Zeitschrift: Zeitschrift für schweizerisches Recht = Revue de droit suisse = Rivista di diritto svizzero = Revista da dretg svizzer : Halbband II. Referate und Mitteilungen des SJV

Herausgeber: Schweizerischer Juristenverein

Band: 139 (2020)

Artikel: Social power, social responsibilities, and corporations : from CSR to business and human rights

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DOI: https://doi.org/10.5169/seals-1052942

Social Power, Social Responsibilities, and Corporations: from CSR to Business and Human Rights

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Contents

Einleitung

Konzernverantwortlichkeit für Sozial- und Umweltprobleme ist kein neues Anliegen. Die Ursprünge der Konzernverantwortlichkeit («corporate social responsibility», oder CSR) reichen ins 19. Jahrhundert zurück und haben sich im Kern seit dann nicht verändert: Es ist das Verlangen, die soziale Macht der Konzerne mit einer sozialen Verantwortlichkeit auszugleichen. Das neuere Konzept einer Bindung der Wirtschaft an die Menschenrechte (Business and Human Rights) ist mit der Konzernverantwortlichkeit zwar verwandt, unterscheidet sich aber von ihr in zentralen Aspekten. Die Bewegung „Business and Human Rights" strebt nach einer rechtlich verbindlichen Verantwortlichkeit der Unternehmen, im Gegensatz zur bisher freiwilligen Konzernverantwortlichkeit. Die Entwicklung des Wandels der Konzernverantwortlichkeit hin zu „Business and

Human Rights“ wird vorliegend beschrieben und anhand einer rechtskontextuellen Sicht des U.S.-Rechts und seiner Auswirkungen auf das Konzept der Konzernverantwortlichkeit im internationalen sowie europäischen Rahmen analysiert.

A. Introduction

> *«To the extent that businessmen or any other group have social power, the lessons of history suggest that their social responsibility should be equated with it. Stated in the form of a general relationship, it can be said that social responsibilities of businessmen need to be commensurate with their social power. […]*
>
> *The idea that responsibility and power go hand in hand appears to be as old as civilization itself. Wherever one looks in ancient and medieval history – Palestine, Rome, Britain – men were concerned with balancing power and responsibility. Men, being something less than perfect, have often failed to achieve this balance, but they have generally sought it as a necessary antecedent to justice. […]»*[1]

Power. Responsibility. Balance. Justice. This quartet of concepts could easily encompass a large portion of our public law framework. What is sovereignty, after all, if not power, and what is law, if not an attempt to balance power with responsibility? And what are legal norms, if not responsibilities to pursue justice?

And yet, reading Keith Davis' words published in 1960 – a time when France and the United Kingdom alone still oversaw over 30 colonies – the idea of how power and responsibility must be balanced for justice to exist still seems fresh. This is, in my view, the fundamental issue. It leads, correspondingly, to the question I will pursue in this article: Does power and responsibility of corporations need to be balanced in the same way as states balance power and responsibility in order to achieve (or at least approach) justice – by trying to enhance responsibility? Or might that balance for corporations be better achieved through reducing their social power to meet their acceptance of responsibility?

The following pages set forth the history of the concept of *Corporate Social Responsibility* (CSR) from its earliest days to the present. My perspective in reviewing the developments was on the balance of the power and the responsibilities of corporations – a perspective that requires taking into account not just the legislative or administrative debates surrounding CSR per se, but the overall societal, governmental, and judicial approaches to corporate responsibilities

1 Keith Davis, Can Business Afford to Ignore Social Responsibilities? 2:3 Ca. Management Rev. 70–76, 71 (1960).

that exist. This, then, requires a national law focus, even where international trends are apparent. Thus, while I address the European adoption – and adaptation – of the US-centric notion of CSR and highlight how the internationalization of CSR has led to the current attempt to create a binding treaty on business and human rights, the bulk of the article remains in looking at these issues in U.S. law.

My conclusions are modest, but they surprised myself. I considered the move towards legally binding responsibilities as something unambiguously good. I no longer think so. Balance – necessary for justice – can be achieved in two ways: increasing both power and responsibility; or decreasing power and responsibility. More than a century of attempts to harness CSR by raising corporations' responsibilities leads me to wonder whether the law has not, after all, been trying too hard to escape the notion of "the business of business is business".

B. Defining CSR: What it is (generally) and What it is not (specifically)

Corporate Social Responsibility (CSR), it might be thought, refers to the social responsibility of corporations. I suggest that this is only one possible view of CSR. The concept of CSR is no doubt, in part, about what duties (or, "responsibilities") business entities (or, "corporations") have, to those whose lives their actions (or inactions) affect (or, "society"). Yet, CSR is clearly also more than the sum of its individual parts.

First, CSR is not only about corporations in the legal sense of the corporation. It is about commercial actors of all kinds: partnerships, limited liability companies, associations, state-owned entities, single-person firms, and even individual entrepreneurs. While the entity of "the corporation" is a particularly interesting focus for the law of CSR, due to the separation of ownership from liability, certainly the broader growth in the notion of CSR and in the norms emerging out of CSR regard a wider range of actors than the corporate person itself.

Second, the responsibilities of the corporation, as foreseen by CSR, are not necessarily "responsibilities" – as opposed to "duties" or "obligations". The term "responsibilities" may well indicate to CSR proponents that there is an ethical aspect to the propositions contained in a CSR statement, but the term is equally regarded as a softer form of obligation than a legal rule by businesses themselves. The European Commission, for example, defines CSR with explicit notice of the non-law character of the content: "a concept whereby companies integrate social and environmental concerns in their business operations and in their interactions with their stakeholders on a voluntary basis".[2] Some

2 European Commission, Directorate General For Employment and Social Affairs.

aspects of CSR, moreover, are legally required in some jurisdictions – making them part of corporate law. This, however, I do not regard as lessening their value as norms of CSR.

Finally, the corporations' responsibilities under CSR are not merely "social".[3] The human, or community, orientation of the "social" duties of a corporation under CSR extend beyond the immediate geography of where the corporation undertakes activities, includes the persons working for the corporation, even when they are scattered across multiple jurisdictions (as the employees of multinational corporations are), but also intends to cover environmental impacts, arguably even when those impacts are not solely related to human lives. Indeed, with the close relationship between CSR and sustainable development, the "S" becomes a placeholder for practically anything that is not directly related to the financial profit-making activity of the company.

The terms *Corporate Social Responsibility* and *CSR*, then, are less legal terms than abbreviations used by different parties to express a view of how commercial actors relate to the life of the planet. The view one takes depends on where one is when looking at it. From the perspective of corporate law, the social responsibility questions that arise may be tied strongly to the very fundamentals of the corporate form: the role, for example, of shareholder interests and management decisions; the relationship between long-term and short-term goals; the relationship between stakeholder well-being and the purposes of the corporation as set out in the charter of incorporation; and the elements of corporate governance that need to be in place to make socially responsible decision-making an ordinary element within the basic decision-making framework.

From a private law perspective more generally, the questions often center on the liability of economic actors vis-à-vis stakeholders who are harmed directly or indirectly by management's decisions. These questions can be either national or international in scope and cover both contract and tort law principles.

National public law has serious concerns about the regulation of corporate activities that affect or even alter the civil and political rights of individuals vis-à-vis the state. Questions such as what rights attach to corporations themselves, whether the "voice" of the corporation must be protected, and to what degree corporation interests should be permitted to influence election campaigns, are all aspects of the tie-in of CSR to public law.

Administrative law, too, is heavily influential on CSR. Obviously, numerous topics under administrative regulations overlap with CSR – labor law and environmental law top the list by virtue of their obvious connections. Consumer pro-

3 See Holger Fleischer, Corporate Social Responsibility: Vermessung eines Forschungsfeldes aus rechtlicher Sicht in: Holger Fleischer, Susanne Kalss, und Hans-Ueli Vogt, eds., Corporate Social Responsibility 1–38, ftnt. 4 (Mohr Siebeck: Tübingen, 2018) (explaining the potential misunderstandings arising from the use of the word «social» in the reference to CSR in German, underscoring the difference between the meaning of «social» and the meaning of "sozial").

tection law, health rules, and data privacy frameworks are equally significant aspects of corporations' legal concerns related to societies in which they are active. The overall administrative law system, however, also determines how far governments can intrude into the activities of companies. Economic and social regulatory "meta"-frameworks may be just as important as the individual rules emanating from executive agencies.

From a public international law perspective, the evolution of the use of the concept of CSR continues to struggle with detaching enforcement jurisdiction from the territorial boundaries of a host to extend to territories in which damages arise. This ties in with trying to concretize the state's role in promoting CSR – a duty recognized by the Swiss Confederation as one related to the pursuit of sustainable development[4]. Even more significant in the broad view, however, is the underanalyzed aspect of CSR in terms of the core international legal philosophies regarding how to protect equal sovereignty in a world of grave inequalities in wealth, influence, and capabilities among states.

C. History of CSR

The history of the international move to recognize corporate social responsibility is often tied to the history of the corporate form itself. While numerous authors have pointed out the role of "public interest" in the law of chartering corporations during the 18th and 19th centuries[5], from a public law viewpoint, the more striking lesson from history is that CSR is potentially picking up on a controversial aspect of corporate activity that has existed since the original corporate businesses: the state's role in authorizing the existence of a legal entity and lending it powers to pursue profit.

The idea of a "corporate" entity had – at the latest – Roman law origins. The "corporate" form provided a group of persons the possibility of creating a body that could own property, sign contracts, and engage in legal proceedings (as plaintiff or defendant). Perhaps as importantly, a corporate body could outlive any of the individual members. Thus, universities, professional organizations, even local governments and churches, were incorporated.[6] The corporation's relation to the state was integral – it was a creature formed under state power. Its acts, therefore, were plausibly regarded as extensions of state power.

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4 See SECO, Bericht zur CSR-Positionspaper des Bundesrates p. 5 (1 April 2015).

5 See, e.g., Fleischer, supra n. 3 at 4–11; Catherine Dolan and Dinah Rajak, Introduction: Toward the Anthropology of Corporate Social Responsibility in: ibid., eds., The Anthropology of Corporate Social Responsibility 1–28, 5, 6 (Berghahn Books: New York/Oxford, 2016)

6 Harold Joseph Berman, *Law and Revolution: The Formation of the Western Legal Tradition* 215–216 (Cambridge: Harvard University Press, 1983).

I. 1600–1800: Corporation as Deputy of the State

By the late Renaissance, monarchs, and later their government agents, were granting legal authorization for incorporation in the form of a charter. The charter set forth the rights of the corporation and procedures for its dissolution and its purpose of existence, the latter being of particular importance for CSR.

These purposes, not surprising, reflected the granter's own interests. The English East India Company, for example, requested a charter to establish a company to develop England's trade relations with India and other as-yet-undiscovered ports in the area. Queen Elizabeth's grant, at the end of 1600, included not only her permission to form the company, but also her expectations that the company would participate in the "Increase of our Navigation, and the Advancement of lawful Traffick, to the Benefit of our Common Wealth".[7]

While the imagined "Benefit of our Common Wealth" in the seventeenth century may not coincide with our view of social responsibility, the lesson for CSR is that early corporations were a commercial arm of the state, at least in their overseas engagements.[8] This quasi-deputization of corporations was more often realized in exercising the advantages of authority than in being held accountable to citizenry, but then again, a state's own responsibility to its people was not well developed prior to the 20th century, either.

II. 19th Century: Corporations and the Rise of Business Philanthropy

> *"I believe that every right implies a responsibility; every opportunity, an obligation; every possession, a duty." John D. Rockefeller*

The history of becoming CSR continues with the Industrial Revolution's entrepreneurs. The rapid changes in social relations that occurred across Europe and America over the course of the 19th century paved the way for much thinking about the role of commerce in the life of communities. The rise of factory work and its resulting urbanization made clear that business' pursuit of profits could have a deep and long-lasting impact on the health and lives of people and the physical environment. Child labor and indentured servitude, polluted air and water, and dense living spaces made more dangerous by instable and

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7 Charter Granted by Queen Elizabeth to the East India Company, 31 December 1600 (‹https://en.wikisource.org/wiki/Charter_Granted_by_Queen_Elizabeth_to_the_East_India_Company›).

8 The border between state and commercial actor was blurred even more strongly in the case of the Dutch East India Company, or Verenigde Oostindische Compagnie (VOC), chartered two years later. The VOC's charter set out the reason for the grant as one to create "a fixed, secure and orderly entity [to be] managed and expanded for the good of all the residents of the united provinces." Peter Reynders, Rupert Gerritsen, A Translation of the Charter of the Dutch East India Company (Verenigde Oostindische Compagnie or VOC): Granted by the States General of the United Netherlands, 20 March 1602 (Australasian Hydrographic Society, 2009) (‹https://www.australiaonthemap.org.au/voc-charter/›).

cheaply constructed buildings, were as much part of the Victorian lifestyle as were bandstands and the Gothic novel.

The visibility of deeply negative results of unregulated capitalism, brought to widespread attention by popular novels and journalism, was strikingly different to the results of chartered companies' uses of power in the past. Whereas the damages caused by the East India company and its likes lay mainly in far-flung lands, the injuries inflicted by the industrialists were apparent in the daily life of the urban populations of Europe and America.

The state – increasingly moving away from the absolutist vision of the past centuries toward democratic or at least strictly controlled monarchic structures – was still a promoter of the general welfare. The nation state would largely replace the chartered trading companies with a professional corps of diplomats to pursue statal foreign relations – separating (at least philosophically) the public and private sectors.

The creation of the registered joint stock corporation was a legal expression of this change. With establishment of corporations shifted to administrative registration unclear sentence, please rephrase, the corporate purpose became one solely of profit making.[9] The introduction of the limited liability of the individual shareholders, in turn, allowed the activities of the corporation to be clearly distinguished from those of the state in which it was constituted.

The mid-19th century's version of the corporation's relationship with society thereby stepped away from that of the original corporate charter by virtue of seeing businesses as primarily responsible for the making of profits for the shareholders. The conception of the state, on the other hand, mainly revolved around the protection of the rights to property and as an ensurer of individual freedom. This view merged with the growing adherence to liberalist economic theory, which rejected state "intervention" in the private sphere beyond the provision of judicial systems.

Yet, while businesses were absolved of non-commercial duties, the ethics of philanthropy grew to provide for those on whose shoulders the market system was being carried. Growing out of the profit-ethic, which prized the accumulation of wealth as a key to economic development[10], philanthropy (alongside charity) became the hallmark of the businessman's ethics by the late 19th century. Thus, Andrew Carnegie, John D. Rockefeller, and Commodore Cornelius Vanderbilt are known as among those who wanted to improve society by giving away large portions of their profits to dedicated causes. "I believe that every right implies a responsibility; every opportunity, an obligation; every posses-

9 The Delaware corporate law statutes, for example, say: "the purpose of the corporation is to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of Delaware". See ‹www.legalzoom.com›.

10 Richard C. Hoffman, Corporate social responsibility in the 1920s: An institutional perspective 57 (2007) (DOI: 10.1108/17511340710715179; viewed 22 December 2019).

sion, a duty", said Rockefeller. That among Rockefeller's other statements were "Do you know the only thing that gives me pleasure? It's to see my dividends coming in" and "The way to make money is to buy when blood is running in the streets" may lessen somewhat one's admiration for the man's inner drive, but not the belief that he was committed to his philanthropic activities.[11] After all, he also proposed, "Giving is investing".[12]

By the 1880s and 1890 s, financial contributions to organizations such as the Young Men's Christian Association (YMCA) and other employee-welfare charities had become established practice not only by the railroads (who had been supporting the YMCA since its earliest days as a place to foster the skills of railroad workers)[13], but also for other banks and manufacturers.[14]

Aiming to shape society, the philanthropists were "giving back" to the community from which they had derived their profits. The sequential nature of the philanthropic exercise, however, was significant: businessmen made profits first, shared profits second. While economically this increased the financial resources available to keep the economy growing, on the political level, this provided a natural limit to any "responsibility" of business enterprises or businesspersons toward employees and the broader community.

III. The 20th Century: The Rise of Corporate Responsibility and its Opposition

While the 20th century business context began with little difference regarding the beliefs in the role of business in society, it did witness a change that is of great significance to the view of CSR today: the firm establishment of the deeply multinational corporation. The realization of problems beyond the borders of these companies' seats followed closely – as did the attempt to use the law to remedy such failings of responsibility.

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11 Brainy Quotes, John D. Rockefeller (‹https://www.brainyquote.com/authors/john-d-rockefeller-quotes›; 12 January 2020).

12 Id.

13 Railroad companies began making contributions to the establishment of "railroad YMCA" branches in 1872. The Y, History: 1870s-1890 s, ‹https://www.ymca.net/history/1870–1890s.html› (12 January 2020). They helped finance the construction of buildings, and encouraged workers to join as members in return for the YMCA's contributions to workers' physical and moral well-being. See Thomas Winter, Making Men, Making Class: The YMCA and Workingmen, 1877–1920, 65–70 (Univ. Chicago Press, 2002).

14 Pierce Williams and Frederick E. Croxton, Corporation Contributions to Organized Community Welfare Services 54–55 (New York, 1930) (listing contributors noted in various YMCA chapter records; these included a lumber company, cotton manufacturers, and a streetcar company).

1. Progressive Era

Growing popular dissatisfaction with the problems of unfettered capitalism characterized the turn of the century, with the publics concerned not only with the physical effects of the profits-only attitude that corporate titans were having on their employees, but also on the business class's stronghold on political decision-making. As companies grew larger and their executives ever-richer, the political parties of the late 19th century were largely dominated by the demands of business, with corporate contributions having a decisive influence on elections at both federal and State levels.[15]

The rise of investigative journalism (pejoratively labeled "muck-rakers" in 1906 by President Theodore Roosevelt) highlighting the business-political party linkages helped along public awareness – and resentment – of corporate America. A series of laws and court cases looking at the financial relationships between the private and public sectors legally diminished the acceptability of the role of corporations as a shaper of laws and government policy.[16] A number of groups, organized labor in particular, began to become more active in denouncing corporate abuses and calling for their stricter regulation and the accountability of the persons responsible.[17]

Regardless of the changing popular view of corporate unaccountability and despite the growing number of scandals involving corrupt business practices, the widely accepted attitude of the business (and corporate law) community during the Progressive Era was to maintain the narrow view of corporate purpose to be one of making profits for the benefit of the shareholder. Thus, on the side of corporate leaders themselves, corporate philanthropy – voluntary, after-profit, targeted paternalism – remained the main element of corporation-society relations. William J. Ghent labeled this "benevolent feudalism", writing in 1902 of the nearly imperceptible difference between medieval and contem-

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15 Robert North Roberts and Nicole Bizzoco, Campaign Finance Reform (Federal) in: Amy Handlin, ed., 1 Dirty Deals? An Encyclopedia of Lobbying, Political Influence, and Corruption 385–388, 386 (Santa Barbara/Denver/Oxford: ABC-CLIO, 2014) (noting that at the federal level, the presidential campaign of 1896 was allegedly decidedly influenced by corporate contributions to the Republic party). See also Gregory Bordelon, History and Evolution of Lobbying and Regulation, in: Handlin, 29–63, 31 (explaining that the term "lobbying" arose in the 1860s from the practice of interest group representatives waiting in the lobby of a Washington, D.C. hotel popular with politicians to "'smoke a cigar with President Ulysses S. Grant or to meet with Congressmen'" – and, implicitly, to let them know what policies they wanted put into, or kept out of, law; citing Nicolas Allard, The Law of Lobbying: Lobbying is an Honorable Profession: The Right to Petition and the Competition to Be Right, 19 Stan. L. & Pol'y Rev. 23–68 (2008)).

16 Bordelon, 31–33. Bordelon refers, inter alia, to the Supreme Court cases of Trist v. Child, 88 U.S. 441 (1875) (declaring a contract for using personal influence with legislators to promote the passage of a law void if it has a "corrupt influence" on Congress) and Hazelton v. Sheckells, 202 U.S. 71 (1906) (extending the prohibition of corrupting lobbying on legislators to such lobbying of administrative officials).

17 Id. at 31.

porary social relations: "From magnate to baron, from workman to villain, from publicist to court agent and retainer, changes of state and function [are] so slight as to elude all but the keenest eyes".[18] Despite the continuing inequalities, Ghent recognized that the new business owners had "faint stirrings of an ethical sense" absent in times past.[19]

> "The enormous benefactions for social purposes, the construction of ‹model workshops› and ‹model villages,› though in many cases prompted by self-interest and in others by a love of ostentation, are at least sometimes due to a new sense of social responsibility. A duty to society has been apprehended, and these are its first fruits. It is a duty, true enough, which is but dimly seen and imperfectly fulfilled. The greater part of these benefactions, as has already been pointed out, is directed to purposes which have but a slight or indirect bearing upon the relief of social distress, the restraint of injustice, or the mitigation of remediable hardships. The giving is even often economically false […]. But, though often mistaken as is the conception and futile the fulfilment of this duty, the fact that it is apprehended at all is one of considerable importance, and one that carries the promise of baronial security in the days to come."[20]

These "stirrings" were given voice by corporate leaders such as Theodore Vail of Bell System (telephone services), John Rockefeller (Standard Oil), and Elbert Gary and George Perkins (US Steel Corporation); acknowledging that the companies' "efforts to win social approval […] were undoubtedly directed more toward public persuasion than toward self-examination", Morrell Heald notes the significance of the "new sensitivity to community opinion [that] had begun to take form".[21] Indeed, where the community opinion perceived that the social responsibility of companies was feigned, there could be backlash. The Cadbury Brothers case is a good example.[22] The chocolate company had made a positive impression on its customers by making contributions to the Anti-Slavery Society and denouncing slavery in China and central Africa, but the Evening Standard reported on the use of slave labor in Cadbury's supply chain in West Africa. The potential damage to reputation, it seemed, was enough to spur the company to legally accuse the newspaper of libel.

Despite the vocal acknowledgements of corporate managers as "semi-public servants" (as Perkins stated)[23], as the first decade of the 20th century passed, business leaders had to face intensifying popular backlash against their commercial practices. Legislation to further regulate competition (the Clayton Act

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18 William J. Ghent, Our Benevolent Feudalism, 182 (New York, 1902) (available online at ‹http://www.gutenberg.org/files/53052/53052-h/53052-h.htm#Page_180›; viewed 6 January 2020).

19 Id. at 183.

20 Id. at 183–184.

21 Morrell Heald at 378.

22 Cadbury Bros. v. Standard Newspapers, Ltd., CP 115, Supreme Court of Judicature, Court of Appeal (July 28, 1909).

23 Heald at 378 (quoting George W. Perkins, The Modern Corporation (1908)).

of 1914[24] joined the Sherman Act, adding unfair practices to the abuse of monopoly power as prosecutable acts) and lobbying were not enough to stem the tide of negative perceptions of corporate America that were widely held as the First World War broke out. Something, businessmen realized, had to change.

What changed was more about how business presented itself than what business did.[25] Nothing, perhaps, testifies to the seriousness of the public perception problems facing corporations of the early 20th century, than the contemporaneous rise in two aspects of business-society relations: a stated commitment to community and the study (and practice) of public relations.

2. *The Roaring Twenties and New Deal Era*

In its impacts on CSR, the United States' involvement in World War I was more significant at home than were its army's exploits overseas. This was due to the unprecedented need for manufacturing and industrial-level agricultural production to carry out the war effort. As working age men were deployed and had to be equipped, those who remained at home to work in the factories gained new leverage over employers. Labor capitalized on this, and US political climate began to turn in favor of union interests. The government began to protect worker and union rights in a way never before realized, with safer workplaces, better employment conditions (including higher salaries and retirement benefits), and the creation of a new labor relations board (the War Labor Board) allowing workers to resolve their disputes with management.

The favorable conditions, however, proved to have been purely instrumental to the furtherance of the war efforts. Even by early 1919, management interests resumed their pre-war tact. With the return of deployed soldiers, joined by large numbers of women and minorities, who had entered formal employment during the war, unemployment rose. High inflation combined with rising costs of living created dissatisfaction among the working classes:their anger aimed largely at their employers. Labor unrest became a real threat to business, and the "Red Scare" underlined the concomitant governmental fear of a Bolshevik-style rebellion.

With the unions protesting a return to pre-War employment conditions, and with growing skepticism toward big business' role as a core part of society, a

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24 15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53. The Clayton Act expanded the Sherman Act's proscriptions on anti-competitive practices by prohibiting unfair practices such as price discrimination and mergers where the result "may be substantially to lessen competition, or to tend to create a monopoly". 15 USC § 18 (commonly referred to as "section 7" of the Clayton Act).

25 To be fair, there was a considerable level of business contributions to wartime community welfare projects during the First World War. Heald notes that business giving of both "leadership and funds were substantial and a practice of corporate giving for community welfare programs was firmly established". Morrell Heald, Management's Responsibility to Society: The Growth of an Idea, 31:4 Bus. Hist. Rev. 375, 379 (1957).

wave of strikes began to sweep the country.[26] Despite attracting thousands of unionized employees, industrial leaders succeeded in ensuring that the strikes remained largely ineffective.[27] In a climate of anti-communist, anti-immigrant, and racist sentiments, businessmen characterized the organizers as radicals and communists.[28] The two largest strikes (the US Steelworkers' strike of 1919 and the 1922 Railways Shopmen strike) thus not only failed to achieve improvements in labor conditions or a slowing of the growth of US companies, they ended up reducing union membership and labor leverage over management.

With a regulatory climate of partnership between the government and corporate interests (low tax rates, protective tariffs, and increasing limits on the right to strike) and with the labor movement and other critics under control, corporate America in the 1920s was able to move forward with a new narrative of business-community relations: that of industry's "service" to society (captured by Henry Ford's motto, "service before profit").[29] Notably, however, the definition of "service" was largely left to business itself[30], leaving room for seeing business' positive contribution to the community as that of "making and selling merchandise of reliable quality for the lowest practically possible price, provided that the merchandise is made and sold under just conditions" (as stated by Edward Filene)[31].

