

## ‘Emergent State Practice on the creation and practice of Standards on Corporate Social Responsibility’

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**ABSTRACT:** This article examines the emerging State practice on the evolving corporate social responsibility (CSR) standard. It examines its public international law instruments and particularly analyses the role of States in the development of CSR norms and the potential of these norms to impact the recognition, promotion and protection of human rights. The article also assesses the UN effort to consolidate the standards that have emerged from soft law instruments in public international law, focusing on the Ruggie’s process and its potential impact on the future development of the law and practice in this area. The article shows an emerging convergence of standards and practices and coherence on certain themes that could ultimately lead to the establishment of stronger international norms on CSR. A key example is human rights standards for corporations regarding their activities in host States.

### Introduction

CSR has emerged in recent times as a tool or concept for creating or setting new standards<sup>1</sup> against corporations both at national and international levels. The concept is premised on the need to extend the responsibility of corporations beyond the limited traditional set of responsibilities to include responsibilities for externalities emanating from their enterprises, especially in the international context. In the last few decades, States and their international organizations have been active in deliberately trying to establish both a normative framework and an ethical framework within which corporations operate. Significantly, because of the complexity of the issues involved and the difficulty around reaching agreements in this area, CSR standards are emerging mainly from soft law instruments.<sup>2</sup> Furthermore, the key landmarks in the evolution of these standards have happened at the international level. It is therefore pertinent to examine the evolving CSR standards from the perspective of State practice because of the implications this may have for norm creation.<sup>3</sup>

### The Concept of CSR and Its Scope

CSR is a concept that is like the story of the proverbial blind men and the elephant. In the ancient story, a group of blind men touched an elephant in order to determine the shape and size of the creature. Each of the men touched and felt around a different part of the animal, leading to contradictory descriptions of what an elephant looked like. Similarly, establishing fixity about the concept of CSR has proven to be a major ask across disciplines, leading to a

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<sup>1</sup> The ‘standards’ are sometimes called ‘principles’ or ‘norms’ depending on the source. These terms generally mean ‘rules’, binding or non-binding.

<sup>2</sup> The so-called ‘soft law’ are products of normative creation processes outside the classical and familiar legal categories. Pierre-Marie Dupuy, ‘Soft Law and the International Law of the Environment’ (1991) 12 Michigan Journal of International Law 420; Christine M Chinkin, ‘The Challenge of Soft Law: Development and Change in International Law’ (1989) 38 International and Comparative Law Quarterly 850.

<sup>3</sup> Consistent State Practice and a belief in legal obligation to implement elements of CSR standards may lead to creation of new norms of customary international law. North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands) [1969] ICJ Rep 3 [44].

proliferation of definitions and difficulty in understanding the concept.<sup>4</sup> It has been observed that States, international organisations, companies, consultants, lawyers, non-governmental organisations (NGOs), and other interest groups have different definitions of the idea.<sup>5</sup>

For example, environmentalists define CSR in environment-centric terms. Some have inclined their definitions to philanthropic or charitable elements of the idea.<sup>6</sup> Others have defined CSR in human or labour rights-focused terms.<sup>7</sup> Apart from definitional variations it has also been observed that institutions alter or change their definition of the idea from time to time. The World Business Council for Sustainable Development (WBCSD) defined the concept in 1998 as ‘the continuing commitment by business to behave ethically and contribute to economic development while improving the quality of life of the workforce and their families as well as of the local community and society at large’.<sup>8</sup>

However, only four years later, the same organization developed its understanding of the idea of CSR to ‘the commitment of business to contribute to sustainable economic development, working with employees, their families, the local community and society at large to improve their quality of life’.<sup>9</sup> The change was made to align the idea of CSR to the growing popularity of the concept of sustainable development<sup>10</sup> - a contextual influence. Previously, the European Commission, defined the idea as ‘a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis’.<sup>11</sup> In 2011, the Commission put forward what it called a new, simpler definition of CSR to mean: ‘the responsibility of enterprises for their impacts on society’<sup>12</sup> – an accountability approach. The tendency to change and adapt understanding of the idea shows both the importance and fluidity of the idea and exemplifies the challenge faced in the development of common standard for CSR. However, in attempting to delineate the scope of the concept, the EU Commission correctly observed that:

CSR at least covers human rights, labour and employment practices (such as training, diversity, gender equality and employee health and well-being), environmental issues (such as biodiversity, climate change, resource efficiency, life-cycle assessment and pollution prevention), and combating bribery and corruption. Community involvement and development, the integration of disabled persons, and consumer interests, including privacy... The promotion of social and environmental responsibility through the supply-chain, and the disclosure of non-financial information...

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<sup>4</sup> Olufemi Amao, *Corporate Social Responsibility, Human Rights and the Law: Multinational Corporations in Developing Countries* (Routledge 2011) 67.

<sup>5</sup> See the white paper, sponsored by Oracle, from the Economist Intelligence Unit, ‘The Importance of Corporate Responsibility’ (2005).

<sup>6</sup> Kenneth Amaeshi, Bongo Adi and Olufemi Amao, ‘Corporate Social Responsibility in Nigeria: western mimicry or indigenous influences?’ (2006) 24 *Journal of Corporate Citizenship* 83, 95.

<sup>7</sup> The white paper (n 5)

<sup>8</sup> Michael Blowfield and Jędrzej G Frynas, ‘Setting New Agendas: Critical Perspectives on Corporate Social Responsibility in the Developing World’ (2005) 81 *International Affairs* 499.

<sup>9</sup> *ibid*

<sup>10</sup> The most common definition of sustainable development is ‘development that meets the needs of the present without compromising the ability of future generations to meet their own needs.’ See World Commission on Environment and Development (WCED), *Our common future* (OUP 1987) 43.

<sup>11</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions, ‘A renewed EU strategy 2011-2014 for Corporate Social Responsibility’ of 25 October 2011 COM(2011) 681 final.

<sup>12</sup> *ibid*

Examination of current CSR discourse across disciplines shows that the issues identified by the EU commission represent the emergent and recurring themes with varying degrees of emphasis.<sup>13</sup> Generally, CSR standards require corporations to go beyond their current legal obligations and aim for best practices. The concept urges corporations not only to focus on the traditional needs of shareholders but also to serve the need of other stakeholders whom they should have reasonable contemplation of in the execution of their operations.<sup>14</sup> They very much echo the neighbour principle so elegantly enunciated in *Donoghue v Stevenson*.<sup>15</sup>

### **Creation of Standards and the Internalisation of CSR**

The global growth and expansion of Multinational Corporations (MNCs) has increased corporations' influence and significance as international actors. The implication of this development is that MNCs' activities increasingly impact on rights and duties of stakeholders other than shareholders at both the domestic and global levels. While it is generally acknowledged that corporations have rights under international law,<sup>16</sup> the question of their obligations/duties under international law revolves around the theoretically complex but related questions of whether MNCs are subjects of international law on the one hand and, on the other, whether MNCs have international legal personality and international legal capacity.<sup>17</sup> Despite the post World War II increase in subjects of international law to include non-state actors such as intergovernmental organisations and individuals, the legal personality of MNCs is not that clear-cut.<sup>18</sup>

Some writers have suggested that private and public corporations 'may to a limited extent, be directly subject to rights and duties under international law'.<sup>19</sup> However, there is scant evidence of this in practice. One consequence of the failure to make MNCs direct subjects of international law is that international law cannot then enforce any obligations directly upon them. Consequently, more attention has been devoted to closing this lacuna by developing international CSR standards, resulting in soft law regimes.<sup>20</sup> While soft-law regimes are non-binding, they often develop into binding regulatory regimes by influencing/promoting the establishment of treaty regimes, or establishing common practices that crystallise into binding norms of customary international law.<sup>21</sup>

### **A Research Agenda: State practice and CSR**

Generally, standards may be brought about by recognised competent authority through recognised procedures<sup>22</sup> or they may 'gradually evolve by custom'.<sup>23</sup> Where an international

<sup>13</sup> Ilias Bantekas, 'Corporate Social Responsibility in International Law' (2004) 22 Boston University International Law Journal 309, 327.

