global Sullivan Principles, http://www.thesullivanfoundation.org/The-Global-Sullivan-Principles.html.

type of initiatives: a set of ten, human rights based, principles which were put forward at the end of the 1990s at the initiative of the UN Secretary General.[53] Referring back to the Universal Declaration of Human Rights, the Global Compact outlines a number of human rights, labour law and environmental protection principles which can be freely adhered to by enterprises. Its success is shown by the fact that it has so far been accepted by more than 8000 companies, both with regards to their own operations, and those of their business partners. Another system of categorization sets initiatives apart based on their scope, whether it only impacts the functioning of the company itself, or also includes its business partners, the entirety of its supply chain and contractors. This development clearly points to a growing acceptance of widener scopes,[54] however it presents special challenges to those suppliers who work for several customers at once, and thus may need to comply with different sets of corporate responsibility initiatives. Another criterion of categorization is the content of the social responsibility initiative. Their formulation can be generic and over-ambitious,[55] or more detailed and thus easier to apply to actual situations.[56] With respect to their scope of regulation, they can incorporate legal standards, labour law standards or guarantees of environmental protection and sustainable development in an innovative manner.[57] Human rights standards are worth mentioning first, as, on the one hand, the primary inspiration for corporate social responsibility initiatives are the human rights principles which, based on moral grounds, serve as standards for state regulations andother public measures[58] and, on the other hand, they aim to bridge a gap in international law making efforts.[59]

This aspect of corporate social responsibility can apply to any human rights related legal questions which impact the members of a community that is influenced by the manifold operations of a TNC.[60] These include primarily the right to life, the guarantees against torture and inhumane treatment, the human rights protecting individuals against

53 Https://www.unglobalcompact.org/.

54 This is proven by the fact that one of the most important outcomes of the revision of the OECD guidelines in the 2000s was the increase of their scope to include the business partners of companies. Starbucks became the first stock company quoted at the sock exchange to impose human rights requirements on its coffee providers, see: http://pudl.princeton.edu/sheetreader.php?obj=zg64tm84f.

55 Such examples are the OECD guidelines, or the International Code of Ethics for Canadian Business, which contain comprehensive sets of principles.

56 An example of exclusively environmental commitments are the so-called CERES Principles, available at: http://www.ceres.org/about-us/our-history/ceres-principles.

57 Bantekas 2004, p. 327.

58 Cassel 1995, p. 1972.

59 Stephens 2002, p. 79.

60 As a result, similarly to the questions of social responsibility, both the OECD guidelines and the principles of the Global Compact consider the Universal Declaration of Human Rights as a standard. According to the Global Compact, the involvement of TNCs in human rights abuses can be divided into direct, willing and tacit.

forced eviction and those protecting their property,[61] furthermore, the rights to freedom of assembly and opinion.[62] The main difference between classical human rights and the human rights principles related to corporate social responsibility initiatives is that the latter apply to the upholding of the community's collective rights as well.[63] Secondly, one must mention labour standards, which make up the bulk of corporate social responsibility principles,[64] and some of which fall simultaneously under the scope of human rights regulations as well, such as the prohibition of forced labour, child labour or negative discrimination. Some further elements of labour law are not part of internationally recognized human rights, nevertheless numerous social responsibility initiatives assert the right to collective bargaining, the right to health insurance and workplace safety and provide regulations capping the maximum number of working hours.[65] The essence of the sustainable development which stands at the core of international environmental policies is that economic and business growth targets need to be in compliance with the requirements of environmental protection.[66] Social responsibility initiatives with such content are generally appeared in relationship with specific investments, usually as preconditions set by intra-governmental institutions for providing finance or insurance.[67] The importance of corporate social initiatives in the environmental field is given by the fact that it is often TNCs that dispose of the capacities and knowhow which are necessary

61 On the connection between corporate responsibility and fundamental laws (particularly the right to property) *see*: Ádám Auer, 'A felelős társaságirányítás az alapjogok keresztmetszetében, különös tekintettel a tulajdonhoz való jogra', in: Tamás Antal & Tekla Papp (eds.), *The domestic, international and comparative law aspects of fundamental legislation,* A Magyar Tudományos Akadémia Szegedi Akadémiai Bizottsága Jogi Szakbizottságának Gazdasági Jogi Munkacsoportja és a Europe-Direct Szeged tudományos előadóülése. (Lectiones Iuridicae; 8.) Pólay Elemér Alapítvány, 2013, pp. 81-94; for more on the protection of property as a fundamental human right, *see*: András Téglási, 'A tulajdonhoz való jog védelme Európában – az Európai Unió Bírósága, az Emberi Jogok Európai Bírósága és a magyar Alkotmánybíróság gyakorlatának fényében', *Kül-Világ, No.* 4, 2010, pp. 22-47. http://www.kul-vilag.hu/2010/04/teglasi.pdf.