This view meant that the business community would become, increasingly, an integral part of American society, shaping as well as responding to, communities' needs and demands. To generate public support for this evolution – indeed, to make the public active participants in this evolution – the business community turned to public relations.

a. The Role of Public Relations

Public relations was a new and highly controversial field in the first half of the 20th century.[32] Its rise to full acceptance in the 1930s was largely due to the embittered relations between labor and management that existed in the previous decades – and companies' need to appear to be acting for the good of society.[33] Making the public "understand" business' beneficial, indeed even essential, contributions to freedom and the prosperity of all, was the overriding message

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26 Kathleen Morgan Drowne and Patrick Huber, The 1920s 7 (Westport, CN/London: Greenwood Press, 2004)(stating that there were 3,300 strikes in 1919 alone).

27 Id.

28 Drowne and Huber at 7 (writing that the public opposition to the strikes was mainly due to "pre-existing racial and ethnic tensions" in a context in which "economy was in recession, unemployment was high, and living costs were even higher").

29 Heald at 380–381.

30 Id. at 380.

31 Id. at 381.

32 See Richard S. Tedlow, The National Association of Manufacturers and Public Relations during the New Deal, 50: 1 Business History Rev. 25–45, 27 (1976).

33 Id. at 26.

of the public relations professionals of organizations such as the National Association of Manufacturers.[34] To do this, companies (and industries) began to advertise their commitment to the community.

In the mid-1920s, corporations (having weakened the unions) began to "assume greater responsibility for employee welfare on their own terms".[35] The attention to employee welfare mingled with the Taylorist models of management. Adjusting Taylor's vision of the manager's job as one of scientifically determining how production processes should be organized, revisionists of the 1920s "sought to make management practice more responsive to human needs as well as to that of production".[36] Thus, the manager's role took on an important aspect of providing for not only the corporation's economic demands, but also for the conditions within which its workers, customers, and suppliers could flourish. Professionalization of all aspects of the corporate workforce led to a newly professionalized corps of human resources departments that focused not only on hiring, but also on caring for employee welfare. Professionalized public relations teams aimed to spread ideas about the corporation's "service" to its employees and to the community.[37] In short, the corporation began to promote the idea of corporate social responsibility.

The precise nature of this responsibility, however, had little theoretical grounding. Self-interest, to be sure, played a large role, but its further characteristics were fluid.

One of the theories of why CSR-thought remained ungrounded in the between-war years is that the rise of Taylorism's scientific approach to management coincided with the final collapse of the institutional and philosophical foundations of the *laissez-faire* economy.[38] William C. Frederick explains *laissez-faire* as the system (dominant in the 18th and 19th centuries) in which small businesses (including partnerships but not corporations) acted in their own self-interest without governmental constraints, leading to the promotion of public welfare.[39] As corporations continued to grow in size and influence, their management became increasingly removed from ownership, and thus from the constraints of attending to the public interest.[40] This left a theoretical gap in determining how to direct their power to assist societies.[41] In Frederick's words:

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34 Id. at 34 (explaining the industry's view that individual freedom was an indivisible combination of free speech, press, religion, and enterprise).

35 Hoffman, *Corporate social responsibility in the 1920s* at 59. Available from: ‹https://www.researchgate.net/publication/241213324_Corporate_social_responsibility_in_the_1920s_An_institutional_perspective› [accessed Dec 22 2019].

36 Hoffman, *Corporate social responsibility in the 1920s* at 59.

37 Id. at 62.

38 See William C. Frederick, Corporation, be Good!: the Story of Corporate Responsibility 15 (2006).

39 Id. at 13–14.

40 Id.

41 Id. at 15.

> "The philosophy of laissez faire had collapsed as thoroughly as had its supporting institutional framework. […] Gone, or seriously weakened, was the invisible hand of free competition which was to guide selfish interests into socially-useful channels. Displaced from the center of the stage were the old forms of business organization […] through which competition was to work. […] Gone was the theory of harmony of interests which was to be the automatic outcome of the self-seeking interests of a society of rational men checked in their selfishness by the invisible hand of competition. […]
>
> The collapse of the laissez faire philosophy created a philosophical vacuum. It is this vacuum that businessmen and others interested in the issue of business responsibility have been trying to fill since the end of World War II."[42]

The economic downturn of the late 1920s and 1930s slowed progress on the development of the social responsibility discussions until after World War II, but the social responsibility concept established in the 1920s had a lasting impact. Corporate management today continues to accept the "service" role. The question now is just how far this role should obligate the corporation to act as a matter of law.

b. CSR as the Child of Public Relations

While it would be too much to say that corporate social responsibility was solely the product of public relations professionals, the simultaneous growth in the strategic use of the press, public events, and self-published materials – in addition to advertisements – and in the visibility of corporate dedication to community ("stakeholder") interests makes the correlation noteworthy. Lest this make us regard the exercise of CSR as "merely" a "publicity stunt", we would do well to keep in mind that sometimes publicity stunts have unintended beneficiaries. As Tedlow comments:

> "[…] [A]lthough [public relations'] methods and messages may not have satisfied the liberal politician or union leader, it did provide the employer with a nonviolent means of expressing himself. And its basic tenet since the earliest days […] had always been that an underlying harmony of interests existed, which needed only proper communication to be generally recognized.
>
> "Talk, after all, rather than violence, was what public relations was all about, and as Professor Marvin Meyers has observed, "With talk brings responsibility." Perhaps the employer came to believe some of the rhetoric of industrial harmony and "adjustment" that his own public relations men were composing for the consumption of others."[43]

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42 Id. at 14–15.

43 Tedlow at 44 (citing Marvin Meyers, The Jacksonian Persuasion ix (Stanford, 1960)).

3. World War II and Beyond

By the onset of World War II, the stage was set for the emergence of at least basic notions of business "responsibilities" to society as founded on the significance of the corporation itself to the life of the community. Business leaders searching for answers to the fundamental questions of how to be ethical in the market system began to avidly discuss their responsibilities beyond the creation of financial resources for further economic growth.

The move toward CSR followed from the newly perceived role of states as regarding their populations. With the legal developments in the international law of human rights and the law of development, the basis was prepared for attributing obligations to corporations to contribute to the broad goal of ensuring human dignity.

a. Post-WWII

The post-World War II expansion and – particularly, deepening – of the global economy paved the way for the development of transboundary corporate responsibility by creating both the conditions under which corporate influence could spread its geographic scope as well as simultaneously making the conditions of life in far-flung corners of the globe a matter of concern to all.

The Second World War had made apparent the US corporations' importance to the country's prosperity as well as its national security. Having profited greatly from the war, however, the giant companies faced at least some resentment from the public. Perhaps this explains why the years following the end of World War II re-spurred discussions of corporate social responsibility.

The United States' emergence from the war brought with it a renewed period of corporate-state policy correspondence. As the United States engaged in its Marshall Plan program to funnel money into Europe for rebuilding the productive (and consumptive) capacity of the war-damaged nations, it overtly courted the help of private businesses to further its goals. Offering the private sector government-backed investment guarantees[44], the US government, for example,

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44 The idea to involve private businesses in the Marshall Plan eventually led to the founding of the Overseas Private Investment Corporation (OPIC) to offer the guarantee of security that businesses demanded. The OPIC became the model upon which the World Bank Group's Multilateral Investment Guarantee Agency (MIGA) was created. As Lipson explained:

> "The idea originated in the President's Committee for Financing Foreign Trade, a specially-appointed group of major industrialists and financiers. [...] the committee worked closely with the Treasury on the full range of international economic issues. By late 1947, with foreign investments still at a trickle, they began to consider stimulative policies. The idea of guaranty insurance was first broached in December 1947 by Edward Hopkinson, [..] president of the Investment Bankers Association. "Private financing," said Hopkinson, "is likely to continue to be practically non-existent until confidence is established in the ability of Europe to achieve political and economic stability and to maintain a sustained trend in this direction." [footnote omitted] He recommended that the government step into the breach and provide "transfer risk guarantees ... [to] facilitate the private financing of capital equip-

enticed businesses wary of losing their investments to war, expropriation, or currency inconvertibility to help rebuild the economic foundations of the European market. Although not explicitly tied to notions of "responsibility", the idea of self-interested beneficence permeated the overseas activities of the post-war US corporations.[45]

There were, however, also those American businessmen who vocally supported the idea of "responsibility" for their social impacts abstracted from any commercial self-interest. Morris Sayre, a leader in the agricultural products sector, gave a speech to the Congress of American Industry in December of 1948 in which he said the following:

> "Let's be frank about it. If our predecessors in management, two or three generations ago, had devoted a mere modicum of their time to some individual soul-searching about their motives, about their good faith, about the responsibilities they owe to the people – we wouldn't be facing some of the tough problems we face today … An active social conscience … and individual recognition of social responsibilities will compel us, as individuals, to test every managerial practice, measure every policy by a simple yardstick. Not 'What does it mean for me,' but rather 'What will this mean to my workers as people, to my customers, to my suppliers, to my stockholders, to the community in which my plant is located, to my government, to the industry of which I am a part, to the economy as a whole?' These tests, honestly made, of every individual managerial action, policy, and practice, will be evidence of true social consciousness."[46]

Sayre's words aptly captured the sentiment of the enlightened businessman at the dawn of the earliest days of CSR.

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ment and the employment of private American technical and managerial services.' [footnote omitted] […]."

Charles Lipson, The Development of Expropriation Insurance: The Role of Corporate Preferences and State Initiatives, 32:2 International Organization (Spring, 1978), pp. 351–375, at 354 (citing Edward Hopkinson and William Machold, "The Development of the Marshall Plan," unpublished paper (December 31, 1947), in Aldrich Papers, Correspondence File II, Box 140, File "President's Committee for Financing Foreign Trade 1948," p. 3, Baker Library, Harvard Graduate School of Business Administration, Boston, Massachusetts.)

45 The example of canned meat producer Hormel's participation in the Lend-Lease program is noted as an example of post-war CSR. SmartSimple Blog, A Brief History of CSR (‹https://www.smartsimpleblog.com/blog/2019/3/29/a-brief-history-of-csr›; viewed 23 December 2019). The move to solidify corporate backing for the establishment of a permanent investment insurance agency during the 1950s and 1960s continued to use language that suggested the positive benefits that would come to the receivers of investment rather than the profits that were expected by those taking out policies. See Lipson at 359, footnote 25 and accompanying text (citing Memorandum from Don Daughters to Kenneth O'Donnell, "Suggestions for Improvement AID/State Operations," June 13, 1962).

46 Morris Sayre, "We Owe It to America", address before the Congress of American Industry, 3 December 1948 (emphasis in original) (cited in Bowen at 53, n. 9).

D. CSR – as such – begins

I. Bowen's Social Responsibilities of the Businessman

The rise of modern attitudes toward corporate social responsibility is earmarked by the appearance of Howard R. Bowen's book, *Social Responsibilities of the Businessman*. Often credited with being the "father" of the notion of CSR, Bowen himself noted that his reason for writing the book was "to investigate the much-discussed 'concept of social responsibility' as applied to businessmen".[47] His contribution was therefore less that of an inventor as that of a thoughtful observer and synthesizer of philosophy and practice, putting together the current ideals of the US economic system, the realities of the impacts of that system on the country, and the Protestant moral viewpoint. Despite his focus on the contemporaneous situation of "the businessman", his suggestions for action remain deeply insightful for discussions today.

Bowen's introduction sets out his starting point clearly, and shows that his pathbreaking work actually adheres as closely with current CSR critics' views as it does with CSR promoters' claims. An extended quotation from his first chapter is warranted:

> "The businessman occupies a strategic role in American life. It is hardly an exaggeration to say that he is the central figure in American society – the symbol of our culture. Decisions and policies of the greatest import for the general welfare are entrusted to him. […]
>
> "The decisions and actions of the businessman have a direct bearing on the quality of our lives and personalities. His decisions affect not only himself, his stockholders, his immediate workers, or his customers – they affect the lives and fortunes of us all.
>
> […]
>
> "When the far-reaching scope and consequences of private business decisions are recognized, some questions naturally arise: Are businessmen, by virtue of their strategic position and their considerable decision-making power, obligated to consider social consequences when making their private decisions? If so, do they have social responsibilities that transcend obligations to owners or stockholders?
>
> "The answer to both these questions is clearly yes. Hundreds of leading businessmen have publicly affirmed, in speeches and by the written word, their keen sensibility of their 'social responsibilities.› And it is becoming increasingly obvious that a freedom of choice and delegation of power such as businessmen exercise would hardly be permitted to continue without some assumption of social responsibility. […] Businessmen are controlled by competition, by custom, and by law. Nevertheless, we do and must depend also on their assuming a large measure of responsibility if the economic system of free enterprise is to continue and to prosper."[48]

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47 Howard R. Bowen, Social Responsibilities of the Businessman xvii (2d ed., Univ. Iowa Press, 2013).

48 Id. at 3–5.

There are a number of points worth highlighting: who has the responsibility, to whom is the responsibility owed, and what is the justification of the responsibility. The question of the content of the responsibility is taken up separately.

1. Who has the responsibility?

Bowen's focus is on the individual manager ("the businessman") – a natural person. While Bowen notes that his "book is primarily concerned with the social responsibilities of large corporations in the United States"[49], he follows this by looking at the managers. It is they that take the decisions that have impacts on others, and therefore, it is the managers who must carry the responsibility for the decision and its impacts. As "servants of society", Bowen postulates, businessmen may not put their individual interests above those of society.[50] This is the basis of the social responsibility of the businessman.

Interestingly, Bowen does not really address the corporation itself (although he does specify that his thoughts about social responsibility are limited to large businesses and not small and medium sized enterprises[51]). This focus on businessmen is likely because his task was to address human ethical responsibilities: he was writing as an economist (which in those days meant focusing on human behavior and philosophies more than on mathematical elegance) and was given the assignment by the Federal Council of the Churches of Christ, an organization of Protestant and Orthodox churches.[52]

Having an individual as the holder of the responsibility eliminates a number of the legal issues with which those who would like to give CSR more "bite" struggle. The businessperson, of course, is fully subject to the law in every jurisdiction for acts or omissions. Criminal as well as civil liability adheres to natural persons even where it does not attach to corporations. The businessperson, moreover, as a human member of society, has multiple roles: producer of economic goods, certainly, but also consumer, family member, neighbor, resident, or church-goer. While these roles may be geographically separated, it is clear that the concept of "social responsibilities" of a natural person are intuitively more comprehensible than are the social responsibilities of a legal conception. Indeed, the moral act that Bowen calls for rests with the fact that the businessman must balance their personal interests (as a consumer, family member,

49 Id. at 6.
50 Id.
51 Id.
52 Acquier et al. consider Social Responsibilities of the Businessman as a religious work more than one about or for "academia, government, or business", drawing in Weberian thought on protestant ethics and capitalism. Aurélien Acquier, Jean-Pascal Gond, and Jean Pasquero, Rediscovering Howard R. Bowen's Legacy: The Unachieved Agenda and Continuing Relevance of Social Responsibilities of the Businessman, 50:4 Business & Society 607–646, 613 (2011).

neighbor, resident, or church-goer) with the interests of the corporation.[53] In his words:

> "When the businessman is asked to consider broad social and economic effects in reaching his decisions, what is involved? In general, he is expected to consider his prospective actions from the point of view of himself or his firm (stockholders), and at the same time from the point of view of society. When the private and social interests are in harmony, as would frequently be true in a well-ordered society, there is no problem. But when the two interests are not identical, a moral issue is present, and the problem is to achieve a reasonable balance between the private and the public interest.
>
> "The kinds of decisions which a businessman is called upon to make vary according to the nature and scale of his enterprise and according to the latitude for choice which is permitted [...]. Almost all of his decisions [...] have implications for the social interest in that each affects the degree to which one or more of the basic goals of economic life are realized. [...]
>
> "The moral problem of the businessman is to recognize the social implications of his decisions and to consider the social interest – so far as is possible and reasonable – in arriving at these decisions. His duty is to ask himself how the decisions he makes in the ongoing operation of his business relate to these goals and how he might advance the attainment of these goals by appropriate modification of his decisions."[54]

2. *Why does the businessman need to attend to these responsibilities?*

As a project requested by the Protestant church, Bowen's book contains a full chapter on justifications for placing social responsibility on businessmen as stemming from the economic views developed over the centuries by Protestant doctrine.[55] Examining the church's position on the economic system, private property, power, motives and values, vocation, distribution of income, and "other" complaints (most of which are related to the functioning of the capitalist system's impacts on labor), Bowen comes to the conclusion that the church is neither an unswerving ally nor avowed foe of the capitalist system in which the US corporations sit. The circumstances of the day, rather, determine whether a corporation can be a moral force within society, and its actions will determine if it is a force for good.

The more important motivation for the social responsibilities of the businessman for Bowen – despite his sponsors – is a justification to turn away from socialism. Bowen, writing in the early years of the Cold War, pointed openly to the capitalist system's ideological competitor: communism. The government-led production system combined with a controlling political authority was an anathema to the church's belief in the need for an open, evolutionary

53 Bowen at 30.
54 Id. at 29–30 (emphasis in original).
55 See id. at 31–43 (Chapter 5, "Protestant Views on the Social Responsibilities of Businessmen").

economic system that mixes public and private ownership, self-interest, and regulation.[56]

The social responsibilities of the businessmen arise, in Bowen's view, out of the need to maintain the independence of the business enterprise from total state regulation. Unl the businessmen take the task of (self-)regulation upon themselves, making decisions that will foster the social good even when it is against a private (or solely profit-oriented) interest, the state will need to step in to mandate corporate decision-making. Freedom of corporate decision-making is therefore contingent on the impacts of such decisions on society as a whole. To maintain the freedom, then, business decision-makers need to adhere to a moral code of promoting social welfare to the extent possible:

> "[…] The unrivaled freedom of economic decision-making for millions of private businessmen, […] can be justified not if it is good merely for the owners and managers of enterprises, but only if it is good for our entire society. We can support freedom and private control of enterprise only if it is conducive to the general welfare by advancing progress, promoting a high standard of living, contributing to economic justice, etc. […] Business, like government, is basically "of the people, by the people, and for the people."
>
> "Such power and freedom of choice as is permitted to private businessmen is given because the "people" believe this decentralization to be desirable. When it is felt that the powers exercised and the choices made […] do not contribute to the general welfare, businessmen have either to revise their behavior voluntarily or to be subjected to controls. […] If those who exercise freedom are unwilling or unable – even with the best of rationalizations – to relate their private decisions and actions to the attainment of valued social objectives, that freedom is in jeopardy."[57]

3. To whom is the responsibility owed?

The object of the responsibility, Bowen describes, is American "society". Like most of the CSR proponents up until his time, Bowen centered his recommendations on the businessman's immediate surroundings rather than on the global community as a whole: the employee, the employee's family, the customer, the competitor – all are to be considered by the manager and treated under the terms of the manager's stewardship.[58] The limitation of his proposal to the United States is explicit[59], and he speaks of the American public's values as the relevant ones for his assessment of the corresponding demands on business:

– High Standard of Living (including the availability of an abundance of consumer goods and services to purchase)[60]

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56 Id. at 39.
57 Id. at 5–6.
58 See id. at 39–41 (setting out his list of responsibilities).
59 Id. at 7.
60 Id. at 8–9.

- Economic Progress (including the development of new technologies but also resource conservation)[61]
- Economic Stability (including low inflation and low unemployment)[62]
- Personal Security (essentially financial security of individuals at all stages of life)[63]
- Order (meaning economic as well as political order, with supply and demand responsive to each other)[64]
- Justice (here Bowen describes the elements of what is currently recognized as "human development", or social, economic, and cultural rights, such as access to education, right to health, right to an economic system free of nepotism, non-discrimination in the workplace, and the absence of egregious economic inequalities)[65]
- Freedom (Bowen specifically mentions the freedom to choose to be economically active as a producer – whether capital owner or employee – or consumer, and to organize in groups)[66]
- Development of the Individual Person (the description of the value of development of the person underlines the role of economic activity as an integral part of human life, and calling for it to be organized so as to promote enjoyment and mental fulfillment as well as an opportunity to express and develop one's talents)[67]
- Community Improvement (beyond the development of local community services, the reduction of pollution, and the avoidance of environmental degradation, Bowen recalls the "role of industry in creating aesthetic values" as goals for economic actors)[68]
- National Security (military security, a particularly sensitive goal in the early 1950s, is joined by "the defense of liberal institutions" as part of the role of business in society)[69]
- Personal Integrity (Bowen points to "honor" in business transactions as a goal "which few would deny", extending the notion beyond legality to include integrity to the "spirit" of the law and an adherence to fair business practices)[70]

These values are all ones that Americans of the 1950s supposedly believed society should promote. As "social" responsibility's cultural aspect depends on

61 Id. at 9.
62 Id.
63 Id.
64 Id.
65 Id. at 9–10.
66 Id. at 10.
67 Id. at 10–11.
68 Id. at 11.
69 Id.
70 Id. at 12.

the society in which – and to which – the responsibility is directed, Bowen's thoughts are limited to setting forth duties owed to the people of the United States.

That said, Bowen's "Conclusions" are not bereft of global considerations. Neither are they temporally limited to the mid-twentieth century. Indeed, in the list of sixteen "fairly definite principles and recommendations to guide the businessman who wishes to discharge his Christian duty"[71], Bowen mentions several that are clearly inter- or transnational, or that could be (he had probably not imagined the extent of today's global value chains): as stewards, businessmen need to protect natural resources "so that the interests of both present and future generations are safeguarded"; as producers, businessmen need to strive for efficiency to ensure that poverty is eliminated and "the 'needs' of mankind" are met, but are to refrain from producing or selling anything that is not "worthy"; as leaders of economic institutions, businessmen are to determine revenue flows "with considerations of justice paramount" and to handle their business with honesty.[72] Conservation and action against extreme income inequality are also depressingly current topics of concern, whether viewed within a nation's borders or across them.

Even more striking are Bowens' conclusions regarding the businessman as a part of a web of individual relationships. These strike very familiar tones for today's international lawyer, underlining the universality and continuing timeliness of his program: businessmen, he says, need to treat all humans as possessing "dignity", they must offer equal opportunities and conditions of both employment and retirement that are safe, secure and fulfilling to employees and their families; businessmen should "work actively" to reduce discrimination; and, equally significant, the businessman needs to attend to "the distribution of property and power" to ensure that it is not concentrated in the hands of a few.[73]

As amenable to today's blueprint for business and human rights as the vision of CSR put forth by the "father of CSR" is, Bowen's idea diverges significantly in one respect from current advocates: the priority of the business' interest. Recall that Bowen posits that the social responsibility of the businessman is to balance the interests of society with those of the enterprise. His moral duty is not, however, to *necessarily* place society's interests over those of the business. It is to choose the social interest where "reasonable" and to modify (or, "temper") his decisions where possible to promote the social interests affected.[74] There is no absolute duty to forego profits or the private interest in favor of the public's interest. Ultimately, for Bowen, the concept of CSR had to remain one based on the individual's *moral* duty to act. The fulfillment of the duty would

71 Id. at 39.
72 Id. at 40.
73 Id.
74 Id. at 28. A second aspect of his moral duty is to cooperate with the government. Id.

allow for the maximum retention of freedom of the enterprise from governmental control alongside the maximum social acceptance of the use of corporate power to pursue profits. If the businessman should fail to fulfil this responsibility, however, Bowen's attitude – that of a business professor rather than as a lawyer – was that regulation would be the inevitable (rather than the "just") result.

Bowen was not the only author expounding on the social responsibilities of the private sector in the 1950s, but the views were not strikingly different. William C. Frederickson, writing about the decade described the main lines of thought to be that businessmen were called to be "public trustees", and were encouraged to continue the practice of corporate charitable giving.[75] The years following Bowen's book were ones that Carroll describes as "more 'talk' than 'action' with respect to CSR" and "a period of changing attitudes, with business executives learning to get comfortable with CSR talk".[76]

II. 1960s Davis and CSR as Self-Interest

The 1960s was the decade of protest in the United States and Europe. Thirty years after the New Deal, the post-War economic prosperity of the United States had created a large middle class, comfortable enough to concern themselves with citizens who were not benefiting. Minorities and women were among the most obvious non-winners, and increasingly citizen movements started to demand that the government act to rectify inequalities. Women's rights and minority rights were centers of the Civil Rights movement – both aiming to achieve legal equality with white males. The Voting Rights Act made it illegal to erect *de facto* barriers to voting based on a person's race.[77] The Civil Rights Act of 1964 was the most prominent result of the two movements, containing protections against sex-based and racial discrimination in areas ranging from employment, education, and housing.[78] Significantly, the Civil Right Act's non-discrimination provisions apply to private

75 Archie B. Carroll, A History of Corporate Social Responsibility: Concepts and Practice, Oxford Handbooks Online, DOI: 10.1093/oxfordhb/9780199211593.003.0002 at p. 5 (Oxford Univ. Press, 2014) (citing William C. Frederick, Corporation Be Good: The Story of Corporate Social Responsibility (Dog Ear Publishing, 2006)).

76 Carroll, A History at 5.

77 An act to enforce the fifteenth amendment of the Constitution of the United States, and for other purposes (Voting Rights Act), Pub.L. 89–110, 79 Stat. 437 (effective 6 August 1965).