<sup>14</sup> Deborah Leipziger, Benjamin Simmons and Anna Autio, 'Corporate Social Responsibility and Regional Trade and Investment Agreements' (United Nations Environment Programme, 2011) 11.

<sup>15</sup> *Donoghue v Stevenson* [1932] All ER Rep 1.

<sup>16</sup> See Merja Pentikäinen, 'Changing International 'Subjectivity' and Rights and Obligations under International Law – Status of Corporations' (2012) 8 Utrecht Law Review 146, 148.

<sup>17</sup> *ibid*

<sup>18</sup> Antonio Cassese, *International Law* (2nd ed, OUP 2005) 1.

<sup>19</sup> Roger P Alford, 'Apportioning Responsibility Among Joint Tortfeasors for International Law Violations' (2011) 38 Pepperdine Law Review 233, 234.

<sup>20</sup> (n 2)

<sup>21</sup> Herbert M Morais, 'The Quest for International Standards, Global Governance vs Sovereignty' (2001-2002) 50 University of Kansas Law Review 779, 781; Bernard H Oxman, 'The Duty to Respect Generally Accepted International Standards' (1991) 24 New York University Journal of International Law and Politics 110, 119.

<sup>22</sup> Hans Kelsen, 'The Pure Theory of Law: Its Method and Fundamental Concept, Part I' (1934) 50 Law Quarterly Review 475.

standard is established by a competent authority, for example, by treaty, its identification is relatively straightforward and so is the understanding of its scope. However, where an international standard evolves through custom or consensus, it is more challenging to track its development and to identify when a new international standard has been established. These two approaches to creating international standards (treaty law and customary international law (CIL) respectively) are the two main sources of international law.<sup>24</sup>

The secondary rules of recognition require evidence of two elements for the inauguration of a norm of CIL, namely State practice and '*opinio juris*'. State practice is also regarded as the objective element of customary international law as opposed to the subjectivity of '*opinio juris*'.<sup>25</sup> In relation to treaties, the concept of State practice is important in the interpretation of treaties.<sup>26</sup> However, in the context of this article, we are more concerned with State practice in the context of the creation of standards. The forms that State practice takes are numerous and this makes its identification a difficult task.<sup>27</sup> Furthermore, there are diverse views on what should be considered as a State practice. The modern view however is 'to have regard to what States say, what they do, and what they say about what they do, in so far as this reflects their legal beliefs.'<sup>28</sup> The sources of State practice are diverse in form and also in the values attached to them. According to Brownlie, the forms that State practice takes include:

diplomatic correspondence, policy statements, press releases, the opinions of official legal advisers, official manuals on legal questions, e.g. manuals of military law, executive decisions and practices, orders to naval forces, comments by governments on drafts produced by the International Law Commission, state legislation, international and national judicial decisions, recitals in treaties and other international instruments, a pattern of treaties in the same form, the practice of international organs, and resolutions relating to legal questions in the United Nations General Assembly.<sup>29</sup>

Wood added to this list, 'positions taken by States in their written and oral pleadings in international and domestic court proceedings; and under certain conditions their actions in drawing up and becoming parties to treaties.'<sup>30</sup>

The task of this article is to establish and evaluate the emergent State practice on the creation and practice of international standards on CSR. The article will examine significant developments to date and explore whether there is emerging a coherent international standard on CSR.<sup>31</sup> This is important because it will provide clarity to MNCs in relation to their CSR responsibilities and also provide better understanding of the prospect for international law in this area. While it is obvious that at present there is no CIL or treaty on CSR, the question is

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<sup>23</sup> Morais (n 21) 779-780.

<sup>24</sup> Michael Akehurst, 'The Hierarchy of Sources of international Law' (1975) 47 *British Year Book of International Law* 273; Ben Chigara, *Legitimacy Deficit in Custom: Towards a Deconstructionist Theory* (Ashgate 2001).

<sup>25</sup> Michael Wood, 'State Practice' *Max Planck Encyclopedia of International Law*, available at <<http://opil.ouplaw.com/home/EPIL>> accessed 13 December 2013.

<sup>26</sup> William J Aceves, 'The Economic Analysis of International Law: Transaction Cost Economics and the Concept of State Practice' (1996) 17 *University of Pennsylvania Journal of International Economic Law* 995, 1043.

<sup>27</sup> Ian Brownlie, *Principles of Public International Law* (8th ed, OUP 2012) 24.

<sup>28</sup> Wood (n 25).

<sup>29</sup> Brownlie (n 27) 24.

<sup>30</sup> Wood (n 25).

<sup>31</sup> Jennifer Zerk, *Multinational and Corporate Social Responsibility: Limitations and Opportunities in International Law* (CUP 2006) 243.

whether the considerable effort that has been put into devising voluntary standards or soft law for MNCs is driving coherent State practice on international CSR standards.

This article argues that it does. There are recurring themes in the efforts at the international level which is shaping the emerging international standards on CSR. Commenting on the various international soft law instruments on CSR, Zerk writes that the, "...various 'codes of conduct', 'guidelines' and 'principles' contain a number of recurring themes which, if given sufficient support by the international community, could eventually develop into binding obligations."<sup>32</sup> It is therefore plausible to cautiously posit that the existing international soft law regimes on international CSR standards indicate the possibility of the emergence of uniform standards on CSR.<sup>33</sup> However, for these developments to lead to the emergence of a new customary international law principle, "... there must be consistent state practice, evidencing a high degree of consensus around the desirability of the new principle, and evidence of a conviction on the part of states that the new principle is legally binding."<sup>34</sup> The article also discusses the practice of incorporating international CSR standards into investment agreements and the emerging trend in domestic regulation of CSR standards by States.

Going forward, progress towards the development of new international norms on CSR depends on States taking up the principles emerging from international CSR standards and incorporating them in national and international legal frameworks.<sup>35</sup>

### **Creation of CSR Standards through Public International Soft Law Instruments**

It is important to underscore that generally States have been very active in the development of international standards for CSR.<sup>36</sup> It is acknowledged that these standards do not as yet constitute public international law. However, because of the significant State involvement in the creation and implementation of these standards, they may ultimately lead to the emergence of new international norms in the future.

Today, it is acceptable to speak of 'internationally recognised CSR standards'. According to the European Union, "[F]ive instruments together make up an evolving and increasingly coherent global framework for CSR."<sup>37</sup> The five instruments are the Organisation for Economic Co-operation and Development's Guidelines for Multinational Enterprises (OECD Guidelines), the 10 principles of the United Nations Global Compact (Global Compact), United Nations Guiding Principles on Business and Human Rights (The Guiding principles), the International Labour Organisation's (ILO) Tripartite Declaration of Principles concerning Multinational Enterprises on Social Policy (The Tripartite Declaration) and the ISO 26000 Guidance Standard on Social Responsibility (ISO 26000). (These instruments are discussed in details in subsequent sections.) These instruments are universally accepted among States as international standards on CSR albeit non-binding. According to the EU Commission, "[T]his core set of internationally recognised principles and guidelines represents an evolving and recently strengthened global framework for CSR."<sup>38</sup>

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<sup>32</sup> *ibid*

<sup>33</sup> *ibid* 262.

<sup>34</sup> *ibid*

<sup>35</sup> *ibid* 243.

<sup>36</sup> Gunther Teubner, 'Self-Constitutionalizing TNCs? On the Linkage of "Private" and "Public" Corporate Codes of Conduct' (2011) 18 *Indiana Journal of Global Legal Studies* 17, 18-19.

<sup>37</sup> EU, 'CSR guidelines and principles', online at <[http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/guidelines-principles/index\\_en.htm](http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/guidelines-principles/index_en.htm)> accessed 12 December 2013.

<sup>38</sup> COM(2011) 681 final (n 6) 6.