62 There are only a few TNCs which commit to such classical human rights guarantees, as an example: Royal Dutch Shell, Statement of General Business Principles, available at: http://training.itcilo.it/actrav_cdrom1/english/global/code/royal.htm.

63 Bantekas 2004, p. 330.

64 This is particularly valid for retail companies, and fashion brands and their procurement chain, *see*: Helen Keller, *Corporate Codes of Conduct and their implementations,* available at: www.yale.edu/macmillan/Heken_Keller_Paper.pdf.

65 The standards are included in the fundamental agreements of the ILO, for example: ILO Declaration on Fundamental Principles and Rights at Work.

66 Johannesburg Declaration on Sustainable Development, available at: www.joburg.org.za/pdfs/johannesburg declaration.pdf.

67 For example, the World Bank requires strict environmental protection indicators before financing an investment, *see*: Bantekas 2004, pp. 334-335. Further to this the Convention on Establishing the Multilateral Investment Guarantee Agency's Art.12 point d) specifies that the investment must have a high developmental impact on the host country, which is interpreted by the World Bank as handling natural resources in a sustainable manner.

for the development and dissemination of those new technologies[68] and applications which can make environmental policies truly efficient.[69]

From the point of law of international law, corporate social responsibility initiatives are fundamentally dual or hybrid in nature. On the one hand, these initiatives are set up by the private sector rather thanthe legislators. Therefore, the main factors of their adoption and implementation are the industry's requirements and thus the enterprise's governance and company structure. This contributes to their innovative and flexible nature, which is able to bridge such questions as for example the difference between legislations across borders, or the responsibilities of the entire supply chain. On the other hand, they fulfill public functions, because content-wise they regulate matters falling under the scope of legislation, such as human rights, labour law and environmental protection standards. Despite their voluntary nature, their majority formulates fundamental moral requirements which are also covered by human rights treaties.[70] As a conclusion, a number of corporate social responsibility initiatives are actually reflections of international legislations which came into being through contractual and customary law.[71]

18.4 The Role of Social Responsibility in the Development of International Law

As detailed above, the challenges posed by the emergence and operations of TNCs are, without doubt, international in character.[72] Both the attempts, albeit unsuccessful ones, to regulate the obligations of TNCs and the prior *soft law* type norms put forward by international organisations clearly show the need for a regulation that sets a minimal standard for the operations of TNCs.[73] All regulative sources evidently require that, besides focusing on their own operations, TNCs also strive to adopt and promote standards aimed at upholding internationally recognized human rights.[74] In the meantime, one of the most important characteristics of international legislation is that it is shaped rather by the consensual, that is, contractual legislation of countries than by their central legislation. This particularity originates from that fact that in its traditional understanding, states are both the creators and subjects of international law, therefore this type of legisla-

68 Amongst other things, recycling and energy saving technologies, and clean production methods.
69 This principles are uphed both by the OECD guidelines, and principles 3-6 of the Global Compact.
70 Cassel 1995, p. 1972.
71 Stephens 2002, pp. 80-81.
72 Helen Keller, *Corporate Codes of Conduct and their implementations,* available at: www.yale.edu/macmillan/Heken_Keller_Paper.pdf.
73 This idea was aldready included in the Havanna charter drawn up after WWII, whch provided for the set up of a separate international organism, the International Trade Organization, for more, *see*: Andrew Newcombe et al., *Law and Practice of Investment Treaties*, Kluwer Law International, 2009, pp. 19-20.
74 Clapham 2006, p. 195.