78 An act to enforce the constitutional right to vote, to confer jurisdiction upon the district courts of the United States of America to provide injunctive relief against discrimination in public accommodations, to authorize the Attorney General to institute suits to protect constitutional rights in public facilities and public education, to extend the Commission on Civil Rights, to prevent discrimination in federally assisted programs, to establish a Commission on Equal Employment Opportunity, and for other purposes (Civil Rights Act of 1964), Pub.L. 88–352, 78 Stat. 241 (effective 2 July 1964).

persons as well as to governmental entities. Businesses, therefore, were within its scope.

The student protests overlapped with the civil and women's rights protests. They also, however, focused on stopping overseas wars, and, tellingly, on making democracy more effective. The peace movement challenged both governmental aggression and corporate contributors to the war efforts (the March 1968 NYU protests against Dow Chemical for supplying the US Army with napalm is a significant example). The students' challenge to the political power of the wealthy sought to bring politics closer to the individual by increased local activism and policy making.

In the CSR world, the 1960s protests started having an effect. Still characterized by the "more talk than action" attitude toward CSR, a slight but important shift in management's thinking started taking place in reaction to the greater consumer awareness of social injustices.

Keith Davis was a main contributor to the new view that corporate social responsibility was not only a normatively good attitude for businessmen to hold, but that it was also an attitude that was likely to pay off economically in the long-term.[79] This was not, to be sure, the main thrust of Davis' views. It was one, however, that became more prominent as the development of the field in the business schools progressed. It is also one that makes CSR today the object of such suspicion.

As a contributor to profitability, "the business case for CSR" became an issue for managerial study in the United States. As this idea took hold, a new era of CSR began: one that allowed for subsequent growth in the literature on business administration. This literature is interesting and offers numerous avenues of further ideas on how to plan for and measure the effectiveness of CSR, but the details are not relevant for the current study.

For us, the more relevant stream of CSR thought stemming from the 1960s was that of Clarence Walton. Walton defines CSR as "relationships between the corporation and society"[80] and emphasizes that although (contrary to Davis) there may be unmeasurable financial benefits, corporations should nevertheless keep these relationships in mind and *voluntarily* act to promote them while pursuing their own profits. Walton particularly stressed the voluntariness of CSR actions – perhaps not surprising given that the contemporary legal framework was shifting away from its former liberalism toward the regulation of companies' labor and environmental policies.

79 Keith Davis, Can Business Afford to Ignore Social Responsibilities? 2 Ca. Management Rev. 70 (1960).

80 Carroll at 6 (citing Clarence C. Walton, Corporate Social Responsibilities 18 (1967)).

III. 1970s

The 1970s was a period of growing consumer activism on the local level. The civil protest movements of the 1960s had matured and become better organized. While there was political push-back in the United States from the "silent majority", on the international level as well as in domestic lawmaking there was a clear step forward in regulation to protect the environment and political rights. This could indicate that the social power-social responsibility balance would shift away from the public's acceptance of corporate social power with a correlate responsibility toward a public demand for restrictions on corporate power by means of governmental regulation. Interestingly, however, public recognition of deep societal problems (inequality and discrimination, environmental pollution, crime) moved instead to a stated desire to increase the social powers of business by making the private sector responsible for achieving solutions to the problems that government seemed unable to manage.

This, at least, is what emerges from the 1971 "policy statement" by the Committee for Economic Development (CED), "Social Responsibilities of Business Corporations".[81] This statement characterizes the corporation's societal role as one of a "social contract", beginning with the sentence

> "Business functions by public consent, and its basic purpose is to serve constructively the needs of society – to the satisfaction of society".[82]

The CED then posits that society is now expecting business to take on more responsibilities – that they "are being asked to contribute more to the quality of American life than just supplying quantities of goods and services".[83] It points to a "spectrum" of activities in which corporations are expected to be actively trying to improve society. Beyond ensuring productivity and competitiveness, businesses of the 1970s were looked to for:

- ensuring access to quality education (including offering financial assistance to institutions and individuals, giving equipment to schools, and even "aid in counseling and remedial education"[84]);
- providing job possibilities that are suitable for all types of workers (including "active recruitment of the disadvantaged" and offering day-care and worker retraining[85]);
- fostering civil rights in a broad sense (by hiring and training minority employees, locating in disadvantaged areas, and supporting minority-owned businesses[86]);

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81 Committee for Economic Development, Social Responsibilities of Business Corporations (June 1971).
82 Id. at 11.
83 Id. at 16.
84 Id. at 37.
85 Id.
86 Id. at 38.

- helping urban development through construction projects and transportation systems[87];
- reducing pollution and helping conservation efforts[88];
- supporting cultural development (including through political activism to "secure governmental financial support for [...] the National Endowment for the Arts"[89]);
- improving access to quality medical services[90]; and
- assisting in making government more effective[91].

The list is strikingly – almost shockingly – broad. Corporations, it seemed, were to become governmental enablers, acting in the interests of the public for the sake of achieving an equal and prosperous community. Framed exclusively in terms of "responsibilities", the CED was in fact offering corporations tremendous social power with no mention of how uses of such power could be directed by society or the government.

The author S. Prakash Sethi refined the social contract idea by focusing more closely on the terminology being used to discuss what society expects of corporations.[92] Sethi took the notion of CSR and broke it down into three related but separate aspects, or "dimensions of corporate social performance": social obligation; social responsibility; and social responsiveness.[93] Under this view, corporate obligations to society consisted of performance required by law and the market. This meant that, for example, labor must be paid at least the minimum wage, environmental regulations must be followed, and profits must be declared truthfully for tax assessment. The social responsibility of a corporation is a performance that complies with what society expects of its members, reflecting prevailing societal norms. Thus, perhaps a company would offer
in-house childcare facilities, attempt to offset its carbon emissions, or support local sport teams.

Social responsiveness demanded more than responsibility. It was an action to change the way the company performs in order to respond to problems that society faces or will face in the future. Forward-looking, or in Archie B. Carroll's words, "anticipatory and preventive"[94], responsiveness meant going beyond what society expects, to move into the realm of what society needs.

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87 Id.
88 Id. at 38–39.
89 Id. at 39.
90 Id. at 39–40.
91 Id. at 40.
92 S. Prakash Sethi, Dimensions of Corporate Social Performance: An Analytical Framework, 17:3 *Cal. Manag. Rev.* 7 (1975).
93 Id.
94 Archie B. Carroll, A History of Social Responsibility: Concepts and Practices, Oxford Handbooks Online 8 (online publication date 2009).

Importantly, Sethi would allow responsiveness to cut into profits, even if the problems to be solved were not directly related to the commercial scope in which the company was active.[95] Current examples might be Nike's campaign to support athletes' right to express their views on Black Lives Matter, Starbuck's and Google's campaigns to support the legalization of gay marriage, or Amazon's contributions of real estate space for use as homeless shelters. Known today as "corporate political activity", social responsiveness highlights the precariousness of the social power-social responsibility balance because it permits corporate actors, rather than communities or the government, to define the issues that are considered "problems to be fixed".

As the 1970s progressed, the popular demand for governmentally imposed limits to corporate social power resulted in continued growth in socially protective legislation. This reduced critical attention to the concept of CSR. This in turn provided an environment in which the term could be used without its meaning being clearly defined.[96]

It was not until 1979 that Archie Carroll set out what some argue is the first unified definition of CSR.[97] Carroll followed Sethi's delineation of CSR, looking to "refinement" of the concept.[98] Proffering his own model of "Corporate Social Performance" which essentially took Sethi's 3-part analysis, Carroll defined CSR according to it, and then set that within the "performance" framework for managers to use.[99]

Carroll's CSR definition combined Sethi's obligation, responsibility, and responsiveness idea:

> "The social responsibility of business encompasses the economic, legal, ethical, and discretionary expectations that society has of organizations at a given point in time".[100]

Again, the expansion of CSR beyond the "ethical" to include "discretionary" is fundamental, and, from the point of view of the power-responsibility balancing, noteworthy. Although coming from management scholars it may seem like a positive enhancement of societal involvement, the view of social contract on which it rests cannot be presumed to be only beneficial.

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95 Damien Krichewsky, Corporate Social Responsibility and Economic Responsiveness in India 29 (Cambridge Univ. Press, 2019).

96 Latapí Agudelo, M.A., Jóhannsdóttir, L. & Davídsdóttir, B. A literature review of the history and evolution of corporate social responsibility. Int J Corporate Soc Responsibility 4, 1 (2019). ‹https://doi.org/10.1186/s40991-018-0039-y›.

97 Id.

98 Archie B. Carroll, A Three-Dimensional Conceptual Model of Corporate Performance, 4:4 Academy of Management Rev. 497, 504 (1979) (‹https://doi.org/10.5465/amr.1979.4498296›).

99 The model Carroll set out looked at the four dimensions of societal expectations and then added the social issues involved and the philosophy of "responsiveness" the business wanted to adopt in order to determine the most suitable social performance model. See id. at 503.

100 Id. at 500.

Indeed, the social contract idea and social responsiveness were not welcomed by everyone. Milton Friedman was vigorously objecting to the development of the concept of social responsibilities of corporations with his shareholder interest-only view of corporate purpose.[101] His opposition to CSR was multi-faceted. He noted its illogical super-imposition of corporations and individuals, its frequent use as "hypocritical window-dressing", and its problematic political consequences.[102] Even if one does not accept Friedman's fundamental critique – that CSR would shift the basic capitalist nature of the US economy to one of authoritarian communism – it is hard to deny his argument regarding the potential for preventative social problem-solving by corporations to lead to highly undemocratic social shifts.

While Friedman's views remained important in corporate legal thought (indeed, the shareholder-stakeholder interest debate continues), they succumbed to the interest CSR continued to generate both in public debates and in the management literature.

IV. 1980s

With the 1980s came the rise of neoconservative economic philosophies in government and the public sector. Reaganism ("government is the problem") and Thatcherism ("the state as servant and not as master") put the government itself in retreat from regulation.

With the ideals of "conspicuous opulence" promoted as a new way of life, society's expectations of anyone – much less corporations – acting for the public interest also seemed to recede.[103] The question of balancing social power and social responsibility, therefore, was subordinated to reducing both to a minimum. As a result, while CSR as a management tool continued to generate some interest among business scholars, its development as a guiding concept in the public sphere slowed.

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101 Milton Friedman, The Social Responsibility of Business is to Increase its Profits, The New York Times Magazine, 13 September 1970:
"In a free-enterprise, private-property system, a corporate executive is an employee of the owners of the business. He has direct responsibility to his employers. That responsibility is to conduct the business in accordance with their desires, which generally will be to make as much money as possible while conforming to their basic rules of the society, both those embodied in law and those embodied in ethical custom. [...] What does it mean to say that the corporate executive has a 'social responsibility' in his capacity as businessman? If this statement is not pure rhetoric, it must mean that he is to act in some way that is not in the interest of his employers".

102 Id.

103 The popular view of the 1980s as the "greed decade" has been challenged by many as inaccurate. Richard McKenzie noted, for example, that charitable giving rose disproportionately during the decade, even though tax rates dropped. See Richard McKenzie, Was it a Decade of Greed? The Public Interest 91–96 (1992) (available at ‹https://www.nationalaffairs.com/public_interest/detail/was-it-a-decade-of-greed›; viewed 9 February 2020).

One of the three significant exceptions to the otherwise unremarkable developments in the theorizing of CSR in the 1980s was the emergence of the stakeholder theory in management studies. In 1984, the publication of Freeman's *Strategic Management: A Stakeholder Approach*[104] kicked off a vigorous discussion of the fundamental ethical issue behind CSR: does the corporation have duties to non-owners? This discussion also had a business ethics dimension, which itself has created a particular view of what a "good" corporate citizen is. The push for corporate governance had been taken up in 1981 by the American Law Institute (ALI), but had been faltering in the face of significant opposition from corporate boards and scholars. The Stakeholder Approach, however, generated enough debate to keep the issues underlying CSR alive.

Tied closely to the stakeholder-CSR nexus were the questions of corporate citizenship and corporate governance. The corporate governance discussions in the 1980s led to the growth in popularity of codes of conduct, the second of the exceptions to the stagnation of CSR.

Using promises of good behavior as set out in the codes, corporations offered the public a written promise to act on societal expectations. As a way to measure a company's compliance with its own promises related to its social power, codes of conduct ultimately generated increased pressure for enforcement of the responsibilities attached to corporate ability to impact on stakeholders.

Company- or industry-level codes changed the conceptual discussions surrounding social power and highlighted the problematic nature of their contents as voluntary and explicitly non-binding. This, perhaps more than anything directly tied to CSR concepts, was an ideological stepping-stone to the Business and Human Rights movement, to which we will turn shortly.

The third and final development in 1980s CSR evolution was the shift in CSR from being mainly a discussion about corporate responsibilities to national stakeholders (framed as issues of good corporate governance), to one about corporate responsibilities toward stakeholders anywhere in the world. By the end of the decade, important debates on the scope and relevance of CSR as a concept (and eventually its concretization) were poised to move into the center of the international human rights arena.

V. 1990s-2010s

By the 1990s, the political climate regarding the state's role in society had shifted again. The Clinton Administration's moderate economic policies focused on deficit reduction and greater globalization, but also incorporated ex-

104 R. Edward Freeman, Strategic Management: A Stakeholder Approach (1984).

panded welfare payments and infrastructure investments. This helped put the economy into an expansive period, while maintaining government's primacy over responsibility for exercising social power nationally.

This corresponds with the continued lack of significant development in CSR on a national level in the United States. The state was present with power and responsibilities, leaving companies to consider how to "do well by doing good". CSR, that is, became even more an instrument of marketing than before.

The growing internationalization of corporate activity, however, had different effects on CSR development. Globalization of business meant that corporations were becoming increasingly multinational and that multinationals were becoming increasingly large.[105] The size of companies increased their potential to have social power (for example on local employment, environment, and communities). The spread into developing economies increased their ability to exert their social power (by having resources that the host government needed for growth and development). The attention to international norms of corporate responsibility was therefore a natural result of abuses of the social power becoming known – which they were with increasing frequency.

A number of large advocacy campaigns directed at specific problems or industry actors generated widespread attention during the 1990s. This helped in the process of "norm-tipping", a re-consideration of CSR from being a management-only question of ethics to becoming considered a "normalized" matter for businesses (at least for large multinational companies) to pursue in the course of their daily activities.[106]

Some have characterized the 1990s as a period of CSR institutionalization, given that it was during this time that formal standards for CSR began appearing.[107] Standards were being developed by numerous actors: civil society organizations, businesses, industry groups, and multi-stakeholder initiatives.[108] Some standards, like the International Organization for Standardization (ISO)'s ISO 14001 on environmental management systems concerned how to help corporations achieve their own goals, while others, such as the Global Reporting Initiative, addressed processes to help promote accountability by making corpo-

105 The United Nations Committee on Trade and Development (UNCTAD) publishes an annual World Investment Report which captures the trends in foreign investment flows and in transnational corporations (TNCs). For the growth of TNCs during the 1990s, see, e.g., UNCTAD, World Investment Report 2001: Promoting Linkages, Figure III.13 at p. 111 (2001).

106 See Lisbeth Segerlund, Making Corporate Social Responsibility a Global Concern: Norm Construction in a Globalizing World 65 (Ashgate, 2010).

107 Wayne Visser, The Rise and Fall of CSR: Shapeshifting from CSR 1.0 to CSR 2.0, CSR International Paper Series, No. 2, p. (2010); Archie B. Carroll, Corporate Social Responsibility: The Centerpiece of Competing and Complementary Frameworks, 44 Organizational Dynamics 87–96, 87 (2015) (naming "three strong trends" in CSR in the 1990s as "*globalization, institutionalization*, and *strategic reconciliation*").

108 See Segerlund, at 99.

rate-owned information about implementation of CSR programs accessible to interested outsiders. The creation of these standards helped generate intense debates around the characterization of CSR as much as about its content and the possibilities of oversight.

More significant for today's view of CSR is that the 1990s saw the real globalization of CSR as a "thing". This was in part due to technology and in part to a great growth in interest in the topic in Europe.

As the internet became widely available[109], CSR internationalization took a large step forward. Through internet, abuses of corporate social power and the absence of legal responsibilities were evermore apparent to an increasingly global audience. The audiences, in turn, were uniting across borders. Experiences of individuals and communities directly affected by the corporations' actions in host countries could be shared with individuals and organizations in the home countries, creating a new perspective on what the scope of "social" could be.

In addition, global problems were uniting interest groups from around the world in a push to get solutions from states and internationally active corporations. Expectations of redress were rising, and where publics detected governmental weakness in addressing social ills, corporations were being expected to take up the responsibility for implementing solutions. As many of the most egregious examples of social and environmental harms were perpetuated by corporations headquartered in the global North but operating in the global South, it is not surprising that activist organizations in the companies' home jurisdictions began to look for ways to hold their "national" businesses accountable for overseas activities.

By the 2000s, however, internationally active corporations were substituting global supply chains (contractual relationships with numerous producers) for overseas subsidiaries. These supply chains were to become one of the most important aspects of CSR, because even where large companies themselves were complying with the laws and societal values of their home constituents, their suppliers may not be similarly "responsible". Law, however, shielded companies from liability for abuses of non-related entities.

Corporate social power was once again unbalanced by social responsibility. Hiding behind the voluntary nature of their promises to home constituents and behind the host state's (legislative and executive) sovereignty, corporations were seen as trying to reap the public relations benefits of their codes of conduct but avoiding any accountability for their impacts on communities abroad.

Critical attention thus began to coalesce around a drive to make corporations responsible for damages they cause directly or indirectly through their suppliers

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109 Reportedly growing at an average of 100% per year in the 1990s, the internet had a two-year period of "explosive growth" between 1995 and 1996, growing 1000% in each of those years. The History and Growth of the Internet, ‹http://faculty.bus.olemiss.edu/breithel/b620s02/garrison/Internet_history.asp› (10 Feb. 2020).

and to make such responsibility legally binding. This is when the shift from CSR to Business and Human Rights perspectives of "corporate social responsibility" began.

E. International Instruments Containing CSR

We turn now to a brief overview of the different instruments that contain promises of "responsible" conduct by the corporation.

I. Instruments of the New International Economic Order

1. Investment Guidelines

The regulation of internationally active corporations started in earnest only with the New International Economic Order movement (NIEO). The feeling of the 1960s and early 1970s (shared by capital importing countries and sympathetic interests in the industrialized economies) was that corporate and national interests clashed, and that regulation was necessary to channel economic activities into the national interest. Acting on this sentiment, developing economy governments, as capital importers, began to voice their strong criticism of corporate activities in their jurisdictions and began to regulate them more strictly. Investment limitations, barriers to capital movements, and expropriations were commonly used tools to retain sovereignty.

It was during these years that corporations (with the support of the United Nations) began to consider international self-regulation through non-binding rules. The first corporate guidelines, the International Chamber of Commerce (ICC) Guidelines for International Investment, appeared in 1972.[110] The ICC Guidelines were intended to set out best practices of investors and host governments in the investment relationship, covering topics such as ownership, management, fiscal policies, financial and legal frameworks, and technologies. As a private association, the ICC could not create binding obligations on states, and its membership's interests prevented significant intrusions into corporate activities. The emphasis, therefore, was on the overall relationship between corporation and host, preventing specific obligations from being of much relevance. Unsurprisingly, the ICC Guidelines did little to satisfy critical voices. It was, however, only one of a multitude of contemporary attempts to move the CSR dialogue onto the international platform.

An overhaul of the ICC Guidelines in 2012 and a "relaunch" again at the end of 2016 bear witness to the contextual changes regarding global expectations on

110 The ICC Guidelines for International Investment became the basis for the Abs-Shawcross Convention, 7 ILM 117 (1968).

companies.[111] The Preface of the 2016 version, for example, refers to the Sustainable Development Goals, and the hopes that investment can contribute to their achievement. More importantly, Section XI is titled "Corporate Responsibility" and addresses investors, home states, and host states. Still worded hortatorily ("the investor should"), the 2016 ICC Guidelines not only recommend internal governance controls, but also stakeholder dialogue and due diligence in evaluating suppliers.[112]

2. *United Nations Centre on Transnational Corporations*

The more, perhaps the most, influential effort to fix attention on the questions surrounding the role of corporations on the world came with the United Nations Secretary General's appointment of a "Group of Eminent Persons" to study and report on multinational corporations.[113] The Group's resulting report was published in 1974[114], setting not only the stage for the establishment of the United Nations Centre on Transnational Corporations (UNCTC) as an institution devoted to the collection and analysis of statistical information on corporate activities abroad and their relationships to host governments[115], but also for the move toward legalization of CSR, which occurred in the next four decades[116]. The Group of Eminent Persons' Report on Multinational Corporations in World Development notably suggested:

– fostering greater state-state cooperation in maintaining policy-making autonomy on the local level[117];

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111 The text of the 2016 Guidelines is available at ‹https://cdn.shopify.com/s/files/1/2992/1976/files/ICC-Guidelines-For-International-Investment-2016.pdf?2361› (viewed 21 March 2020).

112 Id. at 14–15.

113 The Group of Eminent Persons was called for by the United Nations Economic and Social Council in Resolution 1,721 of 28 July 1972. Christopher May, Multinational Corporations in World Development: 40 years on, 38:10 Third World Quarterly 2223–2241, 2226 (2017), ‹doi: 10.1080/01436597.2017.1350098›. The Secretary General granted the request and formally appointed members to the Group. Id.

114 United Nations Department of Economic & Social Affairs (UNDESA), Multinational Corporations in World Development (Praeger Publishers: New York, 1974).

115 United Nations Economic and Social Council Res. 1913 (LVII) (1974). The Centre was structurally eliminated, incorporated (or "collapsed", as May writes, because of the perceived threat it posed to the interests of "some powerful countries" who were home to many transnational corporations) into the United Nations Committee on Trade and Development in 1992. May at 2230. See also Khalil Hamdani and Lorraine Ruffing, eds., United Nations Centre on Transnational Corporations: Corporate Conduct and the Public Interest (Routledge, 2017).

116 May at 2227 (additionally citing Tagi Sagafi-Nejad and John Dunning, The UN and Transnational Corporations: From Code of Conduct to Global Compact 60, 63 (Bloomington: Indiana University Press, 2008) as saying "The range of policy issues [the Report] covered set the agenda for subsequent years, and the concepts it considered became springboards for later UN work […]").

117 Report on Multinational Corporations in World Development (Chapter IV–Towards a Programme of Action), 12 I.L.M. 1109, 1120–1121 (1973) (calling also for training programs and envisioning the coordination of such programs as being a task of the UN).

- harmonizing tax, competition, and environmental policies across states[118];
- creating a "General Agreement on multinational corporations" [sic], including a binding and enforceable set of rules embedded in an institutional setting to control corporations' actions and impacts[119];
- making transnational corporations legal subjects of international law[120]; and
- creating a dispute settlement and prevention mechanism to address corporate misconduct.[121]

While the UNCTC itself "seems to be written out of history"[122], the report that created the momentum for its establishment remains a highpoint of state-led enthusiasm to grapple with the practical difficulties of containing corporate activities' externalities on persons and communities, even while recognizing the economic benefits such activities bring. Forty years later, we are no further politically than we were then.

II. Business-encouraging Instruments

There were, of course, multiple other international attempts to balance corporations' international social power with responsibilities. While none succeeded in binding corporations to enforceable norms, the vocabulary of "CSR" became mainstreamed as industrialized countries took up the banner and multistakeholder approaches brought multinational corporations themselves into the discussions.

Three particular sets of instruments stand out from the rest as worthy of attention: the Organization for Economic Cooperation and Development Guidelines for Multinational Enterprises, the International Labour Organization Declaration of Principles Concerning Multinational Enterprises and Social Policy, and the United Nations Global Compact. These will be briefly summarized to highlight their contribution to the international movement toward today's views on CSR.[123]

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118 Id. 1121–1124. The Report had a heavy emphasis on the need to harmonize tax policies and suggests, as a "radical change", the use of a "factor-formula technique" to divide taxation on the basis of "factors" such as payroll, profit, and property ownership. Id. at 1123. This latter suggestion is particularly intriguing given the OECD taxation models being discussed currently.

119 Id. at 1125.

120 Id. at 1125–1126 (using the terms "supranational corporation" and "'cosmocorps'" to denote the internationalized firm subject to "international company law").

121 Id. at 1127 (considering the investor-State arbitration mechanism established by the International Center for the Settlement of Investment Disputes and the ICC).

122 May at 2230.

123 See also Kathryn Gordon, "The OECD Guidelines and Other Corporate Responsibility Instruments: A Comparison", OECD Working Papers on International Investment, 2001/05, p. 9 (OECD Publishing, 2001; ‹http://dx.doi.org/10.1787/302255465771›) (box containing a summary of different international instruments on CSR as of 2000, including the Caux Principles for Business, the Global Reporting Initiative, the Global Sullivan Principles, and Social

1. OECD Guidelines

In 1976, the Organization for Economic Cooperation and Development (OECD) issued its Declaration on International Investment and Multinational Enterprises.[124] Composed at the time of twenty-four industrialized capital-exporting states[125], the OECD was committed to maintaining the ability of corporations to move their capital freely across borders. Nevertheless, the organization was keenly aware of the dissatisfaction of capital-importing governments and civil society regarding the regulatory arbitrage made possible by just such liberalizations.

The OECD's Executive Committee established the Committee on International Investment and Multinational Enterprises in 1975 to address governments' sovereignty concerns arising out of the "rapid growth in the number [...], [...] size and scope, as well as the discrepancies, which may exist between the transnational structures of these enterprises and the national character of governments".[126] The Committee fulfilled its mandate by negotiating and issuing the Declaration as a package of instruments that tied together corporate behavior and government investment policy. As described by the OECD itself, the Declaration is an achievement in balancing the competing interests of stakeholders by:

> "promot[ing] a comprehensive, interlinked and balanced approach for governments' treatment of foreign direct investment and for enterprises' activities in adhering countries. [They are] one of the main means by which the OECD assists adhering countries in working towards a liberal regime for foreign direct investment, while at the same time ensuring MNEs operate in harmony with the countries where they are located."[127]

Composed of four instruments[128], the Declaration was accepted by OECD governments as a non-binding but "solemn"[129] instrument to which they commit

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Accountability 8000 as well as the OECD Guidelines for Multinational Enterprises and the UN Global Compact).