Despite the fact that these instruments are strictly speaking soft law and non-binding, they are still important from a legal standpoint. As stated earlier, the soft law could develop into binding obligations by prompting treaty development or by being incorporated into customary international law. According to Zerk, the instruments are significant as ways of ‘testing attitudes, developing consensus around an issue and shaping future norms.’<sup>39</sup> Teubner has interestingly argued that these instruments, which he describes as ‘public codes’:

...define certain politically desired obligations and establish the boundary between permitted and banned activities, they are only informal recommendations and mere appeals for certain conduct. They are also valid law, yet in paradoxical form; they are law in force but without legal sanctions.<sup>40</sup>

It is trite to say that most international law scholars may not agree with the description of these standards as ‘valid laws’ or ‘law in force’. But more significant and relevant is Teubner’s argument that ‘[T]he public codes...provide templates, behavioural models, principles, best practices, and recommendations for the private codes’.<sup>41</sup> In other words, States set standards through these various voluntary instruments which have informed the standards set by MNCs themselves in their own corporate codes of conduct.<sup>42</sup> It is therefore pertinent to examine these instruments and their impact on the development of international standards for CSR.

### **CSR and International Labour standards for MNCs**

The International Labour Organisation’s Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy<sup>43</sup> (Tripartite Declaration) is reputed to be the first effort by the international community to cover the social dimension of business and sets corporate responsibility standards for MNCs. The ILO consists of a significant number of States in its membership, 183 States to date. The instrument therefore has considerable States’ endorsement and backing. It also includes workers’ and employers’ organisations. The tripartite structure of the ILO’s membership makes it a unique international organisation. According to the ILO, the Declaration ‘...[I]s the only international instrument on socially responsible business practices that has been agreed to by governments and representatives of workers’ and employers’ organizations.’<sup>44</sup>

The social justice sentiment behind the establishment of the ILO (as an Agency of the United Nation) is similar to the main rationale behind the CSR movement. The Preamble to Article 13 of the Treaty of Versailles establishing the ILO states that the High Contracting Parties to the treaty ‘moved by sentiments of justice and humanity as well as by the desire to secure the permanent peace of the world’ agreed to the establishment of the ILO. The focus of the agenda was the creation of global standards that would improve labour conditions on an international scale.<sup>45</sup> The ambition was also to establish a global standard that would not put

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<sup>39</sup> Zerk (n 31) 262.

<sup>40</sup> Teubner (n 36) 34.

<sup>41</sup> *ibid* 36.

<sup>42</sup> Corporate Codes of Conduct has been described as ‘policy statements that outline the ethical standards of conduct to which a corporation adheres’. Bantekas (n 13) 322.

<sup>43</sup> See ILO, ‘Tripartite declaration of principles concerning multinational enterprises and social policy (MNE Declaration) - 4th edition’, available at <[www.ilo.org/empent/Publications/WCMS\\_094386/lang-en/index.htm](http://www.ilo.org/empent/Publications/WCMS_094386/lang-en/index.htm)> accessed 12 December 2013.

<sup>44</sup> See ILO, ‘MNEs contributors to creation of employment’, available at <[www.ilo.org/empent/areas/mnes-contributors-to-creation-of-employment/lang-en/index.htm](http://www.ilo.org/empent/areas/mnes-contributors-to-creation-of-employment/lang-en/index.htm)> accessed 12 December 2013.

<sup>45</sup> See generally Ben Chigara, ‘Latecomers to the ILO and the Authorship and Ownership of the International Labour Code’ (2007) 29 Human Rights Quarterly 706, 710.

any country or industry adopting social reform at an economic disadvantage.<sup>46</sup> It was therefore important to create a level playing field that would improve social conditions and also lead to economic growth. The ILO'S strategy was to develop guidelines for companies operating internationally. This was achieved through the introduction of the Tripartite Declaration.

Following deliberations between member States' governments, labour organisations and employer groups, the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy was passed on the 16<sup>th</sup> of November 1977. It was revised in 2000 to include the fundamental principles and rights at work, and again in 2006 to update references to other ILO instruments. The recommendations in the Declaration apply to all Member States Parties and non-States Parties. The Declaration laid down the principles which Member States governments and employers' and workers' organisations are enjoined to observe albeit on a voluntary basis.

Some parts of the Declaration reflected existing binding obligations on Member States Parties which, according to Clapham is probably declaratory and a reminder of those existing obligations.<sup>47</sup> An example is the obligation to realize the fundamental principles and rights at work.<sup>48</sup> However, apart from this, the inclusion of such provisions in an instrument that also addresses MNCs led to the perception that these provisions are the minimum requirement that voluntary corporate initiatives such as corporate codes of conduct need to meet in order to be credible.<sup>49</sup> Nevertheless, there are provisions in the Declaration which appear to alter significantly the international standards on CSR.

A key provision in this regard is the specific reference to 'human rights' in paragraph 8 of the Declaration. The paragraph provides that: '[A]ll the parties concerned by this Declaration should respect ... the Universal Declaration of Human Rights (1948) and the corresponding International Covenants adopted by the General Assembly of the United Nations...'" According to Clapham, this was a 'clear recognition by states, and employers' and workers' organizations...that they should all take on human rights obligations as defined in the Universal Declaration and the two human rights Covenants of 1966'.<sup>50</sup> The ILO guidelines further provide standards on employment and industrial relations, training, living and working conditions.

The ILO Tripartite Declaration can thus be seen as an important summary of the standards States expect MNCs to apply. The gradual embedding of these standards in MNCs' codes of conduct is an apposite example of how the Declaration is shaping standards at the international level.<sup>51</sup> A survey conducted by Vigeo, a European Agency in 2008 examined how the largest publicly-listed European Companies were using the ILO's Tripartite Declaration, the OECD Guidelines and the UN Global Compact.<sup>52</sup> 89 companies participated in the

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<sup>46</sup> William B Gould IV, 'Labor Law for a Global Economy: The Uneasy Case for International Standards' (2001) 80 Nebraska Law Review 716, 720

<sup>47</sup> Andrew Clapham, *Human Rights Obligations of Non-State Actors* (OUP 2006) 213.

<sup>48</sup> Tripartite Declaration (n 43) para 1.

<sup>49</sup> Clapham (n 47) 215.

<sup>50</sup> *ibid* 214.

<sup>51</sup> Kathryn Gordon and Maiko Miyake, 'Deciphering Codes of Conduct: a Review of their Contents' OECD Working Papers on International Investment 1999/2, revised March 2000, 14. Kenneth Amaeshi and Olufemi Amao, 'Corporate Social Responsibility in Transnational Spaces: Exploring Influences of Varieties of Capitalism on Expressions of Corporate Codes of Conduct in Nigeria' (2009) 86 Journal of Business Ethics 225, 232.

<sup>52</sup> Fouad Benseddik and Annabelle Szwed, 'International Public Standards in the Conception and Practice of Social Responsibility by Large European Companies' (2008, Vigeo, SRI Research).

survey and the researchers analysed 281 corporate CSR and sustainability reports. In answer to the question ‘Is your Company’s CSR approach based on/inspired by international CSR guidance, standards or instruments?’ 64% of the respondents (two-thirds) refer to the ILO’s Tripartite Declaration. Furthermore, 53.9% of the companies referenced the Tripartite Declaration in their annual CSR or sustainability report. The survey also revealed that the companies prefer to base their CSR approach on international standards rather than national laws. 52.8% of the respondents stated this in the affirmative. The preference for international standards may be explained by the fact that these instruments are well developed when compared to national laws on CSR.<sup>53</sup>

### **International Human Rights Standards for Corporations**

Perhaps a logical follow up to the discussion on the Tripartite Declaration is to examine the recent United Nations Framework and Guiding Principles on Business and Human Rights.<sup>54</sup> With these two instruments, the UN attempted to consolidate all previous efforts on setting international standards for CSR. In 2005, the UN Secretary General appointed Professor John Ruggie as the special representative for the establishment of international human rights standards applicable to corporations. Six years later Ruggie and his team produced a governance framework and guiding principles on business and human rights - the Ruggies process.