tion is more focused on the interests of the state rather than that of individuals, local communities or the international community as a whole.[75] This situation often benefits the parties interested in the deregulation of foreign capital investments, who regard the creation and strengthening of domestic or international legal standards as directly connected with an increase of the country's political risk and thus also with a decrease in its competitiveness when it comes to the demand of capital in the world market.[76] Despite the prevalence of state interests in international legislation, the past decades have seen several successes in the drafting of regulations which cover certain areas of corporate social responsibility. Among these agreements the first one worth noting is the Civil Liability Convention, opened to signature in 1969, which creates international legal responsibility by placing the obligation of compensating damages in the case of oil spills on the companies operating the tankers.[77] This model of international agreement can be used as a precedent for regulating further businesses that run possibly dangerous operations across borders.[78] Accordingly, for example, similar principles were put forward in the Basel Protocol of 1999 with regards to the damages resulting from the transboundary movement, disposal and handling of hazardous waste. Both international agreements and their systems also provide for the creation of an insurance fund and the obligation of having liability insurance in place.[79] The convention on banning the worst forms of child labour, opened for signature in 1999 as a result of regulatory work done by the International Labour Organization was elaborated along slightly different principles, but nevertheless it regulates economic and business activities.[80] In contrast with previous legislation, this convention, instead of calling for independent liability under international law, pushes for further international cooperation, and financial and technical aid from the signatory countries with regards to stamping out child labour.[81] Similar mechanisms are invoked by the framework convention on tobacco control, opened for signature in 2003 under the auspices of the World Health Organization, calling for the control on tobacco products, when it subjects the contracted parties to extraterritorial health standards in connection with the trade of tobacco products.[82] Furthermore, one should also mention the 2002 World Summit on Sustainable Development,[83] during which the

75 Jennifer A. Zerk, *Multinationals and Corporate Social Responsibility, Limitations and Opportunities in International Law,* Cambridge University Press, 2006, p. 309.

76 Sauvant 2015, pp. 56-62.

77 *See*: http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-on-Civil-Liability-for-Oil-Pollution-Damage-%28CLC%29.aspx. The fundamental mechanisms of the convention were later supplemented with the creation of a damage fund, and the upper limit of damage compensation was raised in its amendments.

78 Zerk 2006, pp. 284-286.

79 *See*: http://archive.basel.int/meetings/cop/cop5/docs/prot-e.pdf.

80 *See*: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C182.

81 *See* Art. 8 of the Convention.

82 Covered by Art. 13 point 2 of the Convention, *see*: http://www.who.int/fctc/text_download/en/.

83 *See*: http://www.un-documents.net/jburgdec.htm.

participating states agreed on a legislative plan.[84] With this plan the states committed, amongst other things, to bolster the social responsibility of TNCs through intergovernmental agreements, in order to reach the goals of the Johannesburg Declaration on Sustainable Development.[85]

The international agreements outlined above show that the state consensus needed for international legislation is being reached when it comes to regulating individual areas of transborder business operations. In turn, a number of these international agreements is based on previous voluntary initiatives, or *soft law* type principles. Such an example is the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, which is in fact built on the voluntary principles outlined by the UN's Food and Agriculture Organization and by its Environment programme.[86] Nevertheless, the legislative failure of the previously outlined international agreement plans is due mostly to the opposition of the business community and of capital exporting countries, who are focused primarily on their own interests.[87] By contrast, corporate social responsibility initiatives embody exactly those minimal standards which, due to the above mentioned legislative failures, take on public functions, and which companies accept with regards to their own operations, that is, they tailor them according to their needs. As a result, these social responsibility initiatives of TNCs can, on the one hand, be important starting points for the creation and evolution of an international standard and, on the other hand, they can enable both the quick integration of such standards into international legislation[88] and the strengthening of its future legitimacy and its prevalence in international relations.[89]

As opposition to domestic legislation, another characteristic of the international one is that voluntary compliance plays a much larger role both in the course of its application and development. Accordingly, international law is characterized mainly not by binding legislation, but rather by the normative power of the voluntarily accepted recurrent behaviour of states.[90] Furthermore, due to the lack of a central sovereign power, international law has a weak enforcement mechanism. As a result, the dividing lines between its binding and non-binding norms are much more blurred than in the strict hierarchical system typical of domestic state legislation. Accordingly, the binding power of individual legislation is considered less relevant than the degree of its acceptance. Therefore, the soft

84 UN A/Conf.199/20; *see*: http://www.un-documents.net/jburgpln.htm.
85 *See* point 49 of the WSSD Plan of Implementation.
86 Zerk 2006, pp. 294-295.
87 Clapham 2006, p. 234.
88 This point of view is espoused by the European Council with regards to the elaboration of its directives regarding the regulation of the relationship between human rights and the business world. See: CDDH-CORP(2015)R4 27 February 2015.
89 Charney 1983, pp. 774-778.
90 Id., pp. 757-758.

law type standards[91] impacting TNCs, inspired by their corporate social responsibility initiative are not necessarily binding, but are nevertheless relevant when assessing international consensus and the shared approach of states.[92] This field has experienced an accelerated legislation in the past half a century, therefore it is not impossible that, depending on state policies and the consistency of legislation, certain standards of social responsibility initiatives, or some of their areas, could become international customary law and it is ultimately the standards accepted by TNCs that will play a fundamental role in shaping it. This process can be strengthened, on the one hand, by the fact that corporate social responsibility initiatives generally fulfill a public function based primarily on moral and ethical requirements. On the other hand, through their connections with human rights, they are being characterized as 'fundamental', 'central' or 'international', which lead one to believe that their upholding does not belong merely to the legislation of the host country.[93] Similarly to the morally justified Universal Declaration of Human Rights, adopted at the middle of the 20th century, these standards are now well on their way to becoming customary international law.[94]