124 For the relevant texts, see ‹http://www.oecd.org/daf/inv/mne/oecddeclarationanddecisions.htm› (viewed 21 March 2020).

125 See OECD, List of OECD Member countries – Ratification of the Convention on the OECD, ‹https://www.oecd.org/about/document/list-oecd-member-countries.htm› (viewed 28 February 2020). Turkey was one of the early members of the OECD despite some sources considering it a developing country.

126 R. Blanpain, The OECD Guidelines for Multinational Enterprises and Labour Relations 1976–1979: Experience and Review 30 (Deventer: Kluwer, 1979) (quoting the OECD Secretary General E. Van Lennep's statement to the Committee on International Investment and Multinational Enterprises at its first meeting, as recorded in The OECD Observer, 1975, no. 74, pp. 14–15).

127 OECD, Policy Brief: The OECD Guidelines for Multinational Enterprises, OECD Observer, June 2001 at p. 3 (2001).

128 The four elements of the Declaration are: the Guidelines for Multinational Enterprises; the National Treatment instrument; the Conflicting Requirements instrument; and the International Investment Incentives and Disincentives instrument.

129 Nicola Bonucci, The legal status of an OECD act and the procedure for its adoption (note prepared for a meeting held in April 2004). The OECD legal and quasi-legal instruments are catego-

themselves. While three of the instruments contained in the Declaration are directed to governments, the first instrument, the Guidelines for Multinational Enterprises (Guidelines), is meant to provide guidance to companies themselves.

It is the Guidelines that are the most widely known of the Declaration's quartet of texts and the most significant to the CSR narrative. They, even more than the Declaration as a whole, are aimed at satisfying both corporations and civil society: on the one hand, the Guidelines urge corporations to "fully [take] into account established general policy objectives of the Member countries in which they operate", including those of employment creation and environmental protection, but on the other hand the Guidelines areexplicitly voluntary.[130]

The content of the Guidelines has been revised several times, the latest being 2010/2011, when human rights, due diligence, and supply chain management were added to the areas in which corporations have a duty to behave responsibly.[131] A brief explanation of the most significant changes suffices for present purposes.[132]

The 1976 version of the Guidelines mainly urged corporations to attend to their economic impact on host countries and local communities[133]: transfer of technology, adherence to national development policies, enhanced employment of local populations, fair competition, non-bribery, and fair payment of taxes were all topics of the original Guidelines. Yet, even in 1976, labor rights (in the form of companies' approach to organized labor) and environmental protection were also promoted.

The 1984 revisions supplemented the earlier Guidelines with a "built-in implementation mechanism": the National Contact Points (NCPs).[134] The NCPs were to act as both providers of information about the Guidelines within the country, and as "promoters" of the Guidelines.[135] At the time, NCPs were con-

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rized as "OECD Acts" and "other" instruments. Declarations are in the latter category, intended as non-binding but "solemn texts […] noted by the OECD Council and […] generally monitored by the responsible OECD body". Id. at p. 2. For a more thorough explanation of OECD internal structures and legal instruments, see Blanpain at 25–29.

130 OECD Guidelines for Multinational Enterprises, Preface, para. 1. See also Blanpain at 60 (quoting Special Consultant to the OECD Secretary General Theodore Vogelaar as saying that the non-legally binding nature of the Guidelines was "not so much a matter of principle as of judicial necessity", given that national legislatures are the only bodies with "the power to bind citizens and corporations").

131 OECD, Guidelines for Multinational Enterprises, 2011 edition (OECD, 2011) (‹http://www.oecd.org/daf/inv/mne/48004323.pdf›; viewed 21 March 2020).

132 See alternatively, John Ruggie and Tamaryn Nelson, Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges, Corporate Social Responsibility Initiative Working Paper No. 66, 1–3 (Cambridge, MA: John F. Kennedy School of Government, Harvard University, 2015).

133 OECD, Declaration, Annex 1 (The Guidelines for Multinational Enterprises) (1976).

134 OECD Secretariat, Executive Summary, Implementing the OECD Guidelines for Multinational Enterprises: The National Contact Points from 2000 to 2015, 11 (OECD, 2016).

135 The Guidelines for Multinational Enterprises: Second revised Decision of the OECD Council (Amended June 1991) (found as Annex 3 to DAFFE/IME(98)15).

sidered progressive, because they created the possibility of enforcement of the Guideline standards. Neverthless, disillusionment with the complaint processes came soon. The resulting reluctance to use the offices led to the need to either improve or abandon their functioning. The former option was seized upon, with changes in NCP working procedures and cross-office coordination coming forth with the 2001 revision of the Guidelines.[136] Even greater changes followed the publication of the Ruggie Framework. The 2011 Guidelines revision processes incorporated human rights and supply chain issues more completely, leading to an expansion of the NCPs' scope of activities.[137]

a. Impact of the Guidelines

While the OECD Guidelines underline that governments and companies have moral commitments to which they must adhere, and while there was scholarly attention directed to the influence of even non-binding guidelines on the development of customary international law[138], it is the voluntariness of the OECD framework (for right or wrong[139]) that prevented it from satisfying critics of multinational corporations. The characterization of CSR as an idea dominated by the global North's interests rather than the real concerns of the South, all the while making sure that whatever was done was not going to restrict businesses' activities[140], continues to cast a shadow over the OECD's efforts to promote itself as a champion of real improvements rather than of CSR as it has always been.

2. ILO Declaration of Principles Concerning Multinational Enterprises and Social Policy

The International Labour Organization (ILO), established in 1919, is one of the world's oldest international organizations. Its focus on protecting workers and improving the work conditions deeply embeds the movement to heighten CSR in its work program. The fact that employer representatives sit alongside government and labor representatives adds to the experiential value of the ILO contributions to CSR discussions.

While many of the ILO conventions and programs could be considered as at least tangentially related to CSR, the two main ILO contributions to CSR are

136 Ruggie at 2.

137 Id. at 6.

138 See Hans W. Baade, The Legal Effects of Codes of Conduct for Multinational Enterprises, in: Norbert Horn, ed., Legal Problems of Codes of Conduct for Multinational Enterprises 3-38 (Deventer: Kluwer, 1980).

139 See Ian Brownlie, Legal Effects of Codes of Conduct for MNEs: Commentary, in: Horn, ibid. 39–43 (considering that analyses of the problem of the legal status of the Guidelines may be less helpful than delving into the questions of home state responsibility).

140 See generally, Rhys Jenkins, Globalization, Corporate Social Responsibility and poverty, 81:3 Int'l Aff. 525, 528 (2005).

the ILO's Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, promulgated in 1977 and revised in 2017[141], and the 1998 Declaration on Fundamental Principles and Rights at Work.

The 1998 Declaration on Fundamental Principles and Rights at Work is significant for setting out four areas of labor protection that the ILO has determined are essential: the right to association; the prohibition on slavery and slave-like practices; the right to non-discriminatory employment; and the protection of child workers. These areas are set out in eight "fundamental" conventions that form the minimum core of labor protection. In turn, these conventions are frequently included as required elements in CSR instruments.

The Declaration of Principles Concerning MNEs and Social Policy is explicitly focused on CSR. In its original form, it noted multinationals' potential for beneficial, but also for harmful, effects in host jurisdictions and set out principles to guide the interests of states, employers, and labor, as well as of businesses, in adopting policies and taking actions to ensure the benefits outweigh the disadvantages. Unsurprisingly, much emphasis is given to the promotion of employment: "governments should declare and pursue, as a major goal, an active policy designed to promote full, productive and freely-chosen employment".[142] Working conditions (wages[143], safety and health[144], assurance of social security[145]) are spelled out, too, as is the heavy emphasis on rights to unionize, and collective bargaining[146]. The 2017 revisions add to the original Declaration by integrating the United Nations Guiding Principles framework (in particular due diligence) and the Sustainable Development Goals' agenda.[147]

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141 See Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, Adopted by the Governing Body of the International Labour Office at its 204th Session (Geneva, November 1977) and amended at its 279th (November 2000), 295th (March 2006) and 329th (March 2017) Sessions.
The InFocus Initiative on CSR, launched in 2006, is a program to implement the MNE. See International Labour Office Governing Body Subcommittee on Multinational Enterprises, InFocus Initiative on Corporate Social Responsibility (CSR), GB.295/MNE/2/1 (March 2006). The Initiative should help promote CSR by giving companies ideas on how to "give effect to the MNE Declaration" by sponsoring research and publications on trends and sector experiences with CSR, helping to develop a harmonized view on good practices, and training stakeholders on implementing CSR. Id.

142 Declaration, para. 13. See also id. at paras. 14–21.

143 Id. at para. 41.

144 Id. at paras. 42–46.

145 Id. at para. 22.

146 Id., "Industrial Relations", paras. 47–63.

147 See ILO, ILO revises its landmark Declaration on multinational enterprises, ‹https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_547615/lang–en/index.htm›. The ILO describes its updates as responding to the "new economic realities":
"The revision of the Declaration by the ILO Governing Body responds to new economic realities, including increased international investment and trade, and the growth of global supply chains. It also takes into account developments[…] within and outside the ILO, including new labour standards adopted by the International Labour Conference, the Guiding Principles on

3. *United Nations Global Compact (2000)*

By the late 1990s, the United Nations (UN) itself was ready to move again on the topic of multinational corporations' impacts on host states and populations. At the World Economic Forum in Davos, then Secretary-General of the UN, Kofi Annan, addressed the participants by illustrating his latest progress in developing "a creative partnership between the United Nations and the private sector".[148] The partnership, he explained, would consist of businesses adopting "a global compact of shared values and principles" to "embrace, support and enact a set of core values in the areas of human rights, labor standards, and environmental practices."[149] For its part, the UN would continue to strive to keep peace and foster development, the "prerequisites" of profitable business activities.[150]

Eventually extended to include norms of anti-corruption, the ten principles of the Global Compact are aimed at fostering an effective corporate commitment to sustainability, broadly conceived. Each of the four main areas was already firmly established as reflecting "universal" principles, or matters of international legal consideration, when the Compact took them on[151], making them easy to sell as ideals that businesses should be promoting.

Signed onto by several thousand businesses around the world, the Global Compact has certainly been successful in terms of getting adherents to Annan's call for putting a "human face to the global market". It was also, however, highly successful in Annan's other goal: to prevent legally binding rules on protection of human rights, labor, the environment (and – to a lesser extent – anti-corruption) from being taken up and applied directly to corporations by the international organizations regulating trade and investment. Reading Annan's 1999 call, one is struck by the reasoning he gives to business leaders to support the Global Compact:

> There is enormous pressure from various interest groups to load the trade regime and investment agreements with restrictions aimed at preserving standards in the three areas I have just mentioned. These are legitimate concerns. But restrictions on trade and investment are not the right means to use when tackling them. Instead, we should

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Business and Human Rights endorsed by the Human Rights Council in 2011, and the 2030 Agenda for Sustainable Development.
[…]"
Id.

148 Press Release, Secretary-General Kofi Annan, Secretary-General Proposes Global Compact on Human Rights, Labour, Environment, in Address to World Economic Forum in Davos, U.N. Press Release SG/SM/6881 (Feb. 1, 1999) (text available at ‹https://www.un.org/press/en/1999/19990201.sgsm6881.html›; viewed 1 March 2020).

149 Id.

150 Id.

151 See Karin Buhmann, Regulating Corporate Social and Human Rights Responsibilities at the UN Plane: Institutionalising New Forms of Law and Law-Making Approaches, 78 Nordic J. Int'l L. 1, 32 (2009) (recording the legal instruments upon which each principle is based).

> find a way to achieve our proclaimed standards by other means. And that is precisely what the compact I am proposing to you is meant to do."[152]

Significantly, Annan also used the power-responsibility balance in his comments, highlighting that the corporations' power over host governments "brings with it great opportunities and great responsibilities".[153] The Global Compact, then, is clearly a continuation of the ideas that had always been behind CSR.

The same line on CSR, however, was also subject to the same line of attack by those who no longer believed that the social responsibilities were equally balancing out the social power of businesses. The Global Compact's civil society critics, of which there are many, point to the program's lack of any real oversight of participants and resulting potential for "blue washing" of businesses.[154] Scholarly work, critical of the program, digs more deeply into these issues,[155] as well as into the actual empirical impacts[156].

4. United Nations Guidelines on Business and Human Rights (2005–2011)

a. The Ruggie Framework

As the questions surrounding corporate liability for the harm businesses caused individuals, communities, and the environment gained increasing public attention, the legal questions on the status of large transnational corporations correspondingly rose in prominence. If, scholars wondered, international organizations can be considered subjects of international law, could corporations be so considered as well? Can a company be held liable for behavior that would breach international legal norms if a state had been the actor?

Diverging interests of states as well as the inability of international law scholars to agree on these questions spurred the United Nations to take them

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152 Id.

153 Press Release, Annan.

154 See Global Policy Forum, NGOs Criticize "Blue Washing" by the Global Compact (4 July 2007) (recording statements condemning the Global Compact from the Berne Declaration, Greenpeace International, Amnesty International, and ActionAid. These organizations called the Global Compact "a toothless paper tiger" and "a fig leaf") (‹https://www.globalpolicy.org/global-taxes/32267-ngos-criticize-qblue-washingq-by-the-global-compact.html›; viewed 1 March 2020).

155 See generally Evaristus Oshionebo, The U.N. Global Compact and Accountability of Transnational Corporations: Separating Myth from Realities, 19 Fla. J. Int'l L. 1, 20–30 (2007) (especially criticizing the assumption of unified norms of corporate governance across companies and the legitimacy of Global Compact's processes given the power dynamics between developed and developing states); Surya Deva, Global Compact: A Critique of the U.N.›s «Public-Private» Partnership for Promoting Corporate Citizenship, 34 Syracuse J. Int'l L. & Com. 107, 143–149 (2006) (pointing to the Compact's "directional uncertainty", the participant's failure to adhere to reporting requirements, and the absence of an accountability mechanism, among other failings).

156 Deva, Global Compact at 128–143 (pointing to the small number of participants that are involved when compared with overall numbers of multinational companies and to their lack of communication).

up within the Sub-commission on the Promotion and Protection of Human Rights. In 2005, Kofi Annan appointed John Ruggie to be a Special Rapporteur of Business and Human Rights. As Special Rapporteur, Ruggie's job was to:

> "(a) To identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights;
>
> (b) To elaborate on the role of States in effectively regulating and adjudicating the role of [business] with regard to human rights, including through international cooperation;
>
> (c) To research and clarify the implications [...] of concepts such as 'complicity' and 'sphere of influence';
>
> (d) To develop materials and methodologies for undertaking human rights impact assessments [...];
>
> (e) To compile a compendium of best practices [...]."[157]

Ruggie and his team drafted a proposal for corporate responsibility based on human rights perspectives and obligations on states as well as corporations. In 2008, Ruggie submitted his "3 Pillar Framework" to the Council on Human Rights, which approved it unanimously.[158] The Framework puts forth a "respect, protect, and remedy" set of principles that are to apply to all companies:

> Pillar 1: A duty on states to protect human rights
>
> Pillar 2: A duty on business to respect human rights (even where it goes beyond applicable law)
>
> Pillar 3: A victim's right to remedy.[159]

Within his Framework, Ruggie sought to seek and confirm, rather than to develop, the international law on CSR. Thus, under Pillar 1 (State Duty to Protect), he affirmed that States – but only States – have the trio of legal obligations regarding human rights. States, under the Vienna Declaration of Human Rights must respect, protect, and fulfil human rights. The role toward corporate behavior in this trio is that of protecting their populations against actions by third parties – including legal persons – that harm the rights. Thus, the Framework speaks of the need to "prevent, investigate, punish and redress" violations. This entails states' obligations to make it clear to their own companies that human

157 ECOSOC, Promotion and Protection of Human Rights, E/CN. 4/2005/L.87, 1 (15 Apr. 2005).

158 United Nations Human Rights Council, Protect, Respect and Remedy: a Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/8/5 (7 April 29008).

159 Id.

rights are to be respected wherever they are active, to enforce their own laws, to adopt government procurement policies that include human rights compliance as a factor of consideration, and to work to ensure that their own international obligations in non-human rights areas permit human rights to be pursued.

Under Pillar 2 (Business Duty to Respect), businesses have an independent responsibility to uphold the human rights listed in the international bill of human rights and the International Labor Organization's Fundamental Conventions. While not directly obligated to adhere to the provisions of those treaties, the Framework encourages companies to "seek to prevent or mitigate" violations that are linked to their operations. The Pillar also foresees changes to the management of negative externalities of a company's activities, calling for mainstreaming of human rights policy, and pressing for on-going due diligence efforts in assessing actual and potential abuses of human rights. The Framework refrains from going further than asking for proactive attention by businesses to the impacts their own activities have on stakeholders. Thus, if a violation of human rights is not directly caused by the company itself, the company does not have a duty to "provide for remediation", even if there is a link between the company and the damaging conduct. The Framework does not require the social power of the company to be balanced by firm social responsibilities.

The third Pillar (Victims' Right to Remedy) calls for the establishment of "grievance mechanisms" to address violations of human rights that are caused by either the state or companies. While Ruggie would consider a wide variety of processes to be considered a suitable "grievance mechanism"[160], even the least institutionalized of these mechanisms are to be legitimate (trust-worthy and accountable), accessible (known and affordable), predictable, equitable (give access to information and expertise necessary), transparent, and "based on engagement and dialogue".[161]

b. United Nations Guiding Principles

Ruggie's Framework was then extended into "guiding principles" that were opened to consultation in 2011 and endorsed by the Human Rights Council in resolution 17/4 on June 16, of the same year.[162] The United Nations Guiding Principles on Business and Human Rights (UNGPs) begin by noting that they are "grounded in recognition of" the basic ideals behind Ruggie's three pillars (although the list does not refer to Ruggie or his Framework's pillars): states' duties to respect, protect, and fulfil human rights; corporate duties to act law-

160 See generally A/HRC/8/5, pp. 22–27.

161 Id., p. 24.

162 Office of the High Commissioner for Human Rights, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, HR/PUB/11/04 (2011).

fully and to respect human rights; and the need for remedies to be available to individuals in cases where the "rights and obligations" are breached.[163]

Further statements are made as to the scope (they apply to all States and all "business enterprises"), interpretation (they are to be "understood" as attempting to promote real improvements to the lives of persons and groups affected by business activities but are not intended to create "new" legal obligations), and the need for differentiated application to ensure non-discrimination.[164] Following the General Principles are the specifics of each, as divided into three parts. Each provides "Foundational Principles" and "Operational Principles", themselves containing a "Commentary" to further explain the intentions of the drafters and possible means of implementation.

The UNGPs as a whole and the individual aspects of the UNGPs have been exhaustively discussed, debated, and analyzed from a wide variety of perspectives.[165] Much of the vast literature is descriptive and explanatory, which is not surprising given that they were "generally welcomed" upon their adoption.[166] Most striking for the purposes of the present article, however, is the wording of the second General Principle and the development of the obligation of corporations to prevent harm through what is called "human rights due diligence". The due diligence aspects of the UNGP have been called "the central operational

163 Id. at p. 1 ("General Principles").

164 Id.

165 A HeinOnline seach of the term "guiding principles on business and human rights" resulted in 1,508 results on 21 February 2020. While many (particularly newer articles) were not expansively discussing the UNGP, among those that do were articles taking business law, human rights law, international criminal law, and professional ethics law perspectives; contributions looking at specific sectors, specific stakeholders, specific jurisdictions and specific cases; and feminist critiques and embracive approaches. E.g., Surya Deva, Guiding Principles on Business and Human Rights: Implications for Companies, 9:2 Europ. Company L. 101 (2012); Michael K. Addo, The Reality of the United Nations Guiding Principles on Business and Human Rights, 14:1 Hum. Rts. L.Rev. 133 (2014); Extraterritorial Detention Contracting in Australia and the UN Guiding Principles on Business and Human Rights, 1:2 Bus. & Hum. Rts. J. 333 (2016); Transnational Tort and Access to Remedy under the UN Guiding Principles on Business and Human Rights: Kamasaee v. Commonwealth, 19:1 Melbourne J. Int'l L. 52 (2018); Penelope Simons and Melisa Handl, Relations of Ruling: A Feminist Critique of the United Nations Guiding Principles on Business and Human Rights and Violence against Women in the Contex of Resource Extraction, 31:1 Can. J. Women & L. 113 (2019); Beyond Ruggie's Guiding Principles on Business and Human Rights: Charting an Embracive Approach to Corporate Human Rights Compliance, 48:1 Tex. Int'l L.J. 33 (2012–2013). See also the debates between John Gerard Ruggie and John F. Sherman on one side and Jonathan Bonnitcha and Robert McCorquodale on the other side, in "The Concept of Due Diligence in the UN Guiding Principles on Business and Human Rights" in the EJIL: Debate section of the European Journal of International Law, volume 28 (2017).

166 Bret Thiele and Mayra Gómez, Highlights of the Seventeenth Regular Session of the United Nations Human Rights Council, 29:4 Neth. Q. Hum. Rts. 552, 556 (2011). Dissatisfaction was not entirely absent, of course. Non-governmental organizations were critical of the UNGPs' lack of ambition regarding corporate behavior. See Katherine L. Caldwell, With Great Power Comes Great Responsibility: Grassroots Corporate Campaigns for Workers' Human Rights, 45 Clearinghouse Rev. 225, 227, footnote 9 and accompanying text (2011).

feature" of the UNGP as they relate to corporate behavior[167], meaning that it and the General Principle regarding businesses together embody the most widely accepted notions of CSR today. These aspects come out most clearly in General Principle (b), Guiding Principle 13(b), and Guiding Principle 17.

The second General Principle is as follows:

> "These Guiding Principles are grounded in the recognition of:
>
> [...]"
>
> "(b) The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights."[168]

Noteworthy is the recognition of companies as "specialized organs of society" – a clear nod to their social power. This recognition immediately calls for a balancing notion, which is why the sentence includes a recognition of the duty of lawfulness.

The balancing of social power and social responsibility continues with Part II of the UNGP, in particular with Guiding Principles 13(b) and 17. Guiding Principle 13(b) falls within the "Foundational Principles" of the Corporate Responsibility to Respect Human Rights. It sets out that the responsibility to respect includes business' duty to

> "Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships [...]".[169]

The Commentary specifies that the business relationships implicated in the duty include those within their value chain.[170] This note is important, for as we saw above, the development of global value chains allowed for large corporations to be legally separate from companies that were under their *de facto* control, making it more difficult for those injured by suppliers to take remedial action against the controlling entity.

Finally, Guiding Principle 17 firmly establishes the element of "due diligence" within the CSR discussion. As an Operational Principle, the concept of Human Rights Due Diligence is set out in terms that define due diligence by directing how businesses are to implement it:

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167 Larry Cata Backer, From Institutional Misalignments to Socially Sustainable Governance: The Guiding Principles for the Implementation of the United Nations Protect, Respect and Remedy and the Construction of Inter-Systemic Global Governance, 25 Pac. McGeorge Global Bus. & Dev. L.J. 69, 130 (2012).

168 UNGP, p. 1.

169 Id. at p. 14.

170 Id. at p. 15.

> "17. In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. [...]"[171]

The Commentary to 17 explains the Principle as one that is mainly preventative and forward-looking. It also sets out General Principles 18–21, which concern themselves with further implementation aspects of due diligence, as "elaborat[ing] its essential components", thereby indicating that stakeholder consultations in advance of beginning projects,[172] as well as during the life of the project,[173] are a necessary part of identifying risks of business activities. They stipulate that corporate governance structures need to be adapted to make best use of the human rights impact estimates and that the entity's economic power can be used as "leverage" over problematic commercial partners[174], and that businesses should inform stakeholders about their actions to mitigate human rights risks posed by their activities.[175]

The soft nature of the corporate responsibilities contained in the UNGPs is clear and unambiguous. Ruggie, however, harks back to the traditional position on CSR to defend his Framework:

> "[...] the broader scope of the responsibility to respect is defined by social expectations – as part of what is sometimes called a company's social licence to operate."[176]

c. *The Impact of UNGPs on the CSR Discussion*

While the UNGP do not challenge fundamental understandings of international law by subjecting corporations to anything but national legal frameworks, they definitely changed the shape of CSR discussions (even while being based on them). The CSR aspects of the UNGP center on the Second Pillar[177] – and almost upon adoption, this became the central focus of what should be considered a baseline for assessing corporate conduct.

The fact that the Second Pillar remained voluntary, however, continued to cause discontent. NGOs, but also states hosting transnational corporations' ac-

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171 Id. at p. 17.
172 Guiding Principle 18(b), id. at 19–20. See also Cata Backer, From Institutional Misalignments, supra at 132–133.
173 Guiding Principle 20, id. at 22–23.
174 Guiding Principle 19, id. at 20–22.
175 Guiding Principle 21, id. at 23–24.
176 A/HRC/8/5, para. 54.
177 To be sure, the Third Pillar (Right to Remedy) implicates corporations as well. Under the Access to Remedies framework, corporations must create mechanisms by which complaints can be filed, managed, and addressed.

tivities at the lower end of the value chain, refused to be satisfied with a Business and Human Rights framework that did not accommodate a firmly balanced power-responsibility relationship.

The next step was to propose a treaty to fix the obligations of states and business in a "binding" legal instrument. CSR thus took its next evolutionary step.