The framework was proposed in 2008. In 2011, the guiding principles were established to aid the implementation of the framework. The guiding principles were endorsed by the UN Human Rights Council in 2011.<sup>55</sup> The instrument is the first of its kind in the UN history to define the responsibilities of States and of businesses in relation to human rights impact of business activities. The Ruggie’s process is significant because it identifies international standards against which conduct of MNCs can be measured. Notably, these standards go beyond compliance with local laws. The significance of this development is summed up in the Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises as providing:

... a “single, logically coherent template” for all States and all businesses in every part of the world - an approach which draws on existing international law, standards and practice, and formulates, after taking into account the gaps in such body of hard and soft law, a series of comprehensive principles. In addition, the Guiding Principles provide substantial clarification on the role of States and corporations with regards to business impacts that was not present in previous standards.<sup>56</sup>

The main idea behind the instrument itself is the notion that MNCs should share human rights responsibilities and the provision of remedies with States.<sup>57</sup> This notion is in contrast to

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<sup>53</sup> Discussed fully at a later stage in this article.

<sup>54</sup> HRC, ‘Report of the Special Representative of the Secretary General on the issue of Human Rights and Transnational Corporations and other Business Enterprises’ (7 April 2008) UN Doc A/HRC/8/5 (hereafter ‘the framework’); HRC, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’ (21 March 2011) UN Doc A/HRC/17/31 (hereafter ‘the guiding principles’).

<sup>55</sup> HRC, ‘Human rights and transnational corporations and other business enterprises’ (6 July 2011) UN Doc A/HRC/RES/17/4.

<sup>56</sup> UNGA, ‘Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises. Addendum: Uptake of the Guiding Principles on Business and results from Pilot Surveys of Governments and Corporations’ (16 April 2013) UN Doc A/HRC/23/32/Add.2 para 21.

<sup>57</sup> See the guiding principles (n 54) paras 11-15.

the traditional view that places these responsibilities solely upon States. Therefore, the governance framework's purpose is to clarify the roles and responsibilities of governments and companies in relation to the human right impact of business activities. The framework rests on complimentary responsibilities which are encapsulated in three core principles (or pillars), namely, the State duty to protect against human rights abuses by third parties - including business; a separate and independent corporate responsibility to respect human rights; and the need for the provision of effective access to (judicial and non-judicial) remedies.<sup>58</sup> The principles or pillars are designed to support each other.

The first two pillars clarify the duties of States and corporations for human rights respectively. On the part of States, it recognises the settled position in international law that the State has a duty to protect human rights and prevent abuses by entities including MNCs. While not recommending specific legislative intervention or policy actions, the framework pinpoints certain innovative approaches which may be useful in the achievement of the States' duty to protect. The first is for governments to foster a corporate culture that incorporates the recognition, promotion and protection of human rights as an integral part of business operations. States can achieve this by introducing statutory provisions that require comprehensive sustainability reporting, wider fiduciary duties of company officers and supports the use of shareholder proposals. Also significant is the provision in the first pillar on the requirement to focus on company policies, rules and practices in the criminal determination of culpability of MNCs. The second is for both the host and the home State to jointly coordinate to develop better means of achieving balanced outcomes between for all concerned parties in the context of international investment and dispute resolution.

The framework further encourages cooperation and partnership between States, especially with States that may lack the technical know-how or financial resources to regulate and monitor companies. In conflict zones where the institutional system may be broken down or deficient, the framework recommends that home States identify key indicators that may help signpost human rights issues for MNCs. Business access to this information would enhance their potential to plan for and to respond effectively to human rights challenges around their spheres of operation.

On the part of corporations, the framework seeks to advance further the responsibility recognised in the Tripartite Declaration and the OECD Guidelines for Multinational Enterprises (discussed below), namely, that MNCs have the duty to respect the principles recognised in those instruments. According to the framework, except in situations where companies perform a public function or where they have voluntarily undertaken additional responsibility, the duty to respect means that companies 'should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved.'<sup>59</sup> The framework stipulates that MNCs' responsibility can be achieved by due diligence. It is significant that the concept of due diligence was originally established and applied to State responsibility to protect human rights.<sup>60</sup> The principle is also found in legal tools used at State level to shape the behaviour of corporations.<sup>61</sup> The Ruggie's process has thus adopted the concept in defining the responsibility of MNCs.

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<sup>58</sup> *ibid*

<sup>59</sup> *ibid*, Introduction, 4; the framework (n 54) para 24.

<sup>60</sup> See Inter-American Court of Human Rights *Velasquez Rodriguez* (1989) 28 ILM 294.

<sup>61</sup> Examples include environmental assessment tools. See Olivier De Schutter, Anita Ramasastry, Mark B Taylor and RC Thompson, 'Human Rights Due Diligence: The Role of States' (Human Rights Due Diligence Project, 2012).

The framework prescribes that a basic due diligence process should include adoption of a human rights policy, conduct of human rights assessment prior to operations, integrating human rights policy throughout the company and tracking performance through monitoring and auditing company procedures. According to the framework, the substantive content of due diligence is contained in the international bill of human rights and the ILO core conventions. These are instruments that are traditionally addressed to States. The due diligence process is further guided by three key factors that companies should consider, namely, the country context where they operate and the specific human rights challenges in that context; the impact their own activities may have in the context and the possibility that they may contribute to abuse through relationships connected to their activities.

The third pillar states that both States and MNCs have the responsibility to ensure remedies, legal and non-legal, to victims of corporate abuse or misconduct. On the part of the State, the responsibility is to provide effective judicial mechanisms both in the host and home territories. States could facilitate credible and effective non-judicial mechanisms through a variety of means, including national human rights institutions and the National Contact Points under the OECD framework.<sup>62</sup> On the part of companies, the framework suggests that providing an effective grievance mechanism is part of the corporate responsibility to respect.<sup>63</sup> Company-initiated mechanisms, such as mediation, advisory services for complaints and provision of hotlines for raising complaints may be provided directly by the company or through external resources. For effectiveness and credibility, the mechanism is required to comply with the minimum requirement laid down in the Ruggie's framework.<sup>64</sup> The mechanism may be a joint effort of several companies but the design and oversight should involve representatives of groups who may seek to use the mechanism.<sup>65</sup>

Principles from the Ruggie's process have already featured in the adjudication before an international court in the case of *The Registered Trustees of the Socio-Economic Rights & Accountability Project (SERAP) v. President of the Federal Republic of Nigeria & Others*.<sup>66</sup> The parties before the Community Court of Justice of the Economic Community of West African State (ECOWAS) included the Nigerian State, its State owned corporation, the Nigerian National Petroleum Corporation (NNPC) and six other six MNC subsidiaries. A key issue at the preliminary stage was whether the Court had jurisdiction to pronounce on the responsibility and liability of the defendant corporations for alleged human rights violations alongside that of the State.

Counsel for the Plaintiffs argued that MNCs have obligations under international law not to be complicit or assist in human rights violations.<sup>67</sup> Further, the violations or abuse of human rights by the corporations was a direct consequence of the absence of due diligence and proper planning and also a failure to observe the minimum requirement to respect human rights.<sup>68</sup> To support this contention, counsel for the Plaintiff referred to the Ruggie's process, and specifically to the concept of due diligence as a mechanism for discharging the

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<sup>62</sup> The framework (n 54) paras 82-85, 96-99.

<sup>63</sup> *ibid*, paras 93-95.

<sup>64</sup> The framework (n 54) para 92.

<sup>65</sup> *ibid*, para 95.

<sup>66</sup> ECOWAS Community Court of Justice, *The Registered Trustees of the Socio-Economic Rights & Accountability Project (SERAP) v President of the Federal Republic of Nigeria & Others* (10 December 2010) ECW/CCJ/APP/07/10.

<sup>67</sup> Plaintiffs' Brief of Argument (on file with author) 10.