Besides their possible roles in treaty law and customary international law, social responsibility initiatives are present in an even more visible way in recently negotiated bi- and multilateral investment protection agreements. As a result of the increased economical role of foreign capital investments, the social responsibility of TNCs was ever more intensively discussed, from the second half of the 90s onwards,[95] in the context of investments.[96] In relation with this, The UN High Commissioner for Human Rights has called, in 2003, for the adoption of such investment protection agreements that would create a more equitable balance between the rights and obligations of the investing company.[97] Therefore, the social responsibility commitments newly included in treaties regarding international capital investments are meant to ensure a certain balance in opposition to the vast and high level of property protection enjoyed by the investors.[98] There are several ways to include social responsibility initiatives in international investment protection agreements. First, it is worth mentioning the agreements in which they are the signatory states themselves who are committed to the implementation of social responsibility. This

91 Especially the previously discussed OECD guidelines and the principles of the UN Global Compact, *see* point 1.3 of this study.
92 Zerk 2006, pp. 262-263.
93 Id., p. 307.
94 Stephens 2002, p. 37.
95 *See*: http://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=1245.
96 *See*: UNCTAD, World Investment Report 1996, available at: unctad.org/en/Docs/wir1996_en.pdf.
97 E/CN.4/Sub.2/2003/9; *see*: http://daccess-ods.un.org/TMP/4172334.07497406.html.
98 Téglási points out that the heightened level of property protection enjoyed by investors is noticeable in the fact that, in case of loss of property they can claim 'full' instead of just 'equitable' damages. András Téglási, 'A hatékonyság kérdése a tulajdon kisajátítása kapcsán', *Iustum Aequum Salutare,* Vol. VIII, No. 3-4, 2012, p. 188.

indirect model is the one which fits best into the structure of international law, because in this situation it is the host state that, in the course of enabling investments, commits to maintaining the level of protection with regards to the operations of the company, especially those related to environmental protection, workplace safety and healthcare.[99] The second type of agreement outlines standards, aimed at the investors, which urge them to adopt corporate social responsibility initiatives. This model of agreements supposes the limited international legal personality of TNCs, as it formulates requirements concerning them directly.[100] In the third agreement type, the acquisition and enjoyment of rights guaranteed in the investment protection treaty depends on whether the investor committing itself to the social responsibility initiatives outlined by the recommendations of an international organization.[101] These regulatory models enable corporate social responsibility principles to shape and develop international public law by first becoming accepted as a part of international treaty law, and later, of customary law.

The fundamental idea behind the new approach to investment law and all three methods of regulating investment protection is that, beyond their economic and business consequences, investments also have environmental, social, and human rights impacts, and corporate social responsibility clauses can provide guidance in managing these impacts. Furthermore, these clauses do not merely minimize the possibility of legal infringements, but also decrease the threat to the investor's business reputation and at the same time improve the quality of corporate social relationships and enhance the global spread of social responsibility initiatives.[102]

The economic developments of the last decades have given TNCs an enhanced role in business relations. Investment protection regulation has provided a stable framework to this global economic process and is thus considered by many authors to be one of the greatest successes of international law over the past century.[103] Nevertheless, these changes also imply new challenges caused by the lack of minimum standards for the increasing activities of TNCs, thus weakening the legitimacy of international law. The principles of corporate social responsibility can provide an answer to these new challenges by pushing and orienting the constant development of international legislation, thus contributing to the strengthening of its legitimacy.

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99 Examples of this model are the North American Free Trade Agreement, or the 2008 Canada Peru Free Trade Agreement, for a detailed presentation, *see*: Jarrod Hepburn et al., *Corporate Social Responsibility and Investment Treaties* in *Sustainable Development in World Investment Law,* Wolters Kluwer, 2011, p. 597.

100 Examples of this model are the free trade agreements signed by the US in the 2000s with Australia and Morocco, or the Norwegian model agreement for the promotion and protection of investments, ratified in 2007.

101 The International Institute for Sustainable Development elaborated its principles along this model, http://www.iisd.org/search/?qu=investment+model+international+agreement.

102 Hepburn 2011, p. 597.

103 Salacuse 2010, p. 428.