F. CSR Today: the Binding Treaty on Business and Human Rights

The current discussions of a proposed text for a treaty on business and human rights, the so-called "Revised Zero Draft",highlights the latest ways of thinking about how to balance corporate social power with responsibilities.[178] The text of the original (July 2018) "Zero draft" of the Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises[179] faced substantial criticism when it became public.[180] Beyond the ubiquitous too-little-too much disagreements, observers were skeptical of the Zero Draft's muddled legal drafting style.

In the wake of such opposition, the drafting committee subjected the text to a substantial reworking, coming out one year later with a "far more coherent, well-constructed and mature"[181] Revised Zero Draft ("Revised Draft"). Currently warily regarded by the EU and boycotted by the United States[182], the future of the Revised Draft itself is anything but clear. Nevertheless, the direc-

178 Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights (OEIGWG) Chairmanship, Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, Revised Draft (16 July 2019).

179 OEIGWG Chairmanship, Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, Zero Draft (16 July 2018).

180 Including from John Ruggie, Special Rapporteur for Business and Human Rights. See John G. Ruggie, Comments on the "Zero Draft" Treaty on Business & Human Rights, Business and Human Rights Research Center (‹https://www.business-humanrights.org/en/comments-on-the-%E2%80%9Czero-draft%E2%80%9D-treaty-on-business-human-rights›; viewed 15 February 2020).

181 Carlos Lopez, The Revised Draft of a Treaty on Business and Human Rights: Ground-breaking Improvements and Brighter Prospects, Investment Treaty News, 2 October 2019 (‹https://www.iisd.org/itn/2019/10/02/the-revised-draft-of-a-treaty-on-business-and-human-rights-ground-breaking-improvements-and-brighter-prospects-carlos-lopez/›; 15 February 2020).

182 See Mariëtte van Huijstee and Lydia de Leeuw, Re-cap: Negotiations over the Revised Draft of a Binding Treaty on Business and Human Rights, 24 October 2019 (‹https://www.somo.nl/re-cap-negotiations-over-the-revised-draft-of-a-binding-treaty-on-business-and-human-rights/›; viewed 18 February 2020).

tion in which it points cannot be ignored, as it reflects the ideas behind many of the CSR-legislation attempts taking place around the world.

While the structure of the Revised Draft (unlike the Zero Draft) is not itself exotic for an intergovernmental treaty - it looks like a relatively conventional international legal instrument, starting with a Preamble, followed by three articles in Section I (Definitions, Statement of Purpose, Scope), nine articles with substantive text in Section II, and Section III containing the institutional structure (establishment of a Conference Committee competent to issue General Comments and review State Party reports[183]), finally closing with unremarkable final provisions (for example providing for International Court of Justice or arbitral dispute resolution[184], conclusion through ratification or accession[185], entry into force[186], amendment procedures[187], reservation[188] and denunciation[189] possibilities) - the fact that it is an intergovernmental treaty is a large step away from the prior efforts to secure corporate social responsibility. The most obvious characteristic of the Revised Draft is its clear aim of eliminating the voluntariness of certain elements of CSR. Widely referred to as a "draft binding treaty", the idea of legally enforceable corporate obligations is at the base of the support for such an instrument.[190]

What is particular about the Revised Draft is that (1) it places legal responsibilities on state parties to ensure that corporations adhere to their duty to respect human rights, even if the states have to exercise their jurisdiction over the companies extraterritorially; and (2) it aims to make corporations subject to liability for failure to prevent their contractual partners from harming stakeholders. The Revised Zero Draft therefore strives to *activate* the balancing of power and responsibility for both states and businesses.

States' social power emanates from their sovereignty and the resulting authority to pass laws and create enforcement mechanisms. The Revised Draft mentions the need for states to impose legally enforceable obligations on businesses to take positive steps to avoid negative impacts on human rights outside of their home state ("abuses in the context of business activities … including

183 Id., Art. 13.
184 Id., Art. 16.
185 Id., Art. 17.
186 Id., Art. 18.
187 Id., Art. 19 (amendments must be approved by two-thirds of the State Parties and are only binding on those who accept them unless a consensus agrees to adopt and approve an amendment relating to the Conference Committee, in which case the amendment applies to all State Parties).
188 Id., Art. 20 (reservations are permitted).
189 Id., Art. 21 (denunciation is effective one year after receipt of the notification instrument).
190 E.g., van Huijstee and de Leeuw, supra; CCFD-Terre Solidaire, Position Paper: "A la Carte" Justice for Transnational Corporations? (October 2019) (available via the Business-Human Rights Organization website: ‹https://www.business-humanrights.org/en/new-ngo-report-analysis-of-new-regulatory-developments-for-holding-transnational-corporations-accountable›; viewed 21 February 2020); Global Interparliamentary Network (with a website labled bindingtreaty.org).

those of transnational character"[191]), to mandate corporate record-keeping of such efforts[192], and to demand that any extraterritorial harmful impacts that do occur can be challenged[193]. Most importantly, states would be required by the treaty to treat businesses in the aforementioned way because corporations have control over at least some social conditions in jurisdictions where they may not be directly present on the ground: corporations are the best-placed to restrain themselves from implementing actions or processes that can affect human rights of stakeholders, and permitting direct claims against company actions is considered the most efficient way to motivate businesses to improve their performance. Underlying the considerations is also the realization that many of the sovereigns over territories in which transnational corporations are ignoring their social impacts are sovereigns which themselves are weakly governed.

For corporations, the social power they wield comes from their practical effects on persons, communities, and the environment. Here, the Zero Draft recognizes the networked nature of global corporate activity and tries to balance the dispersed power with responsibilities down the chain of command. The basic declared direct obligations on corporations ("all business enterprises [...] have the responsibility to respect all human rights"[194]) represent no paradigm shifts themselves. These had been set forth in the UN Guiding Principles on Business and Human Rights and already then were simply restatements of the existing law. Yet, the Revised Draft takes steps to formalize supply chain responsibility by requiring states to hold companies legally responsible for the actions of their contractual partners and to impose liability on the failure to take actions to prevent "harm to third parties".[195]

More strikingly, the State Parties of the Revised Draft are to ensure that corporations and their employees are liable for a number of acts defined as "criminal offences".[196] It is worthwhile to read paragraph 7 of Article 6 in full, in order to grasp what the drafters of the revised text imagine as within the scope of social responsibility:

> "Subject to their domestic law, State Parties shall ensure that their domestic legislation provides for criminal, civil, or administrative liability of legal persons for the following criminal offences:
>
> a. War crimes, crimes against humanity and genocide as defined in articles 6, 7 and 8 of the Rome Statute for the International Criminal Court;
>
> b. Torture, cruel, inhuman or degrading treatment, as defined in article 1 of the UN Convention against Torture and other cruel, inhuman or degrading treatment or punishment;

191 Revised Draft, Art. 5(2).
192 Id., Art. 5(3)(c).
193 Id., Art. 6.
194 Id., Preamble, *considerata* 12.
195 Id., Art. 6(6).
196 Id., Art. 6(7).

c. enforced disappearance, as defined in articles 7 and 25 of the International Convention for the Protection of All Persons from Enforced Disappearance;

d. extrajudicial execution, as defined in Principle 1 of the Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions;

e. Forced labour as defined in article 2.1 of the ILO Forced Labour Convention 1930 and article 1 of the Abolition of Forced Labour Convention 1957;

f. The use of child soldiers, as defined in article 3 of the Convention on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour 1999

g. Forced eviction, as defined in the Basic Principles and Guidelines on Development based evictions and displacement;

h. slavery and slavery-like offences;

i. Forced displacement of people;

j. Human trafficking, including sexual exploitation;

k. Sexual and gender-based violence."[197]

Viewed in light of "responsibility", the Revised Draft's approach to corporate misbehavior is closely reflective of the overall structure of state responsibility as set out in the International Law Commission's Articles on State Responsibility ("The Articles" or ASR).

The Articles on State Responsibility, considered highly persuasive soft law, regulate the rules on how to consider "wrongful acts of states". The "fundamental principle" is that a violation of any internationally wrongful act of a state will result in the "responsibility" of that state.[198] Whether there is a wrongful act by the state, and what the consequences of the responsibility may be, form the bulk of the ASR themselves. While it is not necessary to go into detail on most of the Articles here, it is interesting to compare the approaches to fix responsibility on states with the approach to fix responsibility on corporations for behaviors that have the same impact on stakeholders.

Comparing the ASR with the Revised Draft, the superficial similarities of approach are easily seen. These make the comparison attractive. It is easy, for example, to equate the ASR attribution of responsibility based on "wrongful acts" by the state, with the Revised Draft's attribution of responsibility based on wrongful acts of corporations. The attribution of acts of natural persons to acts of the state also finds a parallel in the Revised Draft's attribution of wrongfulness by contractual partners of businesses to the corporation. A corporation cannot rely on the rogue employee defense of a person with whom it has a con-

197 Id.

198 James Crawford, Introductory Note, Articles on Responsibility of States for Internationally Wrongful Acts (2001).

tractual relationship and control, just as a state cannot hide behind the *ultra vires* nature of an official's acts to escape international responsibility.[199] The fact that every wrongful act of a state – from whatever source – will lead to responsibility, closely resembles the inclusion of extraterritorial business activities and the consideration of "all human rights" in the Revised Draft's provisions. The range of consequences is another aspect of overlap: where the ASR express remedies as including restitution, compensation, and satisfaction, under the Revised Draft, State Parties are free to use civil, administrative, and/or criminal penalties for corporate acts contrary to the treaty.

Beyond this basic similarity, however, the ASR and the Revised Draft diverge – not just on the level of the details but more fundamentally. One obvious and significant difference is overall direction of the instruments. Where the ASR is mainly setting forth the rules for the consequences of state behavior that contravenes international law, the Revised Draft is at least as much preventative and action-inducing as it is remedial. The Revised Draft sets out "Prevention" in six paragraphs of Article 5: a single article, its provisions are nevertheless absolutely central to the treatymaking process. It is, after all, Article 5(1) that says:

> "State Parties **shall regulate effectively** the activities of business enterprises within their territory or jurisdiction. For this purpose States shall ensure that their domestic legislation requires all persons conducting business activities, including those of a transnational character, in their territory or jurisdiction, to respect human rights and prevent human rights violations or abuses."[200]

This is followed by a list of measures for businesses to conduct due diligence regarding their impacts on human rights. The list of steps includes not just the "[i]dentify and assess" aspects of diligence required to ensure they are not abusing human rights of stakeholders, but also the jobs of acting to prevent such harm, "monitor[ing]" their effects, explaining their actions, and answering for any harms to third parties.[201] No less importantly, paragraph 4 states that Parties "shall ensure that effective national procedures are in place to ensure compliance with the obligations laid down under this Article [...]".

The rest of the substantive provisions – victim rights (Article 4), mutual legal assistance (Article 10), cooperation (Article 11), and even the much-commented upon provisions on liability (Article 6), have a strongly preventative character. Article 6(4), for example, speaks of Parties needing to implement

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199 The *ultra vires* act of a non-state actor carrying out a state function, however, is not attributable to the state. Likewise, a contractual partner of the corporation over whom the state has no control or whose acts could not reasonably have been foreseen to cause harm will not lead the corporation to be considered in violation of its responsibility.

200 Revised Draft Treaty, Art. 5(1) (emphasis supplied).

201 Revised Draft, Art. 5(2). See also id., Art. 5(3) (supplying additional detail on the measures set out in Article 5(2)).

"effective, proportionate, *and dissuasive* sanctions and reparations". While its remedial aspects are important (and explicit) – characterizing the Revised Draft as a document aimed at preventing corporations from causing or being complicit in harms to human right is plausible.

G. National Law and CSR

Current legal attention to the precepts of CSR has condensed on the international level around the concept of Business and Human Rights. This has much to do with the power structure – or lack of it –in international law. In a context of multinational corporations wielding the same (or even more) effective social power over communities as states do, but also in which states and intergovernmental organizations remain the sole subjects of social responsibilities, it is natural to attempt to regulate in such a way as to shift the responsibilities back to the corporations as an exercise of states' remaining legal powers.

On the national level, legal attention to CSR diverges more than it does on the international level both because the social power-responsibility gap is viewed differently by different systems and because (at least in some states) the state's legal power is not so much threatened by corporations' social power as it is supported by it.

It would be far beyond the capacity of this author to set out a full view of the different national law attempts to codify CSR in binding rules (legislation or administrative regulations). The following, therefore, focuses on the development of "CSR law" in the United States and then describes the features of the most visible CSR laws in European jurisdictions. What becomes clear is that, while there has been a recent convergence in the USA and European approaches to concretizing their Business and Human Rights obligations to prevent corporations from harming stakeholders, there remain underlying differences in their conceptualization of corporate social responsibility itself.

1. USA

The United States has become notorious as a jurisdiction that refuses to accept limits on its own or its businesses' freedom to act internationally. In the context of CSR, this image holds largely true.

The history of the United States' legal responses to corporate abuses is long and fraught. The current reasons for this revolve heavily around those falling on the blurred edge between politics and economics (or, more accurately, that between the even more blurred border separating political power and economic power). In the past, however, there were constitutional concerns regarding the federal government's authority to regulate companies' activities. Developing a legal environment in which law requires corporate at-

tention to non-business interests has been neither one of a steady trajectory forward nor one that is completed.

Economic regulation is a term that broadly refers to governmental intervention in economic activities to promote general economic welfare.[202] The main tools include taxes, subsidies, and "legislative and administrative controls over rates, entry and other facets of economic activity".[203] These tools aim, under one view, at restricting the abuse of market power, optimizing efficient behavior of firms and of the industry, and reducing externalities.[204] Other theories argue that regulation is more about protecting vested interests of industry actors against newcomers, than it is about protecting the public or the market.[205] Whatever the political economy views, federal economic regulation's legal status in the United States was challenged early on and repeatedly for nearly half a century. Even though such regulation eventually became well accepted, the constitutional questions had a direct impact on the development of CSR, as they prevented hard law approaches from requiring corporations to be socially accountable.

a. The Beginnings of Corporate Regulation

Although the philanthropy of the 19th century industrial tycoons bettered the lives of many, the extent of their business holdings was such that a few individuals controlled entire industries. Monopoly power was exerted along the supply chain, strangling any attempts to enter the market and leaving both the worker and the consumer exposed to the dictates of the business executive. The clear breakdown of the competitive market led to the first governmental attempts at economic regulation.

The first steps toward economic regulation were in the late-19th century with State actions to promote fair market conditions. The Supreme Court, however, struck down an early attempt by the State of Illinois to regulate the railroads. It was the federal government's authority, wrote the majority in *Wabash,*

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202 See Christopher Decker, Modern Economic Regulation: An Introduction to Theory and Practice 28 (Cambridge Univ. Press, 2015).

203 Richard A. Posner, Theories of Economic Regulation, NBER Working Paper No. 41, 1 (1974).

204 Decker at 28.

205 Posner, Theories of Economic Regulation, supra at 2:
"[The public welfare theory of economic regulation assumes] that the principal government interventions in the economy [...] were simply responses of government to public demands for the rectification of palpable, and remediable, inefficiencies and inequities in the operation of the free market. [...]."
"Were this theory of regulation correct, we would find regulation imposed mainly in highly concentrated industries where the danger of monopoly is greatest) and in industries that generate substantial external costs or benefits. We do not. [...]"
See also George Stigler, The Theory of Economic Regulation, 2 Bell J. Econ. Man. Sci. 3–21 (1971).

St. Louis, & Pacific Railway Co. v. Illinois[206], that was to regulate interstate commerce, not that of an individual State.

The most recognized[207] result of *Wabash* was the passage of the Interstate Commerce Act of 1887[208], creating a federal structure to oversee the railroads. Its motivating concern was the level of securitization of railroad companies and the tied nature of its contracts with market actors.[209] The Sherman Act of 1890 followed, making the abuse of monopoly power illegal.[210] As *economic* regulation, neither law had anything directly relating to non-financial impacts of corporate behavior, nor to behaviors outside of the market.

b. Lochner Era

Early resistance to economic regulation was not just a matter of federalism. Even federal economic regulation was suspect. The so-called Lochner Era (1897–1937) witnessed repeated Supreme Court action to limit governmental power to regulate business by using the 14th Amendment's substantive due process clause to prohibit the state from interfering in corporate behavior. It did so by first declaring a corporation to be "a person" for purposes of benefiting from the 14th Amendment's protections and then by considering regulation of private commercial relations between employer and employee to be an infringement on the property interests of both.[211] The Constitutional question in the case of *Lochner v. New York* was:

> "is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts".[212]

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206 118 U.S. 557 (1886).

207 But see Alan L. Olmstead and Paul W. Rhode, The Origins of Economic Regulation in the United States: The Interstate Commerce and Bureau of Animal Industry Acts, Hoover Institution Regulation and Rule of Law Workshop (Stanford University, 28 October 2019; ‹https://webcache.googleusercontent.com/search?q=cache:ZeUvAPORZ9wJ:https://ostromworkshop.indiana.edu/pdf/seriespapers/2019fall-colloq/rhode-paper.pdf+&cd=13&hl=de&ct=clnk&gl=ch&client=firefox-b-e›, viewed 19 January 2020) (arguing that the Bureau of Animal Industry Acts was both "the most important" and "the most intrusive federal regulatory agency of the late nineteenth and early twentieth centuries").

208 24 Stat. 379 [49 U.S.C.A. § 1 et seq.].

209 The Act regulated short haul pricing and the use of "rebates, drawbacks, and pooling" as well as requiring "reasonable and fair" rates. Olmstead and Rhode, supra at 4.

210 15 U.S.C. §§ 1–7. The Sherman Act prohibits agreements that result in anti-competitive conditions, protecting "the public from the failure of the market". *Spectrum Sports, Inc. v. McQuillan* 506 U.S. 447, 458 (1993).

211 See Martin Shapiro, The Supreme Court's "Return to Economic Regulation" 91 (1986), downloaded from ‹https://www.cambridge.org/core›; 19 January 2020 (describing the "standard historical lore of the Supreme Court's role in the economy" as using the due process clause of the 14th Amendment such that "no statute regulating property was constitutional unless it was reasonable, and the Court was the final arbiter of reasonableness. The Court's approach to reasonableness was that free market laissez-faire was the rule, and governmental regulation was the exception").

212 Lochner v. New York, 198 U.S. 45, 56 (1905).

The "right to contract", as set forth in *Lochner* itself[213], was prototypical of this line of cases. Faced with a New York State law restricting bakeries from concluding contracts with employees that would permit individuals to work more than ten hours per day, a 5–3 Court refused to let it stand. The majority wrote:

> "Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed in the exercise of the police power and upon the subject of the health of the individual whose rights are interfered with, unless there be some fair ground, reasonable in and of itself, to say that there is material danger to the public health or to the health of the employees if the hours of labor are not curtailed."[214]

It continued:

> "It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employees [...] in a private business, not dangerous [...] in any real and substantial degree to the health of the employees. Under such circumstances, the freedom of master and employee to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with without violating the Federal Constitution."[215]

With the Court scrutinizing any legislation passed to protect the health of the employee or public, legislation to promote labor unionism and consumer protection was consistently struck down as unconstitutional through the 1920s and into the 1930s. Despite the catastrophic economic situation of millions of Americans, and denying the public popularity of the New Deal programs, the Lochner-Era Court remained steadfast in its denial of the government's attempts to force business to attend to the individuals in their communities.

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213 The full passage setting out the relevant legal question is as follows:
"In every case that comes before this court [...] where legislation of this character is concerned and where the protection of the Federal Constitution is sought, the question necessarily arises: is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? Of course, the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor."
Id. at 56.
The Court's ultimate determination was that the law violated the individual's due process rights by severely limiting the right to contract without having substantial health benefits for either the worker (bakery work was not seen as particularly harmful work: "There must be more than the mere fact of the possible existence of some small amount of unhealthiness to warrant legislative interference with liberty"; id. at 59) or the public (the connection between the baker's hours worked and the healthfulness of the bread produced was "too shadowy" for the Court; id. at 62).

214 Lochner at 61.

215 Id. at 64.

The result was that until the mid-1930s, corporations were operating in a context largely free from governmental control. The social power corporations were amassing at the time was, therefore, unbalanced by legal (i.e., governmentally required) responsibilities. It is therefore unsurprising that the language of "social responsibility" – as we have seen – began to be developed on the side of concerned managers.

c. The End of Lochner and the Rise of the Regulatory State

With *West Coast Hotel v. Parrish*[216], the Supreme Court ended its string of economic liberalism decisions and recognized the motivations of the New Deal laws as legitimate governmental interests. The Supreme Court, changing its recent case law, striking down minimum wage requirements as unconstitutional, now wrote:

> "The principle which must control our decision is not in doubt. The constitutional provision invoked is the due process clause of the Fourteenth Amendment [...]. In each case, the violation alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom? **The Constitution does not speak of freedom of contract. It speaks of liberty** and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation, the Constitution does not recognize an absolute and uncontrollable liberty. [...]. But **the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people**. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and **regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process**."[217]

West Coast Hotel v. Parrish therefore tossed out the notion of equating Constitutional due process with "freedom to contract" in favor of considering "reasonableness" the measure required for regulation in the community interest. It was in this way that *economic* regulation became firmly accepted.

The courts then began to turn their attention to answering challenges to legislative and administrative actions related to the government's actions to take on responsibility for addressing violations of civil rights and establishing conditions of greater social equality. This did not eliminate judicial action regarding economic regulation, but it tied the legal basis for economic regulation more closely to administrative law than to constitutional law.[218]

By the 1960s and extending into the 1970s, the Civil Rights movement, the Environmental movement, and the Johnson Administration's legislative

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216 300 U.S. 379 (1937).

217 Id. at 391 (emphasis supplied). The Court continued to note that the analysis of the general liberty interest applies in particular to contractual rights. Id. at 392.

218 Shapiro at 100–117 (describing "The Realm Inbetween", by which he means the use of the Administrative Procedure Act – as an example of "quasi-constitutional" legislation – to foster substantive due process claims in the economic area).

package known as the War on Poverty, became three major areas of federal regulatory effort. Each movement had a different history[219], a different legal starting point[220], and different legislative results[221], but they shared the element of demonstrating an expanding public sentiment of expecting the government to more actively regulate in the public's interest. Public pressure for action broadened with the establishment of the television as a nearly universal appli-

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219 The question of whether the US government may pass laws to afford civil rights to black persons in America was originally answered in the negative, requiring passage of the 13th and 14th Amendments to ground it in the Constitution. The now-notorious *Dred Scott* decision of the Supreme Court argued that the Government had no authority to interfere with a slave-owner's property right in his slave, and that the political structure of the "Missouri Compromise", which. Dred Scott v. John F.A. Sanford, 60 U.S. (19 How.) 393 (1857). Chief Justice Taney reasoned:
"But the power of Congress over the person or property of a citizen can never be a mere discretionary power under our Constitution and form of Government. The powers of the Government and the rights and privileges of the citizen are regulated and plainly defined by the Constitution itself. And when the Territory becomes a part of the United States, the Federal Government [...] enters upon it with its powers over the citizen strictly defined, and limited by the Constitution [...]. It has no power of any kind beyond it, and it cannot [...] assume discretionary or despotic powers which the Constitution has denied to it. [...] [T]he Federal Government can exercise no power over his person or property beyond what that instrument confers, nor lawfully deny any right which it has reserved."
Id. at 449–450.
He continued, then, to explain the general principle's application to the case of Mr. Scott, striking down, thereby, the Missouri Compromise itself as unconstitutional:
"Now, as we have already said in an earlier part of this opinion upon a different point, the right of property in a slave is distinctly and expressly affirmed in the Constitution. The right to traffic in it, like an ordinary article of merchandise and property, was guaranteed to the citizens of the United States in every State that might desire it for twenty years. And the Government in express terms is pledged to protect it in all future time if the slave escapes from his owner. This is done in plain words – too plain to be misunderstood. And no word can be found in the Constitution which gives Congress a greater power over slave property or which entitles property of that kind to less protection that property of any other description. The only power conferred is the power coupled with the duty of guarding and protecting the owner in his rights.
"Upon these considerations, it is the opinion of the court that the act of Congress which prohibited a citizen from holding and owning property of this kind in the territory of the United States north of the line therein mentioned is not warranted by the Constitution, and is therefore void, and that neither Dred Scott himself nor any of his family were made free by being carried into this territory, even if they had been carried there by the owner with the intention of becoming a permanent resident."
Id. at 451–452.
The outrage that followed the Dred Scott opinion led eventually to the Civil War and, out of that, the 13th Amendment (prohibiting slavery in the United States) and the 14th Amendment, which promised the equal protections of the Constitution to all persons.

220 While the 14th Amendment constitutionally calls for racial non-discrimination, US Constitutional law knows no affirmative obligation of the government to protect social welfare. There are, in other words, no social "rights" which the government must uphold or refrain from infringing.

221 The Civil Rights Act was the most noteworthy result of the Civil Rights Movement and the Clean Air Act and the Clean Water Act were two of the foundational environmental laws that were drafted and passed in this period. All three Acts vastly expanded the regulatory requirements facing companies.

ance permitted news of corporate involvement in local, national, and international environmental or human rights catastrophes to be widely recognized. Political pressure to regulate, then, was aimed directly at ensuring that the social power of corporations be contained.