<sup>68</sup> *ibid*

responsibility to respect human rights. Counsel for the Plaintiff quoted with approval the following passage from the Ruggie's process: 'To discharge the responsibility to respect requires due diligence. This concept describes the steps a company must take to become aware of, prevent and address adverse human rights impacts.'<sup>69</sup>

In its ruling, the Court acknowledged the fact that the accountability of corporations, especially for violation of human rights or complicity in human rights abuse is one of the most controversial issues in international law.<sup>70</sup> The Court further acknowledged the widely held international concern regarding the challenges attendant upon any effort under present international law to hold MNCs to account for actions that affect human rights.<sup>71</sup> Commenting on the Ruggie's process the Court observed:

This need to make corporations internationally answerable has led to some initiatives, namely the nomination of Special Representative of the Secretary General of the United Nations whose Report titled "Protect, Respect and Remedy: A framework for Business and Human Rights" (The Ruggie Report) is one of the greatest reference on the accountability of multinationals for Human Rights violation in the world.<sup>72</sup>

However, the Court concluded that despite these developments, 'the process of codification of international law has not yet arrived at a point that allows the claim against corporations to be brought before International Courts.'<sup>73</sup> Nevertheless, the significance of this case is the reference to the Ruggie's framework by Counsel for the plaintiffs and also by the Court. This is indicative of the potential of the Ruggie's process to influence developments in this area.

Furthermore, the potential of the Ruggie's process to inform State practice is gradually taking shape. The process' principles are steadily shaping CSR standard setting at national and international levels. A new chapter incorporating its core provisions has been included in the OECD guidelines. Similarly its provisions have been incorporated into the EU's latest strategy on CSR<sup>74</sup> and also in the International Finance Corporation's sustainability policy.<sup>75</sup> Furthermore, the 2013 Guide for developing country negotiators on international investment agreements published by the Commonwealth Secretariat refers to the responsibility of corporations to respect human rights in line with the Guiding Principles.<sup>76</sup>

Recently, the Working Group on the issue of human rights and transnational corporations and other business enterprises conducted a pilot survey on the uptake and implementation of the Guiding Principles by States. Out of 193 UN Member States Parties, there were responses from 26 States. Obviously, this constitutes a small sample size, which arguably may affect the reliability of the result of the survey as representative of State practice. Nonetheless, while no clear conclusions can be drawn from the survey, the report gives a good indication of the

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<sup>69</sup> The framework (n 54) para 56.

<sup>70</sup> *SERAP v President of the Federal Republic of Nigeria* (n 66) para 66.

<sup>71</sup> *ibid* paras 66-68.

<sup>72</sup> *ibid* para 68.

<sup>73</sup> *ibid* para 69.

<sup>74</sup> (n 11)

<sup>75</sup> IFC's Sustainability Framework - 2012 Edition', available at <[www.ifc.org/wps/wcm/connect/Topics\\_Ext\\_Content/IFC\\_External\\_Corporate\\_Site/IFC+Sustainability/Sustainability+Framework/Sustainability+Framework+-+2012/](http://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/IFC+Sustainability/Sustainability+Framework/Sustainability+Framework+-+2012/)> accessed 12 December 2013.

<sup>76</sup> See Anthony VanDuzer, Penelope Simons and Graham Mayeda, 'Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Country Negotiators' (Commonwealth Secretariat, 2013).

potential of the Guidelines to influence State practice. Convergence of practice could ultimately lead to the achievement of coherent global CSR standards at the international level. Out of the 26 responding States, 17 indicated that they had CSR policies. The majority of this number (10) reported that their CSR policies had been premised on the UN Global Compact principles (mentioned with the highest frequency); the OECD Guidelines, and the ISO 26000. Only two States had updated their policies to incorporate the Guiding principles.<sup>77</sup> Notwithstanding, it was further reported that outside of the survey, at least 30 States were already developing national action plans for the purpose of implementing the Guiding Principles.<sup>78</sup>

Notably, the survey found that a significant number of States have policies that ‘mandated or encouraged high-level corporate oversight over human rights due diligence’ and ascribed board responsibility to the monitoring of corporations’ human rights performance. Eleven countries mandated high-level oversight while 12 States outlined board involvement in the monitoring of human rights performances in State policies.<sup>79</sup> Furthermore, 16 States altogether have requirements for business to report on their human rights performance. Out of these 10 stated that such requirements were mandatory. In five States, the reporting requirements are voluntary while in one State the requirement is a mix of mandatory and voluntary rules. In addition, 7 States have follow-up procedures in place to assess company reports pursuant to these requirements.

Another notable finding is in the area of international trade and investment agreements. Fourteen States reported that they had explicit human rights provisions (including labour and environmental issues) in international trade and investment agreements that they were involved with. However, when it comes to the practice of including human rights impact assessment in investment agreements or the framework governing trade and investments, only 4 States had this in place. In addition only 5 States reported that their export and foreign investment promotion policies include specific human rights provisions.<sup>80</sup>

The foregoing discussion makes clear that the UN through the Ruggie’s process is working towards evolving convergence of State practice on international standards of human rights for business and in particular, MNCs. There is growing consensus that MNCs have human rights obligations. What the Ruggie’s process has done is to identify the common elements of the obligations and how the standards can be met. From the discourse, certain themes such as the corporate responsibility to respect human rights and the concept of due diligence are emerging as recognised international principles on CSR.

### **The OECD and International Standards of CSR**

A guideline on acceptable international standards for multinational enterprises was produced by the OECD in 1976 as part of the OECD Declaration on International Investment and Multinational Enterprises.<sup>81</sup> The organisation consists of 34 countries and about five States are currently in talks to join the organisation. Significantly a number of other States have opted to commit to the organisation’s principles or participate in its activities. There are about 50 non-

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<sup>77</sup> UN Working Group (n 56) para 15.

<sup>78</sup> *ibid* para 28.

<sup>79</sup> *ibid* para 18.

<sup>80</sup> *ibid* para 33.

<sup>81</sup> OECD, ‘Guidelines for Multinational Enterprises’ (1976) 15 ILM 9.

member State participants. Gordon describes the rationale for the development and implementation of the instrument as:

... an expression of the shared expectations of the adhering governments. These governments agree to promote them among 'their' multinational enterprises and sign a binding Council Decision that requires them to set up National Contact points...to participate in other facets of Guidelines implementation.<sup>82</sup>

It has also been suggested that the adhering States in effect 'signed up' to the Guidelines on behalf of MNCs based within their territories to uphold the standards contained in the Guidelines.<sup>83</sup>

The instrument was revised in 1991 to take into account environmental considerations.<sup>84</sup> The latest revision of the guidelines occurred in 2011.<sup>85</sup> The negotiations of the guidelines involved participating countries of the OECD, business associations, trade unions and some civil society organisations. The document set out 'the principles for acceptable behaviour for corporations in the social and environmental sphere globally'.<sup>86</sup> It has been suggested that the document is the most comprehensive instrument on CSR standards.<sup>87</sup>

This instrument emphasizes MNCs' obligations in relation to a range of international standards including the standard of disclosure, employment and industrial relations, environment, combating bribery and consumer protection.<sup>88</sup> It also makes direct reference to some important international instruments, including the Universal Declaration of Human Rights (1948) and the ILO Declaration on Fundamental Principles and Rights at Work (1998). MNCs are encouraged to comply with these instruments in line with host States' international obligations and commitments. The revised version (2000) extended the scope of the instrument to corporations operating in or from OECD territories to capture the global nature of MNCs operations.<sup>89</sup> The instrument enjoined MNCs to encourage, where practicable, business partners including suppliers and contractors to follow the Guidelines in their business dealings. On labour standards, the OECD Guidelines supplemented the core ILO standards by specifying additional standards and creating additional ones on occupational health and safety requirements.

A recently updated version of the Guidelines was put in *inter alia* to introduce a new Chapter on human rights in light of the Ruggie's process.<sup>90</sup> This again shows a level of convergence on standards of human rights for corporations. The responsibility of MNCs under the Guidelines is to '[a]void causing or contributing to adverse impacts, on matters covered by the

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<sup>82</sup> Kathryn G Gordon, 'The OECD Guidelines and other Corporate Responsibility Instruments: A Comparison' OECD Working papers on International Investment No 2001/5 (2001).