Corporate legal challenges to these governmental efforts varied, but following *West Parrish Hotel*, they could no longer argue for an alleged unconstitutionality of governmental interference with contracts. With substantive due process anchored in the 14th (and 5th) amendments, the government's basic interest in regulating the public welfare was clear. Businesses' constitutional complaints therefore had to stem from the collision of the government's attempts to regulate in ways that conflicted with other constitutionally-protected individual rights or from the principles of federalism. The former line of argument stemmed directly from the legal recognition of corporations as "persons" with a right to enjoy Constitutional protections, as will be discussed below.

d. Limiting the Administrative State to Limit Corporate Behavior

Interestingly, governmental regulation was also seen critically by 1960s and 1970s civil society. In law, this was the era of the rise of critical legal theory. Distrust of agency rule-making and enforcement led the broad-based "movements" to turn to the courts to hold corporations accountable (if not "responsible") for violations of individual or societal interests.

These cases were often ones utilizing the Administrative Procedure Act of 1946 (APA). The APA opened paths to counter what Tarlock labels "the New Deal tradition of deference to administrative expertise".[222] Constitutional in its breadth and vagueness[223], the APA requires agency regulatory measures to adhere to a set of procedural principles aimed at ensuring responsiveness to stakeholders. As stakeholders include both the interested industry actors and the general public, individuals (nor non-governmental organizations) can launch claims to allege that social interests were not given sufficient attention in rule-making, thereby forcing a greater assumption of responsibility by the government. The use of APA litigation was particularly vigorous in the 1960s and 1970s because Americans were demanding more of the government:

> "The various social revolutions of the 1960s and 1970s coincided with the rise of the deeply pessimistic doctrines of law and economics and public choice theory, which rejected the idea of an objective and higher public interest. […]"
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> "The legal basis for turning this pessimism or at least skepticism into law is the [APA]. The Administrative Procedure Act turned out to be an excellent vehicle to attack administrative decisions for environmental NGOs as well as for the regulated community, which was quick to learn from guerilla environmental litigation."[224]

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222 A. Dan Tarlock, Environmental Law: Then and Now, 32 Wash. Univ. J. L.&Pol'y 1, 19 (2010).
223 Shapiro at 101.
224 Tarlock at 19–20.

e. Rise in Corporate Regulation and Voluntary Codes of Conduct

The main point about the mid-20th century view of law and corporate responsibilities is that it was a time of heightened law-making – legislative, administrative, and judicial – in ways that restricted corporate behavior. The growth in the administrative regulation of companies meant that even though corporations continued to grow and influence US community life, their corporate social power was better balanced by responsibilities – at least on the domestic front. The responsibilities were being realized, however, by the state and society itself. Thus, it is of little surprise that (as recalled above) it was at this point that the CSR dialogue among management scholars turned to emphasize volunteerism along with an internal adaptation of the legislative aims as operative processes within the firm.[225]

The rise in codes of conduct started with the passage of the Foreign Corrupt Practices Act of 1977 (FCPA). The law itself was a clear step by the government to reign in the private sector's lawless actions abroad, making it illegal for US companies to bribe foreign government officials. While this is similar to the contemporary development of governmentally pushed responsibilities, as with the environmental and social regulatory schemes, the contents of the FCPA included financial reporting requirements and the establishment of "internal accounting control" systems.[226] Notably, the Security and Exchange Commission's explicit recognition of such codes as "evidence of 'good faith' compliance with the law" led to the growth in company created "codes of conduct" containing a number of different types of promises of ethical behavior.[227] Codes of conduct, or ethical codes, became the corporations' response to social pressures for responsibility toward stakeholders. The visibility of the codes showed that corporations wanted to keep their own views of responsibility, while the voluntariness of the codes underlined corporate desire to maintain their social power free of governmental oversight.

f. 1980s: Deregulation

The governmental interest in assuming the role of social responsibilities in the United States largely stopped in the 1980s. The Reagan Era was a time of governmental withdrawal from regulating the activities of corporations – whether in terms of their economic activities, or their impacts on society. The deregula-

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225 See Mauricio Andrés Agudelo Latapí, Lára Jóhannsdóttir, and Brynhildur Davídsdóttir, A Literature Review of the History and Evolution of Corporate Social Responsibility, 4:1 International Journal of Corporate Social Responsibility, Springer Online Open Access, ‹https://doi.org/10.1186/s40991-018-0039-y› at 6 (2019) (pointing to Carroll's 1979 article as the one that finally unified the approach to defining CSR and emphasizing the influence of the social and legal framework on shaping responses to calls for CSR).

226 Bernard J. White and B. Ruth Montgomery, Corporate Codes of Conduct, 23:2 Ca. Manag. Rev. 80, at 80 (1980).

227 Id. at 80–81.

tion of major industries (airlines, telecommunications, banks) was accompanied by an equally clear turn away from governmental interference with private activities that had external community effects. Environmental protection was scaled back[228], "drastic cuts" in a wide number of aid programs for the poor were implemented[229], and serious damage was done to affirmative action and civil rights protection for black Americans[230].

With governmental acceptance of responsibility waning, the social power of the corporations was again becoming unbalanced. The public, while less activist than in recent decades, was not entirely convinced of the neo-liberal turn. International political events, in particular, continued to inform thinking about the accountability of corporations, with topics such as international environmental protection, nuclear proliferation, and the promotion of civil and political rights globally emerging as key centers of international treaty making. The domestic law for CSR, however, lagged behind.

g. 1990s-2016

The establishment of personal computing and access to the internet as a feature of daily life in the United States, was critical to the development of legal approaches to corporate responsibility since the 1990s. The 25 years straddling the 20th and 21st centuries witnessed the explosive growth in the use of computers outside the business place and the ability of individuals and non-commercial groups to communicate cheaply with others around the globe. Not coincidentally, these years were also a time of growing awareness of the concept of corporate social responsibility among the broader public.

The public's awareness of CSR again spurred attention to codes of conduct by US-based companies. The 1990s codes were more ambitious than earlier ones, in substance (often committing to labor and environmental concerns) and in scope (namely, including supervising their suppliers).

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228 Reagan's first Head of the Environmental Protection Agency, Anne Gorsuch, was identified as one of the "House Crazies" for her aversion to government-supplied environmental protection, while the appointment of James Watt to lead the Department of the Interior was likened to "appointing Dracula to head a blood bank". Jefferson Decker, Deregulation, Reagan-Style, The Regulatory Review, 13 March 2019 (available at ‹https://www.theregreview.org/2019/03/13/decker-deregulation-reagan-style/›; 2 February 2020).

229 Dedrick Asante-Muhammad, The Reagan Era: Turning Back Racial Equality, HuffPost (11 March 2013) (noting that social spending was cut $ 20 billion/year under Reagan's presidency) (available at ‹https://www.huffpost.com/entry/the-reagan-eraturning-bac_b_2838625?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAN1bLfEvNEQPiDH20LKMLmKFvqmzLIFdZEuGfcGiOjVgCFE6dHY7gROP6VbOQCyO1l9hMVjgpX1eraaIltXCwCL4IYnuUxIJEIIZBZeobMblyo9QqBWhKXPysFi8UtkT6bJ-DKXXJ7FGSUI_GEW0lQrzWCi3iCPwLLMjOaCOjEHj›; viewed 2 February 2020).

230 Doug Rossinow, It's Time We Face the Fact that Ronald Reagan was Hostile to Civil Rights, History News Network, George Washington University, 20 April 2015 (available at: ‹https://historynewsnetwork.org/article/158887›; viewed 2 February 2020).

Opponents in civil society also took up the code-defined CSR issue with increased vigor. For them, the fundamental weakness of CSR (and codes in particular) had always been the lack of legal "bite". The internet provided the means necessary for "watchdog" groups to track companies' adherence to their codes and to publicize their failings broadly and rapidly.

To preempt the stakeholders, companies began to hire CSR consultants and to publish CSR reports to assess their company-wide actions to further their stated social goals. Still voluntary, such reporting was marketed as a tool of heightened accountability, especially when outsourced to an "independent" agent. Theoretically, the publication of a corporation's failings to live up to its self-imposed standard of behavior would cause significant reputational harm – enough, at least, to offset any reputational gains that the company had gleaned from proclaiming itself socially responsible. The market, therefore, would bind companies to acting on their promised values. This conception of reporting remains the primary one in the laws developing today.

Only rarely, however, was this theoretical consumer backlash actualized. Broad-based consumer boycotts remain exceptional, despite some clear successes.[231] Moreover, many currently boycotted companies are not being targeted for violating their expressed CSR commitments, but rather for their overall business model or their cooperation with abusive human rights regimes.[232] The resulting situation was one that left the social power of corporations largely in place with only loose responsibilities. This imbalance called again for changes, and this time, it would be a push for legal regulation.

2. *CSR "Law"*

a. *Administrative Attention to CSR*

The United States executive branch holds power on regulatory rule-making and rule-enforcement in areas Congress delegates to the agencies. The rise of the "administrative state"[233] is the subject of much commentary and current political dissatisfaction[234], but despite a strong anti-regulation position in the Oval

231 Clare Carlile, History of Successful Boycotts (5 May 2019) (‹https://www.ethicalconsumer.org/ethicalcampaigns/boycotts/history-successful-boycotts›; viewed 2 March 2020). But note, the boycott of Nestlé, begun in 1977 for its breastmilk substitute, has not led to a resolution of the underlying disagreements. Ethical Consumer, Boycotts List (‹https://www.ethicalconsumer.org/ethicalcampaigns/boycotts›; viewed 2 March 2020).

232 Id. (numerous boycotts are called due to the targeted company's involvement in occupied Palestinian territories; others include boycotts for collaboration with Myanmar or Cambodia, for abuse of animals, or for contribution to gunshot deaths).

233 This term is widely attributed to Dwight Waldo, The Administrative State (New York: Ronald Press, 1948).

234 See generally Kathy Wagner Hill, The State of the Administrative State: the Regulatory Impact of the Trump Administration, 6 Emory Corp. Gov. & Accountability Rev. 25, 26–32 (2019).

Office and an increasingly hostile Supreme Court[235], the sheer scope of administrative law ensures that it will not disappear any time soon.

That administrative agencies have touched upon issues of corporate social responsibility was to be expected. Surprising is that the regulatory framework has remained so narrowly topical. In essence, the main instruments of administrative regulation of CSR come from the Security and Exchange Commission (SEC). The SEC has a number of rules that give shape to the demands for corporate accountability. One set of such rules are those regulating shareholder proposals. The procedural and substantive aspects, for instance, of Rule 14a-8[236] can determine whether shareholder proposals that target the company's social responsibility must be scheduled for discussion at shareholders' meetings.[237] With a growing number of shareholder actions brought to highlight companies' policies on climate change or questionable political involvements, both shareholders and company boards are becoming more adept at maneuvering within the SEC framework.[238] The SEC's willingness to support the inclusion of shareholder proposals, along with managements' support of such proposals makes this "a rich area of development within the CSR field".[239]

A more prominent, although possibly less effective, SEC foray into CSR is the non-financial information reporting requirement. The topic of what type of and how much nonfinancial information stock-exchange listed companies must report is an old discussion that the CSR debates reinvigorated in the 2000s.[240] SEC Regulation S-K requires publicly traded companies to file disclosure reports for the protection of investors.[241] Mostly treating the form and content of financial reporting, Regulation S-K also includes a first section requiring companies to report on non-financial information.[242] Companies must give an overall description of the business (products, clients, suppliers),[243] as well as possible liabilities arising from ongoing environmental lawsuits[244]. In this context, "environmental" includes climate change. Moreover, mining companies

235 See Matt Ford, The Plot to Level the Administrative State, The New Republic, 14 January 2020 (noting the re-appearance of the non-delegation doctrine in the Trump Supreme Court, with specific discussion of Justice Gorsuch's dissent in Gundy v. United States, No. 17–6086, 588 U.S. __ (2019)).

236 See The Securities and Exchange Act of 1934, 17 C.F.R. § 240.14a-8 (2011).

237 Matthew J. Petrozziello, Beyond Cracker Barrel: Shareholder Proposals as a Means of Effectuating CSR Policies, 13 Rutgers Bus. L.J. 1 (2016).

238 Id. at 26–27.

239 Id. at 30.

240 Eric Engle, Corporate Social Responsibility (CSR): Market-Based Remedies for International Human Rights Violations, 40 Willamette L. Rev. 103, 117 (2004).

241 Code of Federal Regulations, Title 17, Part 229.

242 Id., Sub-part 229.100.

243 Id. § 101–102.

244 Id., § 103.

must also report on any health and safety risks.[245] Finally, there is a provision on "risk factors" beyond those contained above.[246] The SEC is empowered to issue further details on what it expects from reports. If it chooses to define the provisions of Regulation S-K to require supply chain investigations, this administrative law path to CSR would (if allowed to stand by the courts) be a step in the same direction as the international community.

b. Legislative attention

Unlike a number of European parliaments, the United States Congress has largely demurred on the topic of CSR.[247] This is due to partisan reluctance to burden business with regulations and an overall lack of interest in protecting the environment, labor, or human rights; it is also due to bipartisan hesitation to regulate extraterritorial activities of its corporations (to avoid charges of playing the "global police"). Finally, the Constitution's strong protection of the freedom of expression, which extends to corporations, complicates any potential drafting of a CSR-enforcing bill. Nevertheless, there has been some legislative actions to heighten corporations' social responsibilities.

aa. Alien Tort Statute

The main piece of legislation that observers regard under the rubric of CSR is the Alien Tort Statute (ATS).[248] Widely commented upon[249], this statute is part of the Judiciary Act of 1789 and provides US federal court jurisdiction for civil claims by foreigners alleging violations of international law or US treaties.

The concise law ("*The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.*") lay almost unused for nearly 200 years.[250] Its interpretation by the Second Circuit Court in the 1980 *Filártiga* case[251] invigorated the human rights community and generated lively interest

245 Id. § 104.

246 Id. § 105.

247 There are a number of restrictions in place on federal procurement suppliers, requiring anti-human trafficking measures for procurers. E.g., Executive Order 13126: Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labor, 64 Fed.Reg. 32383 (16 June 1999); Executive Order 13627: Strengthening Protections Against Trafficking In Persons In Federal Contracts, 64 Fed.Reg. 32793 (17 June 1999).

248 28 U.S.C. § 1350. The Aliens Tort Statute is part of the Judiciary Act of 1789.

249 For an overview, see Stephen P. Mulligan, The Alien Tort Statute (ATS): A Primer (Congressional Research Service, updated 1 June 2018).

250 The Supreme Court recently noted that the original purpose of the ATS was "to promote harmony in international relations by ensuring foreign plaintiffs a remedy for international-law violations in circumstances where the absence of a remedy might provoke foreign nations to hold the United States accountable." Jesner v. Arab Bank, PLC, 584 U.S. __, 138 S. Ct. 1386, 1406 (2018).

251 Filártiga v. Peña-Irana, 630 F.2d 876 (2d Cir. 1980).

in pursuing ATS potential for creating avenues of victim redress in cases of corporate abuses.[252] The jurisprudence it has generated is discussed below. While the ATS is not known to be under threat of repeal, the Supreme Court's recent interpretations have led to a significantly less optimistic view of its potential as an instrument of CSR-promotion. Whereas, in 2004, Shamir could write:

> "[...] ATCA is truly extraterritorial in its reach, potentially extending American jurisdiction over events that have no bearing on American parties, potentially allowing American courts to declare the valid human rights norms of international law and to apply them to events that took place in other countries"[253],

the Court has limited each of these potentialities since then.

bb. Dodd-Frank Act

The other national legislative provisions relating to corporate social responsibility are three sections of the 2010 Dodd-Franck Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").[254] Proposed by and passed during the Obama Administration, the Dodd-Frank Act's main aim was to improve supervision of the financial industry. In its "Miscellaneous Provisions" of Title XV, however, sections 1502, 1503, and 1504 attempt to address corporate governance of supply chains.

Dodd-Frank Act § 1502 required the SEC to implement regulations to require companies listed on U.S. stock exchanges to report on their due diligence efforts in tracking the origin of their purchases of "conflict minerals".[255] Specifically aiming to help reduce the flow of finances to the warring parties in the Democratic Republic of Congo's (DRC) civil war,[256] the Act is limited to companies that source their purchases of tin, tantalum, and tungsten from the DRC or surrounding countries. The reporting requirement aims to increase public

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252 Or, as one scholar wrote, activists had a "strategy of extraterritorially mobilizing U.S. law to govern [corporations] operating outside the United States". Ronen Shamir, Between Self Regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility, 38 L. & Soc. Rev. 635, 637 (2004).

253 Id. at 639.

254 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub.L. 111–203, 124 Stat. 1376, H.R. 4173, enacted July 21, 2010.

255 For an overview of why addressing the conflict minerals problems involving corporate actors is so difficult for criminal law, see Sandra C Wisner, LL.M., J.D., B.A. (Hons), Criminalizing Corporate Actors for Exploitation of Natural Resources in Armed Conflict: UN Natural Resources Sanctions Committees and the International Criminal Court, 16:5 *J. Int'l Crim. Justice*, 963, 971–973 (December 2018).

256 The "sense of Congress" of § 1502 states that the provision was included because:
"*It is the sense of Congress that the exploitation and trade of conflict minerals originating in the Democratic Republic of the Congo is helping to finance conflict characterized by extreme levels of violence in the eastern Democratic Republic of the Congo, particularly sexual- and gender-based violence, and contributing to an emergency humanitarian situation therein [...]*".
Id., § 1502(a).

scrutiny of companies' commitments to stopping their involvement in human rights abuses occurring in conflict areas.

Section 1503 is also a reporting requirement for companies. Under this provision, mining companies subject to the SEC reporting requirements were to complete reports on violations of health and safety standards in which they or their subsidiaries were involved. Information on the number and types of violations, the number of fatalities caused by the violations, and the amount of fines imposed was to be submitted to the SEC[257], as were the notices received regarding the need to close a mine due to imminent dangers or notices of patterns of violations[258].

Finally, § 1504 aims to require companies to report on the amount of payments they made to foreign governments for the receipt of natural resource extraction rights. As a measure to implement the Extractive Industry Transparency Initiative (EITI), this section targeted bribery or other illicitly motivated financial exchanges by US companies as a factor in undercutting good governance abroad.[259]

Even the low-level of mandatory CSR required by the Dodd-Franck Act's Title XV provisions were, however, too much for the affected industries and the majority of the Republicans in Congress. Although passed into law over their vigorous objections in 2010, the sections were quickly put out of effect by the Trump Administration and Congress in the first weeks of 2017. Three bills, two of which would repeal the offending provisions, one which would simply cut funding for implementation, have been introduced. H.R. 10, the "Financial Choice Act of 2017", passed the House in June 2017. Its Section 862 would repeal §§ 1502–1504, but has not yet been voted on by the Senate.[260] H.R. 4248 would repeal § 1502. The House Committee on Financial Services passed it in November 2017, but it has not had a full vote in the House. Finally, H.R. 3354 proposes prohibiting the use of federal funds to enforce § 1502. This bill has passed the House, but has not been voted on by the Senate.

Moreover, in April 2017, President Trump's appointed Acting Chairman of the SEC stated that he would not enforce the reporting requirements of Dodd-Frank. Thus, even while still legally valid, the provisions for socially responsible supply chain management are currently unenforced and the provision on payments to foreign governments is unenforceable due to a lack of implementing regulations.

257 Id., § 1503(a).
258 Id., § 1503(b).
259 Id., § 1504.
260 In fact, it has not even been voted on by the Senate Committee on Banking, Housing, and Urban Affairs, which must vote to pass it to the Senate as a whole.

cc. Trafficking Victims Prevention and Protection Act

Supply chain management legislation in the United States is not completely dead, however. In late 2018, the Frederick Douglass Trafficking Victims Prevention and Protection Reauthorization Act of 2018 received Congressional approval, and in January 2019 it became law.[261] The Act makes changes to the 2006 Trafficking Victims Protection Reauthorization Act, which itself includes a provision instructing the Department of Labor to produce and publish a list indicating goods produced by trafficked or child labor.[262] The 2018 Act instructs the Department of Labor to change the list to include goods whose inputs might have been the product of underage workers.[263] Because the list is not intended to punish companies who use child labor goods, the effects of the Frederick Douglass Act will depend on the Department of Labor's implementing rules.[264] It is possible, however, that companies will need to adjust their supply chain management, so as to be able to determine if child labor was part of the supply chain.

dd. State Legislation

The power to regulate US corporations does not rest exclusively with the federal government. In 2010, the State of California joined a number of jurisdictions around the world in taking steps to address human trafficking and slavery by requiring businesses to report on their supply chain management. Since 2012, Washington State has also promulgated a bill to stop slavery in supply chains. Not yet a "trend", State legislation may be the most likely source of mandatory CSR in the coming years.

aaa. California's *Transparency in Supply Chains Act of 2010*

Coming into effect in 2012, the California Transparency in Supply Chains Act (TSCA) is a high-profile tool to promote CSR. It is, however, distinctly modest and little more than an official recognition of corporate involvement in abusive practices occurring outside (as well as inside) the United States.

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261 Frederick Douglass Trafficking Victims Prevention and Protection Reauthorization Act of 2018, 132 Stat. 5472, Public Law 115–425 (8 January 2019).

262 Trafficking Victims Protection Reauthorization Act of 2006, 119 Stat. 3558, Public Law 109–164, § 105(b)(2)(C) (10 January 2006).

263 Id., § 133 (stating that the phrase "including, to the extent practicable, goods that are produced with inputs that are produced with forced labor or child labor" should be inserted into the definition of the Trafficking Victims Protection Reauthorization Act definition of the "goods" to be listed and made available to the public).

264 See also Isa Mirza, New Anti-Trafficking Legislation May Spur Closer Look at Manufacturers' Supply Chains, Corporate Social Responsibility and the Law (Foley Hoag, 28 September 2018) (‹https://www.csrandthelaw.com/2018/09/28/new-anti-trafficking-legislation-may-spur-closer-look-at-manufacturers-supply-chains/›; viewed 18 March 2020).

The TSCA requires companies within its scope to publicly report on their efforts to address human trafficking in their supply chains.[265] It has three main scope restrictions applying to companies: (1) that are "retailers and manufacturers"; (2) that do business in California; and (3) which have global "gross receipts" of at least $ 100 million.[266] The remedies for failure to report are limited to the State Attorney General's authority to issue an injunction.[267] That is, there are no civil remedies available for violations of the Act, although violations of the criminal provisions against trafficking or slavery exist.

Mainly composed of the information about which the companies must report, the legislation does not require that the companies investigate or control their supply chains, limiting the obligations to saying how they would need to do such investigations, if they do so at all. The CSR-promotion effect is, in this sense, minimal, because it does not move corporations beyond voluntary direct actions to improve the lives of their stakeholders.

The main value in the TSCA, presumably, comes from its signaling effects. The introductory provisions of the Act emphasize the geographic ubiquitousness of slavery and human trafficking, it also notes the difficulties in oversight, and it explicitly sets out the State policy of ensuring that "large retailers and manufacturers [...] educate consumers on how to purchase goods produced by companies that responsibly manage their supply chains".[268] Remaining cautiously within the traditional realm of CSR, the law encourages rather than demands social responsibility.

bbb. Washington State Transparency in Agricultural Supply Chains Act

Washington is currently the second US State to have taken a CSR-promoting legislative action.[269] The bill introduced to the State Senate in 2019 is similar to that of California's TSCA in requiring large companies to publicly report on the measures they are taking to reduce human trafficking and slavery in their global supply chains. The scope would cover only companies that engage in retail sales of cocoa, dairy, coffee, sugar, and fruit products in Washington and that have global gross receipts of at least $ 200 million.[270] While the Washington bill addresses only agricultural retailers, it requires not only reporting on slavery and trafficking reduction efforts, but also on any violations of slavery

265 California Senate Bill No. 657.
266 Id., Sec. 3 (adding Section 1714.43(a)(1) to the Ca. Civil Code).
267 Id. (adding Section 1714.43(d) to the Ca. Civil Code).
268 Id., Sec. 2(j).
269 See Amy L. Groff, Jared A. Kephart and Laura K. Veith, Modern Slavery and Transparency Legislation in the U.S. – States May Follow Suit (‹http://m.klgates.com/modern-slavery-and-transparency-legislation-in-the-us–states-may-follow-suit-04-02-2019/›; viewed 13 March 2020).
270 State of Washington, 66th Legislature, Substitute Senate Bill 5693 (2019 Regular Session) (‹http://lawfilesext.leg.wa.gov/biennium/2019–20/Pdf/Bills/Senate%20Bills/5693-S.pdf›; viewed 13 March 2020).

laws, and other employment laws in general.[271] Moreover, the bill would not limit remedies to injunctive or declaratory relief, allowing the Attorney General to ask for statutory and punitive damages, as well as attorney fees and costs.[272]

c. Judicial attention

In a society where political disputes are often judicialized, it is no surprise that both advocates and opponents have turned to the courts to test the scope for making corporate social responsibility legally binding. Actions known as "foreign direct liability claims" allow private parties to sue multinational corporations directly for harms occurring along their supply-chains.[273] The lack of governmental involvement in the promotion of CSR, however, means that public law jurisprudence on CSR remains thin. The following highlights three areas beyond contract and tort law on which the judiciary has addressed aspects of corporations' social responsibility.

aa. Administrative Procedure

The Administrative Procedure Act, as described above, is the foundational piece of legislation for the workings of executive agencies. The APA establishes procedures through which agencies promulgate rules to implement legislation and gives jurisdiction to federal courts to ensure adherence to the procedures. Given the significant role played by executive agencies in the regulatory framework facing corporations, the APA requirements are going to be essential elements of realizing attempts to governmentally mandate CSR.

In *American Petroleum Institute v. The Security and Exchange Commission*[274], the constitutionality of the annual reporting requirement of Dodd-Frank § 1504 was challenged, but ultimately not addressed by the court. This section of the Dodd-Frank Act required the SEC to enact a rule to require companies to declare their payments to foreign governments for oil and gas concessions in

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271 SB 5693, Sec. 4(1)-(2).

272 SB 5693, Sec. 4(7). See also Groff et al. (reporting that the original text of the bill would have included the possibility of civil damage suits for Washingtonians "without regard to whether the resident has suffered specific injury").

273 Jan M. Smits, The Expanding Circle of Contract Law, 27 Stellenbosch L. Rev. 227, 228–229 (2016) (referring, inter alia, to the UK courts' hearing on South African plaintiffs' asbestos-related claims in Lubbe v Cape PLC [20001 UKHL 41 (HL), subsequently settled; the Dutch courts' hearing of the claims of NGOs on carbon emissions in District Court The Hague 24 June 2015 ECLI:NL:RBDH:2015:7145 (Stichting Urgenda v Stoat der Nederlanden); and a Peruvian plaintiff's claims against German company, which he claims has harmed him by causing a glacier near his farm to melt). While some private law actions have succeeded, Smits warns against hoping that either tort or contract claims will resolve the injustices of extraterritorial corporate harms. He notes, "the mere fact that these claims are increasingly made does not imply that they will also succeed. Apart from issues of international jurisdiction, substantive private law has difficulty in accommodating externalities that are as remote as described above". Id. at 229.

274 953 F.Supp. 2d 5 (D.D.C., 2013).

their annual reports. The idea behind the reporting requirement of section 13(q) was the presumption that declarations of payments by the extractive industry players to foreign governments would lead to a reduction in illicit payments and, ultimately, to a cure for the "resource curse". In essence, then, it was an indirect measure to improve corporate social behavior in poor countries.

Over the opposition of the industry, which said that in many jurisdictions it would be prohibited from publicizing such information, the SEC promulgated a rule requiring that companies submit their information in a format that would allow for it to be accessible to the public. Industry requests for exemptions for four resource-rich countries were refused.

The American Petroleum Institute challenged the SEC's rule as requiring declarations that would be contrary to its member companies' right to free expression (by remaining silent about these payment amounts). It further asked for a summary judgement on the rule as arbitrarily (and thereby invalidly) demanding public accessibility of the reported information.[275] The court only addressed the legality of the SEC's rulemaking as an administrative law matter. It found that the SEC's decision to require public disclosure of the information regarding payments to foreign governments for oil and gas concessions was arbitrary and capricious, despite the agency's attempt to justify its action by looking to Congressional intent.[276]

The majority presents its analysis as being based on trying to hold the agency to the language of the legislature. Yet, the explanation of the finding indicates a clear preference for commercial interests over the interests of good governance, and in particular over the interests in mandating socially responsible behavior by corporations if that would threaten their profitability. The discussion of the "practicability" of regulations – as a factor to weigh against their effectiveness – is especially destructive for future attempts to regulate in the interest of restricting businesses' overseas activities:

> "True, a broadly written exemption could eviscerate section 13(q) by allowing any country to avoid disclosure by enacting a disclosure-barring law — returning, in effect, to the EITI voluntary compliance regime section 13(q) sought to augment. But dismissing that horrible does not suffice to support a decision costing many billions of dollars and (in the Commission's own analysis) burdening competition. The Commission could have limited the exemption to the four countries cited by the commentators or to all countries that prohibited disclosure as of a certain date, fully addressing this concern. More fundamentally, given the proportion of the burdens on competition and investors associated with this single decision, a fuller analysis was warranted. A general statement about incentive problems with a broad version of the exemption does not satisfy the requirement of reasoned decisionmaking when, by the Commission's own estimates, billions of dollars are on the line. [...]

275 Id. at 11.
276 Id. at 20–21.

> "The Commission undertook no such specific analysis, however, instead focusing heavily on the statute's apparent purpose — a purpose it conceived more broadly than the statutory text, which emphasizes practicability. Averse to sacrificing any of the section 13(q) aims no matter the cost, the Commission abdicated its statutory responsibility to investors. The Commission's exemption analysis hence was arbitrary and capricious and independently invalidates the Rule."[277]

Importantly, the court did not do more than vacate the rule. The SEC could and did reconsider and rewrite the rule, issuing it in June 2016. However, the then-Republican majorities in the House and Senate overturned the second rule, using a mechanism offered by the Congressional Review Act. This left § 1504 unenforceable. Although the SEC legally had to pass a valid rule by February 2018, the Trump Administration has no interest in doing so, and it would require a court order to force the Agency to act.[278]

bb. Free Speech

The limits of the government to restrict the "speech" of corporations has turned out to be a major limitation on making CSR mandatory in the United States. The First Amendment of the US Constitution provides that the government cannot infringe expression: "*Congress shall make no law … abridging the freedom of speech*".[279] Starting with the World War I era, a rapid growth in free speech jurisprudence has continued on to current times and has become iconic of the US legal system.[280]

Importantly, First Amendment protections extend to corporations as well as natural persons, because corporations are considered to be able to express ideas and hold opinions.[281] Free speech, moreover, has been interpreted to mean that

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277 953 F.Supp. 2d at 22–23 (internal citations omitted).

278 See Nicholas Grabar and Sandra L. Flow, Congress Rolls Back SEC Resource Extraction Payments Rule, Harvard Law School Forum on Corporate Governance and Financial Regulation, 16 February 2017 (available at ‹https://corpgov.law.harvard.edu/2017/02/16/congress-rolls-back-sec-resource-extraction-payments-rule/›; viewed 12 March 2020).

279 Surprisingly to many observers of US law today, the jurisprudence on freedom of expression is relatively new. Indeed, the First Amendment only became prominent in the wake of the World War I-era laws passed to limit the voices of anti-War activists. Tim Wu, Is the First Amendment Obsolete, 117 Mich.L. Rev. 547, 551–554 (2018). (This is the time period, the reader will recall, that also saw the rise of CSR and public relations in the world of corporations.)

280 But see Wu at 549 ("With the important exception of cases related to campaign finance, however, the landmark free speech decisions of the last few decades have centered not on political speech but on economic privileges, like the right to resell patient data or the right to register offensive trademarks. If we accept that protection of political speech is a core function of the First Amendment, many of the recent cases are not merely at the periphery of this project but arguably on another continent. The apparent flurry of First Amendment activity masks the fact that the Amendment has become increasingly irrelevant in its area of historic concern: the coercive control of political speech"; footnotes omitted).

281 First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 780, note 15 and accompanying text (1978) (the First Amendment protections extend to corporations through the Due Process Clause of the Fourteenth Amendment). See also id. at 777 (speech is not less protected by virtue of the speaker).

the government can neither forbid nor compel speech – thus, a "freedom of silence" exists alongside a freedom of expression.[282] Finally, the freedom of expression extends beyond the freedom to express (or remain silent on) *ideas* to include the freedom to express (or remain silent upon) *facts*.[283] Thus, governmental control over anything corporations may or must reveal is carefully – or "strictly" – scrutinized and narrowly accepted (only if there is a "compelling interest" at stake).

The protections to corporations set out in the First Amendment (and in the 14th Amendment, in relation to State actions) extend not only to political speech, but also to commercial speech. Commercial speech is less strongly protected than political speech, but it is not always clear whether expressions regarding social responsibility are "commercial" or "political". This has given corporations significant strength in arguing that regulations aiming at reporting requirements or advertisements are unconstitutional.[284] Indeed, recent years have seen such a rise in the use of First Amendment claims to protect corporate speech and corporate silence, that scholars write of the "Corporate Civil Rights" movement.

The strength of the commercial speech protections makes governmental regulation of US corporate statements or actions toward CSR goals problematic in ways not comparable to other jurisdictions.[285] Nevertheless, the one case decided on freedom of expression grounds leaves some hope that courts will not inevitably accept corporate speech regarding CSR as "political" speech, but may see it as "commercial" speech.

The California Supreme Court's *Kasky v. Nike* decision was one of the few court decisions to address corporate "speech" specifically on a company's commitment to social responsibility.[286] The factual background to *Kasky* rested on the plaintiff's complaint that Nike had employed false statements in its response to revelations about labor abuses in Asian factories producing the company's goods.[287] The decisive legal question for the majority was whether Nike's statements, if false (the court's opinion did not answer whether they were actually

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282 Board of Education v. Barnette, 319 U.S. 624, 633 (1943) („It is now a commonplace that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish. It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence").

283 National Association of Manufacturers v. National Labor Relations Board, 717 F.3d 947, 957 (D.C.Cir.2013).

284 E.g., Wooley v. Maynard, 430 U.S. 705, 714 (1977).

285 See Rossella Esther Cerchia & Katherine Piccolo, The Ethical Consumer and Codes of Ethics in the Fashion Industry, 8 Laws 1, 14 (2019) (doi:10.3390/laws8040023; describing EU and Australian regulations on codes of conduct as including public reporting requirements).

286 Kasky v. Nike, Inc., 27 Cal. 4th 939, 119 Cal. Rptr. 2d 296, 45 P.3d 243 (2002).

287 For the background of the complaint and the company's responses, see Don Mayer, Kasky v. Nike and the Quarrelsome Question of Corporate Free Speech, 17:1 Bus. Ethics Q. 65, 66–70 (2007).

false), would nevertheless be Constitutionally protected as political speech or whether they were commercial speech.

Finding that the company's responses to allegations were expressions made *by* a commercial actor, *to* a commercial audience, and *for* a commercial purpose, the California court held that the responses were commercial speech, and thus only protected from unreasonable governmental restrictions.[288] The US Supreme Court refused (backing away from an initial grant of *certiori*) to take the case, leaving the State court's decision intact.[289]

While this does not answer the question of whether a company's code of conduct could be used as a basis for civil suits by consumers who find out that voluntarily professed standards were not upheld, it lends citable authority for such arguments.

cc. Jurisdiction in US Courts

The role of international law in United States' courts is neither a new one, nor one with a simple answer. That CSR is in any way connected to this basic legal inquiry is a function of two things: first, the particularity of the Alien Tort Statute, discussed above; and second, the CSR demand for victims' access to remedies as set out in the UNGP's third pillar. Coming together in one case, these aspects drove the Supreme Court's 2013 decision in *Kiobel v. Royal Dutch Petroleum.*[290]

The UNGP, as we have stated, aim to ensure that individuals who have suffered harms due to corporate activities have a mechanism by which they can make their complaints known and receive relief. The UNGP framework permits nonjudicial remedies to fulfil this obligation, but many advocates protecting broader societal stakeholders' rights prefer judicial mechanisms to complaints offices within the corporation or to ombudsmen approved by the corporation they accuse as perpetrating the abuses.

As noted above, the *Filártiga* case raised hopes that the jurisdictional grant to federal court offered by the Alien Tort Statute could offer a pathway to a judicial remedy in the United States for victims of corporate irresponsibility anywhere in the world. Although the human rights abuses condemned in *Filártiga* were carried out by state actors, it was hoped that the ATS, aimed as it was toward torts that had taken place outside the borders of the USA, could be instrumentalized to impose binding liability on corporate abuses taking place in jurisdictions where the corporations were actually impacting the environment, communities, and individuals' lives. As a result, in the years between *Filártiga* and *Kiobel*, over 150 cases were filed against corporations based on the ATS.[291]

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288 45 P. 3d at 247.

289 539 US 654 (2003).

290 Kiobel v. Royal Dutch Petroleum Co., No. 10–1491, (U.S. 17 April 2013).

291 Donald Earl III Childress, The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation, 100 Geo. L.J. 709, 713 (2012).

aaa. *Sosa v. Alvarez-Machain*

To assess the corporate responsibility types of claims, one of the issues that courts needed to clarify was whether the ATS offered jurisdiction for "regular" human rights violations. The statute itself is old and vague, offering jurisdiction for "a tort only, committed in violation of the law of nations or a treaty of the United States". Were international human rights violations ones that fell within this ambit? The Supreme Court addressed this question with *Sosa v. Alvarez-Machain*.[292] In *Sosa*, the Mexican plaintiff was complaining about arbitrary arrest and detention, having been kidnapped by Mexican agents of the US government in order to be extradited to the US.[293] In the relevant passages, the Court used an historical approach to explain why it was not convinced that arbitrary arrest and detention was covered by the ATS:

> "We think it is correct, then, to assume that the First Congress understood that the district courts would recognize private causes of action for certain torts in violation of the law of nations, though we have found no basis to suspect Congress had any examples in mind beyond those torts corresponding to Blackstone's three primary offenses: violation of safe conducts, infringement of the rights of ambassadors, and piracy. [...]
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> "Still, there are good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action of this kind. Accordingly, we think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized. [...]"[294]

The Court then reemphasized its adherence to a cautious expansion of jurisdiction in the context of ATS:

> "we are persuaded that federal courts should not recognize private claims [...] for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted."[295]

Using this analysis, the Court rejected Alvarez-Machain's ATS complaint.[296]

bbb. *Kiobel v. Royal Dutch Petroleum*

Following *Sosa*, the question arose as to whether ATS claims could be launched against corporations. As various Circuit Courts disagreed on this matter, the Supreme Court agreed to examine the question. It was under this perspective

292 542 U.S. 692 (2004).
293 Id. at 698.
294 Id. at 724–725.
295 Id. at 732.
296 Id. at 738.

that the Court granted a writ for Ms. Kiobel's case[297] and it was for this reason that the CSR community was particularly excited.

The hopes of making ATS into a CSR hammer, however, were dampened by the Supreme Court's final interpretation of the statute.[298] First, the Court ended up not deciding on the statute's applicability to corporate defendants. Second, the majority reduced the remedies offered by ATS to cases in which there was a substantial link to the United States. The following gives an overview of the case and its implications for CSR.

The *Kiobel* case stemmed from the actions of Royal Dutch Petroleum and its Nigerian subsidiary, Shell Petroleum Development Corp. The Ogoni Niger River Delta has oil deposits worth several billion dollars[299] and Royal Dutch Shell has been drilling in the country since the 1950s. In these activities, Shell seems to have been particularly remiss.[300] The thousands of spills, flares, discharges, and other production-related activities have made the land in the area non-arable and the groundwater high in carcinogens and other pollutants. As a result, the native peoples of the area have protested but without positive results. In 1993, protestors tried to stop the laying of new pipeline, but the paramilitary arm of the Nigerian police raided the area to crushed the protest, allegedly killing 2000 people and displacing 80,000 more.

Using the ATS, Ms. Kiobel, widow of one of the victims of the raid, challenged Royal Dutch Petroleum (RDP) in US federal court. She alleged that RDP had worked with the Nigerian government to stop the protest and thereby were complicit in the human rights violations that occurred. The lower court questioned whether particular actions were indeed violations of international law, finding that certain allegations did fulfil that criterion. RDP challenged the finding, arguing that corporations could not be held liable under the ATS because there was no established international law regulating private actors' behavior. The Second Circuit Court of Appeals agreed[301],

297 565 U.S. 961 (2011).

298 569 US 108 (2013). After hearings in February 2012, the Court requested rehearings on the extraterritoriality question. 565 U.S. ___, Order 10-1491 (March 5, 2012).

299 A Reuters journalist reported that even after approximately $ 180 million in losses due to stolen oil, Shell had Nigerian oil profits of about $ 4 billion in 2017. Ron Bousso, In Nigeria, Shell's onshore roots still run deep, Reuters, 23 September 2018 (‹https://www.reuters.com/article/us-nigeria-shell-insight/in-nigeria-shells-onshore-roots-still-run-deep-idUSKCN 1M3069›; viewed 13 March 2020).

300 While Shell has committed itself to addressing the spills and has a webpage to report on the number and source of spills, the revelations remain problematic. Between 2013 and 2019, 799 spills occurred. Shell, Oil Spill Data (‹https://www.shell.com.ng/sustainability/environment/oil-spills.html›; viewed 13 March 2020). By far the most of these were recorded as due to sabotage, but operational spills and even "mystery" spills also figure in the graph. Id. All seven spills in February 2020 were due to sabotage. Id. at ‹https://www.shell.com.ng/sustainability/environment/oil-spills/february-2020.html› (viewed 13 March 2020).

301 Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 145 (2d Cir. 2010), reh'g denied, 642 F.3d 268 (2d Cir. 2011), and reh'g en banc denied, 642 F.3d 379 (2d Cir. 2011).

although Seventh, Ninth, and District of Columbia Circuits had allowed ATS claims against corporations to proceed.[302]

The Supreme Court granted *certiori* and heard arguments on the corporate defendant issue.

After the February 2012 hearings, however, the Supreme Court requested the parties to present arguments on a different issue – whether claims with no "link" to the United States could be heard in US courts.[303] Rehearing arguments were presented in October on the specific question of

> "[w]hether and under what circumstances the [ATS …] allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States".[304]

It was on this basis that the Court ultimately decided to reject the plaintiff's complaint.[305] The circumstances of Kiobel's claims were exclusively foreign: the violations took place in Nigeria, by Nigerians, to Nigerians and the defendant was Dutch/British. Without an explicit basis in the statute to extend jurisdiction extraterritorially, the unanimous Court refused to do so.

> "The principles underlying the presumption against extraterritoriality thus constrain courts exercising their power under the ATS.
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> III
>
> "[…] It is true that Congress, even in a jurisdictional provision, can indicate that it intends federal law to apply to conduct occurring abroad. […] But to rebut the presumption, the ATS would need to evince a "clear indication of extraterritoriality." […] It does not."[306]

Much of the reaction to *Kiobel* by CSR advocates was negative.[307] The Court not only upheld the Appellate Court's determination that Shell would not be subject to ATS liability, it substantially narrowed the scope of the statute, ending attempts to benefit from the US legal system's plaintiff-friendly structures if the plaintiffs and defendants are unrelated to the US. It was, even before the era of "America-First", a judicial proclamation of America-centered jurisdiction. Indeed, even Justice Breyer's concurrence (joined by the three more liberal jus-

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302 Childress at 738 (citing Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1017–21 (7th Cir. 2011); Sarei v. Rio Tinto, PLC, No. 02–56256, 2011 WL 5041927, at *7 (9th Cir. Oct. 25, 2011); Doe VIII v. Exxon Mobil Corp., 654 F.3d 11, 41 (D.C. Cir. 2011)).

303 See Kiobel v. Royal Dutch Petroleum Co., 565 U.S. 1244 (2012) (asking the Parties to file supplemental arguments).

304 Id.

305 Kiobel, 569 U.S. at 115 ("The question here is not whether petitioners have stated a proper claim under the ATS, but whether a claim may reach conduct occurring in the territory of a foreign sovereign").

306 Kiobel, 569 U.S. at 117–118.

307 The decision, however, was precisely what a letter to the Court in 2004 by UK, Australia, and Switzerland had requested.

tices), which disagreed with the majority's presumption against extraterritoriality, called for the ATS to be limited to cases in which there was a clear "American national interest".[308] The important difference with the majority lay in what should count as being a national interest:

> "we should treat this Nation's interest in not becoming a safe harbor for violators of the most fundamental international norms as an important jurisdiction-related interest justifying application of the ATS in light of the statute's basic purposes — in particular that of compensating those who have suffered harm at the hands of, e.g., torturers or other modern pirates".[309]

Even with the extraterritoriality presumption, the question of whether corporations *could be* liable under the ATS was left open. With this, the possibilities of enforcing CSR against US companies remain undisturbed, as do the possibilities of broadly interpreting the "national interest".

This is particularly important in a jurisdiction such as the United States, where legislative and regulatory measures are rare and legally fraught. As multiple authors have pointed out, there is symbolic power in bringing ATS cases against corporations. Childress' comments, written before *Kiobel* was handed down, explain:

> "In light of the dim chances for success in ATS cases based on the small number of plaintiff judgments to date, it is arguable that modem uses of the ATS against corporations have not been driven solely by forum shopping and choice of law, but rather by the signaling value that is offered when bringing suit against a corporation for alleged violations of international law. By alleging that a corporation is violating international law, plaintiffs subject corporations to brand damage while gaining significant publicity in hopes of both encouraging policy change and a monetary settlement. The use of the ATS converts a claim sounding in tort against a corporation into a claim sounding as a violation of international law. This has the potential to create public-relations problems for corporations, and thus force a settlement, because no corporation wishes to be known as a human-rights abuser or violator of international law. Put another way, it seems that the real value of an ATS case is that it transforms a tort case into a human-rights case."[310]

Kiobel did not close the door to corporate ATS cases, even if it left the Ogani people without a legal remedy in US courts. Subsequent cases continue in federal courts, and with each, corporations and their stakeholders are forced to re-negotiate the balance between social power and social responsibility.

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308 Kiobel, Breyer concurring, 569 U.S. at 133.
309 Id.
310 Childress, supra at 725 (footnotes omitted).

3. Europe

Attention to corporate behavior in the sense of CSR came to Europe significantly later than it did to the United States,[311] but has moved since then with notable intensity. Culturally more open to governmental regulation of companies than their American counterparts, Europeans have led the movement to shift international conversations away from CSR and toward the imposition of binding corporate obligations in the area of human rights.

That said, there is still little in the way of binding rules to require European companies to take stakeholder interests into account in decision-making, or to permit victims of abuses abroad to initiate compensation claims against European companies at the top of the supply chain. Europe's lead in the Business and Human Rights dialogue is, it appears, more on the level of international incitement than it is local implementation.

With no pretense of addressing European promotion of CSR comprehensively, the following will sketch out the most noticeable aspects solely for the purpose of comparing them to the international and US approaches.

a. European Union

With a 1995 Manifesto of Enterprises against Social Exclusion[312], the path was set for European businesses to try to establish best practices regarding interactions between firms and community stakeholders. Jacques Delors, then-President of the European Commission, launched the Manifesto and with it created the European Business Network for Social Cohesion.[313] The latter was renamed one year later, becoming the still-existing network of businesses devoted to promoting sustainability and corporate social responsibility, CSR Europe.[314] Subsequent evolutions in the agenda maintained the programmatic nature of the European "way" of doing CSR.[315] Having remained voluntary throughout the first decade of the 2000s, corporate responsibility discussions turned toward greater regulatory interventions in the early 2010s.

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311 Christina Garsten, Corporate Social Responsibility in: Ullrich Kockel, Máiréad Nic Craith, and Jonas Frykman, eds., A Companion to the Anthropology of Europe, 407, 411 (Wiley, 2012).

312 See ‹https://www.csreurope.org/european-commission› (viewed 18 March 2020).

313 See CSR Europe – 20 years of business-policy interaction driving the CSR movement (‹https://www.csreurope.org/history›; viewed 18 March 2020).

314 Id.

315 For an excellent summary of the development of European Union policies and programs on CSR, see Olivier De Schutter, Corporate Social Responsibility European Style, 14 Eur. L. J. 203, 206–217 (2008).

aa. 2001 Green Paper on CSR

In 2001, the European Commission (EC, or the Commission) issued its first guidance paper on CSR: the EC Green Paper on CSR. In this paper, the Commission described[316] CSR to be

> a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis.[317]

The Green Paper then went on to discuss the "internal"[318] and "external"[319] dimensions of CSR, as well as "An Holistic Approach" that companies could employ to implement CSR. The internal aspects were those mainly focused on the company's treatment of its workers, covering hiring and promotional practices, health and safety at work, and sustainable management of restructuring. Interestingly, the Green Paper specifically addressed the need to ensure responsibility among contractors as well as of direct employees and own products.[320]

The external dimension of CSR highlighted by the Commission were those related to local and foreign stakeholders. Here, human rights and environment were specifically mentioned, as were the need for businesses to help the communities by direct economic contributions to the local economy and by encouraging large companies to "give support" to smaller companies and start-ups.[321] Extraterritorial aspects of CSR were not neglected, either. The paper talked of supply chains and the usage of codes of conduct as well as the need to implement and verify company compliance.[322] Transparency, thus, was brought into the European framework as a cornerstone of its CSR policy.

bb. 2011 EU Strategy for CSR

Following up on a 2002 Commission Communication[323] and a 2006 policy paper supporting the creation of the private sector's European Alliance on CSR[324], the Commission took up the corporate social responsibility concept again. In

316 The Commission seemed to not want to *define* the term, noting that «[t]here is no unique definition of corporate social responsibility", instead giving an indication of the generally accepted meaning. European Commission, Green Paper: Promoting a European Framework for Corporate Social Responsibility, COM(2001) 366, para. 24.
317 Id.
318 Id. at 2.1., p. 8.
319 Id. at 2.2., p. 11.
320 E.g., id. at para. 37 (discussing health and safety practices of contractors).
321 Id. at para. 49.
322 E.g., id. at para. 57.
323 European Commission, Communication from the Commission Concerning Social Responsibility: A Business Contribution to Sustainable Development, COM(2002)347.
324 European Commission, Implementing the Partnership for Growth and Jobs: Making Europe a Pole of Excellence on Corporate Social Responsibility, COM(2006)136.

2011, the EU issued its "renewed" CSR policy. The Communication paper is often pointed to as significant for its "new definition of CSR", which it sets out as:

> "the responsibility of enterprises for their impacts on society".[325]

The operative difference to the 2001 description is not immediately obvious, but the 2011 approach implies a shift away from the wishfulness of the 2001 "concept" of voluntary integration interests toward a pointed expectation of accountability for negative impacts. This implicit expectation allowed the Commission to continue to set forth its hope that companies will "carry out risk-based due diligence, including through their supply chains".[326]

Seen from the perspective of today's trajectory of CSR interests morphing into a push for Business and Human rights, the more interesting aspect of the Commission's 2011 paper is its explanation of its multipronged interest in revisiting the topic.[327] The Commission not only wrote that it wanted to add to the earlier policies to make them more effective, it also wanted "to reaffirm the EU's global influence" in the field of CSR, to harmonize Member State policies, "and so reduce the risk of divergent approaches that could create additional costs for enterprises operating in more than one Member State".[328] The EU's "modern understanding of CSR"[329], in other words, is – at its core – only minimally different than the understanding of Heald: maintain enough responsibility to balance social power in order to maintain the level of social power currently enjoyed.

cc. Non-Financial Reporting

One of the steps the European Parliament took to further the 2011 policy was to promulgate a reporting requirement on publicly traded companies to report on their CSR efforts. In 2014, a directive was passed to require large companies to file a "non-financial statement" on matters related to environmental impacts, employee policies, social matters, human rights impacts, and corruption.[330] The Directive does not require that companies implement CSR-promoting poli-

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325 European Commission, Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: A Renewed EU Strategy 2011–14 for Corporate Social Responsibility, COM(2011)681 (25 October 2011).