<sup>83</sup> Joris Oldenziel, Joseph Wilde-Ramsing and Patricia Feeney, '10 Years On: Assessing the Contribution of the OECD Guidelines for Multinational Enterprises to Responsible Business Conduct' (OECD Watch, 2010) 5.

<sup>84</sup> Text of the revised version of the OECD Guideline for Multinational Enterprises is available at <<http://mneguidelines.oecd.org/text/>> accessed 12 December 2013.

<sup>85</sup> *ibid*

<sup>86</sup> Sorcha Macleod and Douglas Lewis, 'Transnational Corporations: Power, Influence and Responsibility' (2004) 4 Global Social Policy 77.

<sup>87</sup> Ran Goel, *Guide to Instruments of Corporate Responsibility: An Overview of 16 Key Tools for Labour Fund Trustees* (York University 2005) 65.

<sup>88</sup> OECD Guidelines (n 81).

<sup>89</sup> *ibid*

<sup>90</sup> *ibid*

Guidelines, through their own activities, and address such impacts when they occur.<sup>91</sup> Where they have caused or contributed to such outcomes MNCs are required to provide or cooperate in the provision of remedies for adverse human rights impact. Furthermore, the Guidelines provide that in situations where the MNC has not directly contributed or caused an adverse impact but the impact is linked to the MNCs' operations, products or services by a business relationship, the company should use its position or influence acting by itself or in cooperation with other entities to prevent or mitigate the adverse impact.<sup>92</sup>

The Guidelines are implemented and promoted through National Contact Points (NCP) which members are obliged to set up as a result of the OECD Council Decision of June 2000.<sup>93</sup> States have a wide latitude in respect of structural arrangements in this regard.<sup>94</sup> The NCPs promote the Guidelines, entertain enquiries and resolve problems in specific processes of implementation. The NCPs also handle complaints against companies for violations of OECD principles. Between 2001 and 2010, a total of 213 cases were brought before the NCPs on the violations of standards contained in the Guidelines.<sup>95</sup> NCPs also gather and collate information on experiences on the implementation of the Guidelines at the national level. These experiences are shared at the general meetings and then published in annual reports submitted by the NCPs<sup>96</sup>

In the survey conducted for Vigeo, 55% of the companies surveyed based their CSR approach on the OECD Guidelines while 53% referenced the instrument in their annual CSR or sustainability report.<sup>97</sup> Companies were generally favourable to the standards laid down in the Guidelines, with 85% stating that the Guidelines may help companies report on their social responsibility to their stakeholders. Further, 77% of the surveyed companies stated that the Guidelines would help address social and environmental dumping risks in the world market. However, the use of the OECD Guidelines is not limited to European companies as there is evidence of its use in other countries such as Canada, Japan, Australia, Switzerland and the USA.<sup>98</sup>

### **A Global Compact for Corporations**

The Global Compact is another international standard-setting initiative that emerged from the United Nations system. The Global Compact programme was initiated by Kofi Anan, as a voluntary initiative designed to help create a fairer world order by enjoining businesses to follow ten principles concerning human rights, labour, the environment, and corruption.<sup>99</sup> It should be noted that the compact was developed by committees and individuals within the UN system and not by States. This fact may weaken its potential to shape State practice.

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<sup>91</sup> *ibid*

<sup>92</sup> *ibid*

<sup>93</sup> OECD Council, Decision of June 2000, available at [www.oecd.org/document/39/0,3343,en\\_2649\\_34889\\_1933095\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/39/0,3343,en_2649_34889_1933095_1_1_1_1,00.html) accessed 12 December 2013.

<sup>94</sup> Macloed and Lewis (n 86).

<sup>95</sup> Joris Oldenziel, 'The Added Value of the UN Norms: A Comparative Analysis of the UN Norms for Business with Existing International Instruments' (SOMO Centre for Research on Multinational Corporations, 2005) 9.

<sup>96</sup> See generally Christopher N Francoise, 'A Critical Assessment of the United States' Implementation of the OECD Guidelines for Multinational Enterprises' (2007) 30 *Boston College International and Comparative Law Review* 223.

<sup>97</sup> Benseddik and Szwed (n 52)

<sup>98</sup> Paul Hohnen, 'OECD MNE Guidelines: A Responsible Business Choice' *OECD Observer* No 270/271 December 2008-January 2009.

<sup>99</sup> Oliver F Williams, 'The UN Global Compact: The Challenge and the Promise' (2004) 14 *Business Ethics Quarterly* 755.

However, taken into consideration the popularity of the instrument among companies, policy makers are likely to take its principles into consideration in designing their CSR standards. Furthermore, the ten principles share similar characteristics with those of State sponsored instruments on CSR previously discussed. This is further evidence of convergence on CSR norms.

The ten principles were derived from the Universal Declaration of Human Rights (1948),<sup>100</sup> the Rio Declaration (1992),<sup>101</sup> the four fundamental principles and rights at work adopted at the World Summit for Social Development (1995)<sup>102</sup> and the UN Convention against Corruption (2003).<sup>103</sup> The principles include:

- Corporations' responsibility to support and respect international human rights and not to be complicit in human right abuses.
- Labour related responsibilities including the upholding of freedom of association and the right to collective bargaining, elimination of forced and compulsory labour.
- Abolition of child labour and elimination of discrimination in employment and occupation.
- Environmental responsibility including support for a precautionary approach to environmental challenges, undertaking initiatives that promote greater environmental responsibility and the development and use of environmentally friendly technologies.
- Businesses requirement to work against all forms of corruption including extortion and bribery.<sup>104</sup>

The idea behind the initiative was to get businesses to internalise these principles in their practices.<sup>105</sup> The Global Compact encourages companies to embrace good practices, 'rather than rely on their often superior bargaining position vis-à-vis national authorities'.<sup>106</sup>

Corporations that sign up to the initiative are required to make an unambiguous statement of support and include some reference in their annual report or other public documents on the progress they have made to internalise the Principles within their operations.<sup>107</sup> Companies are further required to submit a brief description of their report to the Global Compact's website. Failure to submit the brief description within one year of signing up and every year thereafter may result in the defaulting company being removed from the list of participants. The instrument also encourages participating companies to participate in the Global Reporting Initiative - sometimes called the triple bottom line or sustainability reporting. Nonetheless, participation is not yet mandatory.<sup>108</sup>

It has been suggested that the global Compact is an attempt to retrieve the moral purpose of business.<sup>109</sup> It has been opined that, the instrument is designed as an incremental process of

<sup>100</sup> Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217A (III) (UDHR) 71.

<sup>101</sup> Rio Declaration on Environment and Development (adopted 14 June 1992) (1992) 31 ILM 874.

<sup>102</sup> World Summit for Social Development, 'Report of the World Summit for Social Development' (1995) UN Doc A/CONF.166/9.

<sup>103</sup> United Nations Convention against Corruption (adopted 31 October 2003) UNGA Res 58/4, available at <[www.unodc.org/unodc/en/treaties/CAC/index.html](http://www.unodc.org/unodc/en/treaties/CAC/index.html)> accessed 21 September 2013.

<sup>104</sup> United Nations Global Compact, 'The Ten Principles', available at <[www.unglobalcompact.org/aboutthegc/thetenprinciples/](http://www.unglobalcompact.org/aboutthegc/thetenprinciples/)> accessed 12 December 2013.

<sup>105</sup> Surya Deva, 'Global Compact: A Critique of the U.N.'s 'Public-Private' Partnership for Promoting Corporate Citizenship' (2006-2007) 34 Syracuse Journal of International Law and Commerce 107.

<sup>106</sup> John G Ruggie, 'Taking Embedded Liberalism Global: The Corporate Connection' in David Held and Mathias Koenig-Archibugi (eds), *Taming Globalization: Frontiers of Governance* (Polity Press 2003) 93.

<sup>107</sup> Williams (n 99) 756.