326 Id., p. 6.

327 Id., pp. 5–6

328 Id., p. 6.

329 Id., p. 5.

330 Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, L 330/1 (15 November 2014). The directive also requires company reporting on diversity of employees, suggesting information on age, gender, and education as a way of making companies more open to innovation. Id. at paras. 17, 18.

cies, but insists that if there are none, the reasons for the lack of policy must be noted.

dd. Conflict Mineral Regulation

In 2017, the EU passed the Conflict Minerals Regulation to address the human rights impacts of trade in tin, tantalum, tungsten, and gold on persons and communities living in conflict-affected regions.[331] Based on (and incorporating[332]) the OECD's model conflict minerals framework and similar in concept to the Dodd-Frank Act § 1502 regime for conflict minerals, the EU Regulation will require any importer of the named minerals to carry out a due diligence investigation of its supply chain, to ensure that the minerals it imports are not being sourced from areas in which the profits are financing or prolonging wars.[333] They must also arrange their management systems to ensure that someone in the company is responsible for the supply chain oversight of potential conflict minerals[334], to keep records for traceability of their imports,[335] and implement a complete risk management system to scrutinize their supply chains of risks that might occur at any point along it[336]. Consumer disclosure[337] and regulatory reporting[338] requirements are further features of the foreseen program.

Not yet in effect, the verdict is still out on the effectiveness of the EU Regulation, because it is unclear how strictly the Member States will oversee its enforcement within their jurisdictions. In particular, while its scope is broader than, for example, the Dodd-Frank provision (applying to supply chains in any conflict or high-risk area rather than only in the DRC region), the lack of guidance in the Regulation for Member State punishment of violators causes some human rights advocates to be concerned.[339]

b. United Kingdom: Monitoring of Slavery in the Supply Chain

In March 2015, the United Kingdom (UK) House of Common's bill to combine the offenses of slavery and human trafficking and to increase the criminal pe-

331 Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas, L 130/1 (19.5.2017; scheduled to come into effect 1 January 2021).

332 Id., art. 4(b).

333 Id., art. 3.

334 Id., art. 4(c).

335 Id., art. 4(f).

336 Id., art. 5.

337 Id., art. 7.

338 Id., art. 17.

339 E.g., Sascha Matuszak, Report on Supply Chain Compliance 3, no. 5 (Society of Corporate Compliance and Ethics, 5 March 2020) (‹https://www.jdsupra.com/legalnews/a-look-at-the-eu-conflict-minerals-34874/›; viewed 17 March 2020).

nalties for participation in such acts became law.[340] In order to enhance its effects and to require companies to commit to transparency about slavery or trafficking in their supply chains, the Act was amended soon after passage to include Section 54 ("Transparency in Supply Chains etc."), a reporting requirement. Section 54, effective at the end of October 2015, mandates that large companies (companies with a minimum annual global turnover of £36 million), report annually on any steps they have taken to ensure that there is no slavery or trafficking either in their business or in their supply chains.[341] The provisions also require public accessibility of the statement – either by posting it on the business' website or, if there is no website, by sending it to anyone who requests it within 30 days of receiving the request.[342] Failure to submit a report is subject to injunctive relief by the Secretary of State.[343]

Like other CSR reporting requirements, the Act does not require that steps be taken to eliminate slavery or human trafficking from the supply chain. Nevertheless, applying to all sectors of the economy, and to any business with a global turnover of £ 36 million supplying goods or services in the UK, the law covers a broad group of commercial actors.

Early indications of The Modern Slavery Act's effectiveness are mixed. On the one hand, the lack of business attention to the law was a point of sharp criticism several years after its going into effect. Reportedly, the UK Home Office wrote to 17,000 companies in October 2018 to threaten them with being "named and shamed" if they failed to comply with their Section 54 obligation to report.[344]

On the other hand, the UK law, which itself was modeled on the Californian law, has been influential in paving the way for further international discussions on slavery and human trafficking in global supply chains.[345] It was the basis of Australia's (more stringent) 2018 law[346], and of Canada's current Modern Slavery bill[347]. Moreover, Hong Kong and the Netherlands are reportedly con-

340 Modern Slavery Act 2015, UK Public General Acts, 2015 c. 30.

341 See id., sec. 54(4) (defining «A slavery and human trafficking statement»).

342 Id., sec. 54(7).

343 Id., sec. 54(11). But note that in Scotland, the relief is specific performance. Id.

344 Ruth Green, UK Modern Slavery Act Failings Point to Need for Global Action on Slavery, International Bar Association, 7 January 2019 (‹https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=57fc8a75–2a33–422c-9274-e98e53056472›; viewed 14 March 2020).

345 Id. See also Molly Millar, Five years on, is the UK's landmark anti-slavery law fit for purpose? Reuters, 18 October 2019 (quoting Kevin Hyland, former UK Anti-Slavery Commissioner) (‹https://www.reuters.com/article/us-britain-slavery-expertviews-trfn/five-years-on-is-the-uks-landmark-anti-slavery-law-fit-for-purpose-idUSKBN 1WX02J›; viewed 14 March 2020).

346 An Act to require some entities to report on the risks of modern slavery in their operations and supply chains and actions to address those risks, and for related purposes (Modern Slavery Act 2018), Australian Government Federal Register of Legislation No. 153, 2018 (‹https://www.legislation.gov.au/Details/C2018A00153›; viewed 15 March 2020).

347 Cécile Barbière, France's 'Rana Plaza' law delivers few results, EURACTIV, 25 February 2019 (‹https://www.euractiv.com/section/development-policy/news/french-law-on-multinationals-res

sidering taking up legislation to end slavery in supply chains (as discussed below), both of which are similar to the UK's approach to CSR/Business and Human Rights.[348]

c. France's Due Diligence Law

Several years after the UK, the French Parliament passed its own CSR law. Not its first foray into CSR, the passage of the *Loi de Vigilance* was nevertheless significant. Unlike the previous regulations to mandate reporting that had been passed in response to the 2001 Green Paper[349], the 2018 law mandated deeper corporate attention to human rights, environment, and health and safety matters arising from their activities and from those of their suppliers and contractors. It was widely discussed as moving CSR away from voluntary steps and into the sphere of legally binding obligations.

Tracking the third UNGP pillar, the *Loi de Vigilance* requires that companies report on any possible violations of human, labor, or environmental rights in their supply chains. The standard of "human rights due diligence" aims to ensure that not only do companies need to ask whether there are any abuses of human rights occurring along their supply chains, but that they actively seek out where risks of violations may exist.[350] Moreover, beyond the powers of enforcement that the law gives the government, it provides for civil liability of the business vis-à-vis victims of abuses along its supply chain. As such, it conceptually goes further than the legislative provisions of the United States, California, or the UK, and arguably is the standard against which further rules will be measured.

Despite the interest and attention generated by the *Loi de Vigilance*, current assessments of the law's effectiveness are sobering. A consortium of human

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ponsibility-for-workers-abroad-achieves-few-results/›; viewed 15 March 2020); Amnesty International, Devoir de Vigilance: les entreprises peuvent mieux faire, 21 February 2019 (‹https://www.amnesty.fr/responsabilite-des-entreprises/actualites/les-entreprises-dans-le-viseur-des-ong›; viewed 15 March 2020).

348 Green, supra.

349 See Anna Triponel. "Business & Human Rights Law: Diverging Trends in the United States and France" 23:5 Am. Univ. L. Rev. 855, 878 (2007) (citing Law No. 2001–420 of May 15, 2001, Journal Officiel de la République Française [J.O.] [Official Gazette of France], May 16, 2001, p. 7776).

350 UNOHCHR, The Relevance of Human Rights Due Diligence to Determinations of Corporate Liability, UN Doc A/HRC/38/20/Add.2 (1 June 2018). See particularly id. at para. 8:
"Human rights due diligence should not be confused with other forms of legal due diligence activities, such as those carried out in preparation for corporate mergers and acquisitions, or those required for compliance monitoring purposes in areas such as banking or anti-corruption. The key difference between these concepts is that the latter group is generally concerned with identifying, preventing, and mitigating risks to business; whereas human rights due diligence is concerned with risks to people, specifically from adverse human rights impacts that a business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products, or services by its business relationships."
See also Nicolas Bueno, Diligence en Matiere de Droits de l'Homme et Responsabilite de l'Entreprise: Le Point en Droit Suisse, 29 Swiss. Rev. Int'l & Eur. L. 345, 346–349 (2019).

rights NGOs pointed out that with only 80 reports published by February 2019, most of the companies that would be required to publish reports (approximately 300) have not, and those that have made reports have done so incompletely.[351]

d. Denmark: CSR Reporting Requirement

The Scandinavian countries are among the forerunners of integrating societal obligations in corporate regulation on a broad basis.[352] With Denmark having one of the oldest CSR reporting obligations and Norway's having one of the newest sharpened supply chain diligence laws, the generally positive views on corporate social responsibility associated with Scandinavia continue to hold. Denmark in particular has been noted for addressing corporate social responsibility with national legislative tools prior to the rest of continental Europe.[353]

The Danish government's approach to CSR, early though it was, is similar to the overall EU approach: it is based on reporting requirements rather than on mandatory CSR implementation. The most notable of these is found in Section 99a of the Danish Financial Statements Act.[354] This came into effect in 2009 and obliges companies above a prescribed level of assets or profits and/or with more than 250 employees to file a report with information on the company's policies, implementation of the policies, self-assessment of its achievements in CSR, and prognosis of future CSR-promoting actions.[355]

An early study on the actual impact of the reporting requirement, however, indicated disappointing results.[356] Whereas the quantity of information being published by companies had indeed increased, experts recognized real improvements

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351 See Sandra Cossart, What lessons does France's Duty of Vigilance law have for other national initiatives, 27 June 2019 (‹https://www.business-humanrights.org/en/what-lessons-does-frances-duty-of-vigilance-law-have-for-other-national-initiatives›; viewed 21 March 2020) (explaining the law and the "shortcomings" in compliance so far, but noting the website that NGOs Sherpa and CCFD established to provide a list of companies and their plans, vigilance-plan.org).

352 Garsten, at 411; Robert Strand, Corporate Responsibility in Scandinavian Supply Chains, 85 J. Bus. Ethics, 179 (2009).

353 Id. (citing a study by Roepsdorff, 2010).

354 Arsregnskabslovens § 99 a (Danish Financial Statements Act, Act No. 1403, § 99a) (27 December 2008)).

355 Karin Buhmann, The Danish CSR Reporting Requirement as Reflexive Law: Employing CSR as a Modality to Promote Public Policy Objectives through Law, Europ. Bus. L. Rev. 187, 191 (2013); see also Karin Buhmann, Responsible Investment in Denmark: Practices among Institutional Investors in a Context of Statutory Reporting Requirements, in: Tessa Hebb, James P. Hawley, Andreas G.F. Hoepner, Agnes L. Neher, and David Wood, eds., The Routledge Handbook of Responsible Investment.

356 DanWatch, The Impact of the Danish Law on CSR Reporting (November 2011) (‹https://germanwatch.org/sites/germanwatch.org/files/announcement/10649.pdf›; viewed 14 March 2020).

in only a certain number of issue areas, and note that companies have not engaged with the more challenging aspects of CSR.[357]

e. Norway: Supply Chain Due Diligence Law

In November 2019, Norway's Ethics Information Committee recommended a new law to require supply chain human rights due diligence reporting for companies active in Norway. Similar to the UK Modern Slavery Act and the French *Loi de Vigilance*, the Norwegian law requires companies falling within its scope to assess their supply chains for risks to human rights.[358] They must also publish reports on the risks and how they are managing such risks.[359] What is particular about the Norwegian regime is the broad scope: while some of the due diligence and reporting obligations only would apply to larger companies, not only does the threshold of "large" start low (NOK 35 million – under $ 4 million – in assets), all companies have an obligation to respond to third party requests for information about their own and their supply chain's practice with regard to fundamental human rights and decent work.[360] This "stakeholder" request possibility renders the possible commercial consequences of misbehavior much more potent than do mere governmental reporting obligations.

4. Other[361]

a. Australia

aa. Commonwealth Modern Slavery Act

The Australian (Commonwealth) Modern Slavery Act 2018 is one of the more recent CSR laws focusing on human rights abuses in supply chains.[362] Modelled on the California and UK laws, it is more demanding than either. Like the UK Act, Australia's law requires all large companies, established or doing business in Australia, to report on possible slavery or human trafficking in their supply chains.[363] Going beyond the UK law, however, the 2018 Act requires not only reporting about steps the company has taken, but also obliges the company to re-

357 Id. at 10–11.

358 See ‹https://www.ropesgray.com/en/newsroom/alerts/2019/12/Another-Proposed-Human-Rights-Due-Diligence-and-Reporting-Requirement-for-Multinationals› (viewed 15 March 2020).

359 Id.

360 Id.

361 The author has also read of corporate law statutes in Indonesia and India. These have not been further investigated for reasons of space and a lack of research sources. See instead Sally Wheeler, Committing to Human Rights in Australia's Corporate Sector, ANU College of Law Research Paper No 19.13, footnote 30 (2019) (mentioning Indonesia's Company Liability Act 20/2007, Art. 74 and India's Companies Act 2013, sec. 135). These have not been further investigated for reasons of space and a lack of research sources.

362 See Modern Slavery Act 2018.

363 The Act applies to companies with an annual consolidated revenue of at least AUD 100 million. Id., sec. 5.

port on any risks of slavery or trafficking in the supply chain, and to explain its due diligence efforts to determine and eliminate such risks.[364]

Section 16 of the Act specifies the "mandatory criteria" that are to be provided by each company and even provides an "example" of the types of information to be set forth:

> 16 Mandatory criteria for modern slavery statements
>
> (1) A modern slavery statement must, in relation to each reporting entity covered by the statement:
>
> (a) identify the reporting entity; and
>
> (b) describe the structure, operations and supply chains of the reporting entity; and
>
> (c) describe the risks of modern slavery practices in the operations and supply chains of the reporting entity, and any entities that the reporting entity owns or controls; and
>
> (d) describe the actions taken by the reporting entity and any entity that the reporting entity owns or controls, to assess and address those risks, including due diligence and remediation processes; and
>
> (e) describe how the reporting entity assesses the effectiveness of such actions; and
>
> (f) describe the process of consultation with [related entities]
>
> […]; and
>
> (g) include any other information that the reporting entity, or the entity giving the statement, considers relevant.
>
> Example: For paragraph (d), actions taken by an entity may include the development of policies and processes to address modern slavery risks, and providing training for staff about modern slavery.[365]

With the first reporting period coming in the second half of 2020, there is nothing definitive to be said about how successfully the Act will be in spurring due diligence or even reporting, let alone reducing human rights abuses. The weakness of the Act, pointed out by many, is the lack of penalties for failure to report. While the Commissioner may "name and shame" companies who fail to comply with the statement mandate, the Act foresees no fines or other punitive responses that the government may take if it determines that an entity failed to file or incompletely files a statement.[366]

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364 Modern Slavery Act 2018

365 Id., sec. 16.

366 See Paul Redmond, At last, Australia has a Modern Slavery Act. Here's what you'll need to know, 2 December 2018 (‹https://theconversation.com/at-last-australia-has-a-modern-slavery-act-heres-what-youll-need-to-know-107885›; viewed 15 March 2020).

bb. New South Wales: Modern Slavery Proposed Act

Along with the Commonwealth Act, the territory of New South Wales' legislature passed a bill for its own Modern Slavery Act.[367] This bill's demands for supply chain due diligence statements would be obligatory for companies with only AUD 50 million turnover,[368] and, significantly, provides penalties for non-compliance with the reporting[369] and public-awareness[370] requirements. The creation of an Anti-Slavery Commissioner[371] with the power to launch make referrals to the police or other governmental agencies for further investigations lends further "bite" to the regime[372].

Despite passage of the bill, the NSW Act has not been put into force and is now reputedly under reconsideration.[373] The territorial government argues that the legislation may be incompatible with the Commonwealth Modern Slavery Act and has deferred implementation indefinitely. Tellingly, perhaps, a representative of the Australian Institute of Company Directors criticized the Act's binding penalties, calling the "punitive approach [...] inappropriate at this time" and urging for a "regime focused on transparency" only.[374] Corporations, it seems, do not want social responsibility even for the gravest of human rights abuses.

b. Hong Kong

In response to the US State Department's 2016 and 2017 placing of Hong Kong on its Tier 2 list of countries with human trafficking, Hong Kong legislators proposed that the country enact a Modern Slavery Act 2017 based on the UK's Modern Slavery legislation.[375] The proposed Hong Kong Modern Slavery Bill

367 New South Wales, An Act to make provision with respect to slavery, slavery-like practices and human trafficking and to provide for the appointment and functions of an Anti-slavery Commissioner; and for other purposes ("Modern Slavery Act 2018"), No 30 (version of 8 January 2019); assented to 26 June 2018, not yet in force.

368 Id., sec. 24(1)(b).

369 Id., sec. 24(2) (maximum penalty is set at "10,000 penalty units"); sec. 24(7) (another 10,000 penalty units may be imposed if reporting is false).

370 Id., sec. 24(6) (penalty of 10,000 penalty units may be levied if company does not publicize its report).

371 Id., sec. 6.

372 Id. at Sec. 13(2).

373 See Ben Doherty, NSW anti-slavery act could be abandoned despite being voted into law, The Guardian, 8 November 2019 (‹https://www.theguardian.com/australia-news/2019/nov/08/nsw-anti-slavery-act-could-be-abandoned-despite-being-voted-into-law›; viewed 15 March 2020).

374 Id.

375 Hong Kong Government Denies that New Laws are Needed to Tackle Modern Slavery, Herbert, Smith, Freehills Legal Briefings, 8 Jun 2018 (‹https://www.herbertsmithfreehills.com/latest-thinking/hong-kong-government-denies-that-new-laws-are-needed-to-tackle-modern-slavery›; viewed 19 March 2020).

2017, too, would prohibit slavery and human trafficking.[376] It would establish an independent commission and victim protections in the form of allowing victims to bring a civil action for damages against a trafficker.[377] More significantly for CSR, it would also require "sizable" companies to adhere to a supply chain reporting requirement like the UK Act – that is, companies would have to report on what, if anything, they undertake to prevent slavery or trafficking present within their supply chains.[378] With no provision for penalizing non-compliance beyond injunctive authority of the Chief Executive in Council, the Bill relies on company action and consumer notice to demand real changes in policy.

Opposed by the government as unnecessary, the 2017 attempt to pass human trafficking legislation languished, but reportedly restarted in 2019.[379] As of the date of this article, the bill had not moved further.

c. Canada

The UK Modern Slavery Act was also the model for the Canadian proposal for a Transparency in Supply Chains Act.[380] Bill C-423, currently in Parliament, namely aims at shedding light on the risks of slavery and trafficking in the supply chains of Canadian companies and companies doing business in Canada.[381] Similar to the UK Act, the Transparency in Supply Chains Act will contain reporting requirements for the companies subject to it to declare any steps being taken to prevent slavery or the risks of slavery in their operations and in the operations of companies they directly or indirectly control. It, also like the UK law, refrains from imposing a duty to undertake human rights due diligence investigations of supply chains, requiring only that a lack of investigation be reported.[382]

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376 See Dennis Kwok and Kenneth Leung, A brief overview of the Modern Slavery Bill 2017, LC Paper No. CB(2)1480/17–18(05) (June 2018) (‹https://www.legco.gov.hk/yr17–18/chinese/panels/se/papers/se20180605cb2-1480-5-ec.pdf›; viewed 19 March 2020).

377 Id.

378 Id.

379 Beh Lih Yi, Hong Kong lawmaker vows fresh push for UK-style anti-slavery law, Reuters, 9 January 2019 (‹https://www.reuters.com/article/us-hongkong-trafficking-lawmaking/hong-kong-lawmaker-vows-fresh-push-for-uk-style-anti-slavery-law-idUSKCN 1P30PR›; viewed 19 March 2020).

380 House of Commons of Canada, Bill C-423: An Act respecting the fight against certain forms of modern slavery through the imposition of certain measures and amending the Customs Tariff (First Reading 13 December 2018) (‹https://www.parl.ca/DocumentViewer/en/42–1/bill/C-423/first-reading›; viewed 19 March 2020).

381 Id. Sec. 2(1) (definition of "entity"). E.g., sec. 2(1)(b) (the provisions would apply to businesses that have two of: at least CAD 20 million in assets; CAD 40 million in revenue; and/or 250 or more employees).

382 Id., Sec. 7. See also Government of Canada, Supply chain consultation: Issue Paper (30 May 2019) (‹https://www.canada.ca/en/employment-social-development/programs/international-affairs/consultation-supply-chains/issue-paper.html›; viewed 18 March 2020).

Nevertheless, the bill requires that reports be published[383], and proposes the establishment of an Ombudsman with the authority to take complaints from whistleblowers[384]. More importantly, the bill explicitly obliges companies to take subsidiaries' businesses into account in their reporting. Thus, supply chains are implicated.[385] Most importantly, the Canadian reporting requirements would be mandatory, with fines of up to CAD 250,000[386] for both the entity and its officers who ordered or participated in to the fault[387]. Authorities, moreover, would have the right to a warrant to enter business or private premises in search of the information required for a report.[388]

d. The Netherlands

The Dutch Parliament passed a law in 2019, now scheduled to go into effect in 2022, to require companies to perform supply chain due diligence for child labor.[389] The Child Labour Due Diligence Bill has received the praise of human rights advocates for mandating that companies not only scour their supply chains for child labor and publish their findings, but that they also must create a plan to state how they will address the problems.[390] This Human Rights Due Diligence approach, like France's law, is action-oriented rather than merely transparency-directed. Focused only on child labor, however, the scope remains narrower than the French law.

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383 Bill C-423, Sec. 8.

384 See Elizabeth Raymer, Canada expected to pass legislation on modern-day slavery in supply chains (Canadian Lawyer, 30 January 2020) (‹https://www.canadianlawyermag.com/news/general/canada-expected-to-pass-legislation-on-modern-day-slavery-in-supply-chains/325664›; viewed 18 March 2020).

385 Bill C-423, Sec. 6 (indicating that the entities covered include those controlled by the Canadian company).

386 Id., Sec. 15.

387 Id., Sec. 16.

388 Emilie de Haas, Keeping Up with the Times: Why Canada Should Enact a Modern Slavery Act, McGill University Faculty of Law, Centre for Human Rights & Legal Pluralism (7 August 2019) (‹https://www.mcgill.ca/humanrights/article/70th-anniversary-universal-declaration-human-rights/keeping-times-why-canada-should-enact-modern-slavery-act›; viewed 19 March 2020).

389 See also Isa Mirza, Pioneering Dutch Law Raises Global Standards for Eliminating Child Labor in Supply Chains: Understanding the Dimensions of Compliance, Corporate Social Responsibility and the Law (Foley Hoag, 7 June 2019) (‹https://www.csrandthelaw.com/2019/06/07/pioneering-dutch-law-raises-global-standards-for-eliminating-child-labor-in-supply-chains-understanding-the-dimensions-of-compliance/›; viewed 18 March 2020).

390 E.g., MVO Platform, The Netherlands takes a historic step by adopting child labour due diligence law (14 May 2019); Juliane Kippenberg, Netherlands Takes Big Step Toward Tackling Child Labor (Human Rights Watch, 4 June 2019) (‹https://www.hrw.org/news/2019/06/04/netherlands-takes-big-step-toward-tackling-child-labor›; viewed 18 March 2020).

H. Conclusion

Corporate Social Responsibility has had a long history and one that is not likely to be over soon. A concept of tremendous ideological power, the term "CSR" means many things to many stakeholders – and from that diversity derives its influence. It has developed as a possible antidote to the degradations on workers' lives caused by the early raw capitalists to a union-quelling tool of "public relations", to a tool to enhance consumer acceptance of products stemming from global value chains. Along the way, it was the voluntariness of CSR that distinguished it from economic regulation – and what made it a noble cause. CSR, like state diplomacy, is a practice that exists instead of law – not because of law.

Thus, the legal guise of corporate social responsibility today – Business and Human Rights – is not CSR as it was originally conceived. CSR until the 1990s was essentially a concept endemic to the United States, and it was a movement to address the effect US corporations were having on their stakeholders in a way paralleling the ideals that Americans had about what social responsibilities anybody with social power – public or private – should have. CSR, in other words, was to some extent the pendant to state responsibility: aiming to balance social power with social responsibilities.

Interestingly, while they may prove more effective in bringing corporations to heel, current trends in the law of making corporations socially responsible are much less ambitious than CSR. As new laws around the world demonstrate, the obligations being placed on corporations are mainly those of transparency in the treatment of humans in global supply chains. Corporate social power, seen as the power to refuse to contract with those who commit fundamental violations of human dignity, is being channeled through reporting and, in some cases, investigations of risk mitigation techniques.

The Europeanization of the Business and Human Rights model of socially responsible companies has pressed law forward while keeping companies in the business of doing business. They must follow laws and make profits. Legal obligations to investigate their business practices – whether for signs of slavery or child labor, for indications of foreign bribery, or for lax environmental controls – can make companies "law-abiding", not "responsible" in any deeper meaning of the word. Then again, neither did the empty promises of CSR. In looking to balance social responsibilities with social power, then, perhaps reducing the latter will be the next study to consider.