<sup>108</sup> *ibid*

<sup>109</sup> *ibid*761.

learning and improvement, rooted in local networks that share the same universal values.<sup>110</sup> According to Ruggie, the Compact “operates on the premise that the socially legitimated good practices would help drive out the bad ones through the power of transparency and competition”.<sup>111</sup> Ruggie hopes that experience learnt through the Global Compact implementation will strengthen the desire for greater benchmarking so that some of the soft laws produced by voluntary initiatives will possibly develop subsequently into positive obligations.<sup>112</sup>

It is interesting to note that the Global compact features more than other instruments in the corporate code of MNCs. According to the Vigeo survey, 92% of the companies surveyed reported that their CSR approach is based on or inspired by the Global Compact.<sup>113</sup> Furthermore, 87.2% of the companies refer to the compact in their annual CSR or sustainability report. This shows the extent to which the instrument may be shaping corporate standards and the popularity of the instrument in the corporate world makes it influential on States’ policy decisions on CSR.

### **The ISO 26000 Guidance Standards on Social Responsibility**

Another notable international standard-setting instrument is the International Standard Organisation’s ISO 2600: Guidance Standards on Social Responsibility. The ISO is a Geneva based independent non-governmental organisation made up of members from national standards bodies of 163 countries from around the world. It is the world’s largest and most widely accepted international industrial and commercial standards developer. The institution represents a strong confluence between the public (States) and the private sector in the creation of international standards. It has been observed that ISO international standards often become law, either through international treaties or transforming national legislation.<sup>114</sup>

The ISO 26000 was launched in Geneva in 2010. The instrument was produced by the ISO Working Group on Social Responsibility whose mandate was to develop an authoritative standard on social responsibility. The membership of the working group includes participants from the industrial sector, States, labour organisations, consumers, non-governmental organisations, service, support, research and others. The wide representation of stakeholders in the working group has been described as the broadest in the history of ISO standards development.<sup>115</sup> The document is a voluntary international standard which, unlike other ISO standards, is not meant to be used by organisations for certification purposes. The term ‘social responsibility’ was used to accommodate ‘corporate social responsibility’ in the private sector and the social responsibility of public organisations.<sup>116</sup>

According to Rob Steele, the ISO’s secretary general, ‘What makes ISO 26000 exceptional among the many already existing social responsibility initiatives is that it distils a truly international consensus on what social responsibility means and what core subjects need to be addressed to implement it.’<sup>117</sup>

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<sup>110</sup> *ibid*

<sup>111</sup> Ruggie (n 106).

<sup>112</sup> *ibid*

<sup>113</sup> Benseddik and Szwed (n 52)

<sup>114</sup> Thomas Hemphill, ‘The ISO 26000 Guidance on Social Responsibility International Standard: What Are the Business Governance Implications?’ (2013) 13 Corporate Governance 305, 312.

<sup>115</sup> *ibid*

<sup>116</sup> *ibid* 306.

<sup>117</sup> Available at <[www.iso.org/iso/home/news\\_index/news\\_archive/news.htm?refid=Ref1366](http://www.iso.org/iso/home/news_index/news_archive/news.htm?refid=Ref1366)> accessed 9 February 2014.

The ISO 26000 aims to build a consensus around CSR by drawing its principles and guidelines from existing public and private initiative such as the United Nations Global Compact. Hemphill writes that:

Nowhere else is there such a comprehensive and concise document bringing all the elements of social responsibility together, helping to develop an international consensus on what social responsibility means to business enterprises, identifying the social responsibility issues which business enterprises need to address, and explaining how the principles and objectives of social responsibility can pragmatically integrated into such business enterprises.<sup>118</sup>

The standard is based on seven core principles. These include accountability, transparency, ethical behaviour, respect for stakeholders' interests, respect for rule of law, respect for international norms of behaviour and respect for human rights. These principles are not dissimilar from the principles in the instruments previously discussed.

### **International CSR Standards and International Investment Treaties and Framework Agreements**

According to United Nations Conference on Trade and Development (UNCTAD), as at 2013, the international investment regime consists of over 3200 agreements. These agreements include more than 2860 Bilateral Investment Treaties (BITs) and over 340 other agreements.<sup>119</sup> Traditionally investment instruments are put in place to protect investors and investments. However, recent trends have seen the inclusion of CSR standards as a *quid pro quo*.<sup>120</sup> Therefore, while the home State secures protection for the property right of the investor from its territory under the instrument, the host State secures the right to regulate CSR standard in the agreement.<sup>121</sup> Another significant trend is the practice of incorporating by reference the international soft law CSR instrument into investment agreements.<sup>122</sup>

UNCTAD also noted that some of the recently concluded International Investment Agreements (IIAs) include features that are meant to ensure that the treaty framework contribute to sustainable development strategies that focus on inclusive economic growth, support policies for industrial development, and address the environmental and social impacts of investment.<sup>123</sup> This development has engendered the challenge to balance the rights and obligations of States and investors<sup>124</sup> by paying attention to the corresponding responsibilities of investors. UNCTAD recommends that IIAs give more prominence to the issue of CSR. In the organisation's view, States' investment policies should be aligned with sustainable development goals and 'should promote and facilitate the adoption of and compliance with best international practices of CSR and good corporate governance'.<sup>125</sup>

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<sup>118</sup> Hemphill (n 114) 313.

<sup>119</sup> UNCTAD, 'International Investment Policy Making in Transition: Challenges and Opportunities of Treaty Renewal' IIA Issue Note No 4 (June 2013).

<sup>120</sup> Mary E Footer, 'BITs and Pieces: Social and Environmental Protection in the Regulation of Foreign Investments' (2009-2010) 18 Michigan State Journal of International Law 34.

<sup>121</sup> *ibid* 34.

<sup>122</sup> *ibid* 61.

<sup>123</sup> UNCTAD, 'Towards a New Generation of International Investment Policies: UNCTAD's Fresh Approach to Multilateral Investment Policy-Making' IIA Issue Note, No 5 (July 2013).

<sup>124</sup> *ibid*

<sup>125</sup> *ibid*

It is also worth mentioning the 2010 European Parliament's resolution that demanded the inclusion of CSR clauses into trade agreements signed by the EU.<sup>126</sup> The resolution made reference to the international instruments discussed in this article and other CSR initiatives as the basis for the demand.

In emerging practice the provisions on CSR related issues can be found in pre-ambular texts.<sup>127</sup> However, such provisions are now appearing in substantive provisions of the agreements. An example is Article 1106 of the North American Free Trade Agreement which allows States to put in place measures necessary for the protection of the environment to protect human, or plant health and safety or the conservation of exhaustible natural resources.<sup>128</sup> Furthermore, there is an emerging practice of conditioning the support that home States provide for MNCs on CSR issues. States use Export Credit agencies to assist MNCs with financing in the form of credit or credit insurance/guarantees and control the terms of the arrangement. An example in this regard is the Dutch Export Credit Insurance facility which is expressly used to promote CSR through the OECD guidelines. The State requires all applicants to indicate their familiarity with the OECD Guidelines and undertake to implement it in their companies.<sup>129</sup>

### CSR and State Legislation

CSR principles are increasingly evident in national legislation albeit at a very slow pace. At the moment, the development is rather haphazard, but the development is significant because it shows that States are engaging with the CSR concept at the national level. This development may be part of the process of the emergence of coherent State practice on CSR standards.<sup>130</sup> It is interesting to note that governments in the developing world have taken the lead in this regard.

In 2007, the Indonesian parliament passed a new company law, the Limited Liability Company Law, 2007, repealing the Limited Liability Company Law No.5 of 1995. In addition, a new investment law was introduced, the Investment Law No. 25 of 2007. Under these laws, the Indonesian government made CSR a mandatory concept for companies. The relevant provisions of the laws are Article 1 and 74 of the Limited Liability Company Law, 2007 and Article 15b of the Investment Law No. 25 of 2007. Article 74 which is on the 'Social and Environmental Responsibility' provides as follows:

1. Companies conducting business activities in the field of and/or related to natural resources have the obligation to carry out Social and Environmental Responsibility.
2. Social and Environmental Responsibility as referred to in paragraph (1) is the company's obligation, which is budgeted for and calculated as a cost of the company, and which is implemented with attention to appropriateness.
3. Companies which do not carry out their obligation as referred to in paragraph (1) shall be subject to sanctions according to the provisions of laws and regulations.

<sup>126</sup> European Parliament Resolution 2012/C 99 E/19 of 25 November 2010 on corporate social responsibility in international trade agreements (2009/2201(INI)) [2012] OJ 99 E/101.

<sup>127</sup> Footer (n 120) 38.

<sup>128</sup> *ibid* 42.

<sup>129</sup> Governments of the Netherlands, 'Export Credit Insurance', available at <[www.government.nl/issues/entrepreneurship-and-innovation/excport-credit-insurances-eci](http://www.government.nl/issues/entrepreneurship-and-innovation/excport-credit-insurances-eci)> accessed 12 December 2013.

<sup>130</sup> Renginee G Pillay, 'Legislating Philanthropy: New Corporate Accountability' (2012) 12 Contemporary Issues in Law Journal 75, 77.

4. Further provisions on Social and Environmental Responsibility shall be regulated by Government Regulation.

Article 1 of the Law defines social and environmental responsibility as:

the company's commitment to participate in sustainable economic development in order to improve the quality of life and beneficial environment, both for the company itself, the local community, and society in general.

The Investment Law No 25, 2007 provides in Article 15 b that 'Each investor is obliged to...carry out corporate social responsibility'.

These provisions thus formalise regulatory backing to CSR at the national level, reflecting generally the CSR principles developed at the international level.

Similarly, Mauritius introduced in 2009 a statutory requirement under its Mauritius Income Tax Act 1995<sup>131</sup> to the effect that all companies of a certain size have the legal obligation to contribute two per cent of their profit after tax to CSR activities such as socio-economic development, including gender and human rights issues; environmental protection and eradication of poverty. India introduced in 2011 a Company Bill, which requires companies of a certain net-worth to spend at least 2% of their average net profits within the three previous year on CSR initiatives. Also, Nigeria continues in its attempt to introduce a law on CSR.<sup>132</sup>

However, these developments are not limited to developing countries. The provision on Directors' duties in the UK Company Act 2006 is presented in CSR language.<sup>133</sup> Section 172 (1)(c) of the Companies Act 2006 on the general duty of Company Directors to act in ways that promote the success of the company also obliges Company Directors to have regard to the "impact of the company's operations on the community and the environment."

In 2001 France amended its laws to include mandatory CSR reporting. The law requires extensive disclosure of social and environmental issues by corporations. Notably, article 116 of the New Economic Regulation makes it mandatory for all companies trading on the French Stock Exchange to report annually on the social and environmental impact of their activities commencing from 2003. Article 116 was implemented by Decree Number 2002-221 (Decree) of February 20, 2002 which established nine separate categories of social information that must appear in the annual report. These include matters relating to human resources, community issues and engagement, labour standards, health and safety and environmental issues. Furthermore, mandatory CSR reporting requirements now exist in several countries including Sweden, Netherlands, Norway, Denmark and Australia.

At the EU level, CSR is recognised as an essential component of the European Social model. Corporations are required to disclose in their consolidated annual reports non-financial matters, including information relating to environmental and employee matters.<sup>134</sup> However,

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<sup>131</sup> The Mauritius Finance (Miscellaneous Provisions) Act 2009. Act No 14 of 2009 amended the Act by incorporating Sub-Part AD on CSR.

<sup>132</sup> Olufemi Amao, 'Mandating Corporate Social Responsibility: Emerging Trends in Nigeria' (2008) 6 Journal of Commonwealth Law and Legal Education 75.

<sup>133</sup> See Companies Act 2006.

<sup>134</sup> Council Directive 2003/51/EC of 18 June 2003 amending Directives 78/660/EEC, 83/349/EEC, 86/635/EEC and 91/674/EEC on the annual and consolidated accounts of certain types of companies, banks and other financial institutions and insurance undertakings [2003] OJ L 178/16.

the disclosure requirement is only applicable where it is deemed necessary for an understanding of the company's development.<sup>135</sup> More recently, the EU Commission adopted a Directive on disclosure of non-financial and diversity information by EU companies with the objective of increasing EU companies' transparency and performance in relation to policies, risks and results on environmental, social and employee related matters, respect for human rights, anti-corruption and bribery issues and diversity on the board of directors.<sup>136</sup> Significantly, the directive is a legal requirement though its mode of implementation appears flexible. Companies are enjoined to use international or national CSR guidelines such as the UN Global Compact or ISO 26000 in determining the relevant information to disclose. This directive is expected to take effect in 2017.

There are similar developments in the U.S. The Dodd Frank Wall Street Reform and Consumer Protection Act signed into law in 2010 both have provisions which have widely been described as 'Corporate Social Responsibility requirements'. The provisions are designed to promote greater sensibility to human rights issues and greater transparency.

Section 1502 of the Act targets oil, gas and mining companies and other companies that purchase minerals from the Democratic Republic of Congo (DRC) i.e. the conflict region and its surrounding areas. Furthermore, the provisions bind companies that are required to file reports with the US Securities and Exchange Commission. The section imposes significant due diligence requirements on companies and requires companies that use minerals sourced from the area of conflict to disclose annually the origin of minerals that they use. Where the minerals are from the areas specified in the Act, companies are required to disclose the facilities used in processing the minerals and the minerals' country of origin and the effort the company took to determine the mine or location of the origin of the mineral.

Section 1504 requires companies involved in resource extraction (such as drilling for oil, mining for precious minerals or extraction of natural gas etc.) to disclose payments made to foreign governments or to the US government in order to promote transparency and prevent bribery and corruption.

Even at the preparatory stage of the implementation process of Section 1502 provisions, the US Department of State advised companies to start performing meaningful due diligence in relation to conflict minerals. To achieve this, the Department endorsed the OECD Guidelines on due diligence.<sup>137</sup>

## Conclusion

CSR has emerged as an important concept in the creation and setting up of standards for corporations both at the national and international levels. The concept is more significant at the international level because of the globalization of MNCs' operations and the lack of a global governance regime for MNCs. In addition, the inability of most domestic legal frameworks to hold MNCs to account in their global operations has led attention to be focused on the creation of international CSR standards. States and their organisations have played important, and in most cases leading roles in facilitating the creation of these standards.

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<sup>135</sup> See Ruben Zandvliet, 'Corporate Social Responsibility Reporting in the European Union: Towards a more Univocal Framework' (2011) 18 Columbia Journal of European Law 38.

<sup>136</sup> On non-financial reporting, see the EU website at <[http://ec.europa.eu/internal\\_market/accounting/non-financial\\_reporting/index\\_en.htm](http://ec.europa.eu/internal_market/accounting/non-financial_reporting/index_en.htm)> accessed 12 December 2013.

<sup>137</sup> Celia R Taylor 'The New Disclosure Requirements under the Dodd-Frank Financial Reform Act: A move towards Greater Transparency' (2012) 9 European Company Law 64, 67.

This article shows that the involvement of States in the creation and practice of CSR raises the question of the emergence of new State practice that may have important implication for customary international law in the future. The article examined the key public international soft law provisions that are widely regarded as internationally recognised CSR standards. These include the OECD Guidelines, the United Nations Global Compact, The ILO's Tripartite Declaration, the ISO 26000 and the United Nations Framework and Guiding Principles on Business and Human Rights. The article shows that the emerging themes from these instruments and the linkages between the instruments are driving convergence. It is significant that even though these instruments approached the subject of CSR standards from different perspectives, the themes that have emerged from them are not dissimilar. Significantly, the United Nations Framework and Guiding Principles on Business and Human Rights attempt to consolidate previous efforts and bring a level of coherence into the CSR discourse. Furthermore, the emerging standards are increasingly being reflected in international treaties and framework agreements. These standards are already shaping MNCs' practices globally. Notably, as it has been shown in this article, CSR standards are increasingly evident in national legislation in developing and the developed countries. Therefore, looking at how these developments are beginning to influence international investment treaties/agreements, regional and domestic policies, it is plausible to conclude that in the near future new international law is likely to emerge from this discourse.

