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Trading and Aiding Human Rights:
Corporations in the Global Economy

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This article traces the interrelationship of human rights with business and considers the central role played by corporations in the global economy. In particular it examines three points of intersection between human rights and business: transnational commerce, trade and investment, and development aid. As the influence of corporations on the economic and political scene in many countries has increased in recent decades, international law has barely responded to this growing imbalance of power exposing an accountability gap within the broad global economy for corporate related human rights abuses. In outlining the key theoretical, practical and institutional features of the intersection with international human rights standards and the global economy, the paper stresses the growing importance of corporations in the field and the attendant international legal responsibilities and expectations that are now made of corporations in the quest to better protect and promote human rights. Evidently the impact of the global economy on human rights is extremely significant, even if, as yet, the same cannot be said in respect of the human rights impact on the global economy.

TRADING AND AIDING HUMAN RIGHTS: CORPORATIONS IN THE GLOBAL ECONOMY

DAVID KINLEY* AND JUSTINE NOLAN**

Abstract: *This article traces the interrelationship of human rights with business and considers the central role played by corporations in the global economy. In particular it examines three points of intersection between human rights and business: transnational commerce, trade and investment, and development aid. As the influence of corporations on the economic and political scene in many countries has increased in recent decades, international law has barely responded to this growing imbalance of power exposing an accountability gap within the broad global economy for corporate related human rights abuses. In outlining the key theoretical, practical and institutional features of the intersection with international human rights standards and the global economy, the paper stresses the growing importance of corporations in the field and the attendant international legal responsibilities and expectations that are now made of corporations in the quest to better protect and promote human rights. Evidently the impact of the global economy on human rights is extremely significant, even if, as yet, the same cannot be said in respect of the human rights impact on the global economy.*

Key words: *Trade, aid, corporate social responsibility, global economy.*

A. INTRODUCTION

The many and various features of the global economy and the centrality of corporations within it, have a direct and enduring impact on the quest to better protect and promote human rights. That impact, of course, cuts both ways. Consider, for instance, such recent events as the United Nation's appointment of a Special Representative to the Secretary-

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General on human rights and corporations;¹ the World Bank's proclamation that "human rights are the very essence of the Bank's work";² and the entreaties made of the world's principal trading nations at the last WTO Ministerial meeting in Hong Kong of the sclerotic Doha Round (which, at the time of writing, limps on still),³ to leverage global trade for the benefit of securing basic human rights of the poor,⁴ all of which bear testimony to some appreciation of the global economy's great potential not only to help but also to hamper the objects of human rights.

¹ Which followed consideration (for the second time) by the then Commission on Human Rights of the *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003), available at <<http://www1.umn.edu/humanrts/links/norms-Aug2003.html>> (hereinafter '*Norms 2003*') in 2005, on which see David Kinley & Rachel Chambers: 'The UN Human Rights Norms for Corporations: The Private Implications of Public International Law' (2006) 6 *Human Rights Law Review* 447-97, as well as notes 30 & 31 below and accompanying text.

² Roberto Dañino, (the then) Senior Vice President and General Counsel, The World Bank Group, in a speech delivered at the World Bank Legal Forum: Law, Equity and Development, 1 December 2005, available at <<http://siteresources.worldbank.org/INTLAWJUSTICE/214576-1139604306966/20817193/LegalForum2005.pdf>> (visited 29 January 2008) and see further Roberto Dañino: 'Legal Aspects of the World Bank's Work on Human Rights: Some Preliminary Thoughts', in Philip Alston & Mary Robinson (eds): *Human Rights and Development: Towards Mutual Reinforcement* (Oxford; New York: Oxford University Press 2005) 509-524. Dañino's successor Ana Palacio has endorsed this interpretation; see Ana Palacio: 'The Way Forward: Human Rights and the World Bank', October 2006, at <<http://go.worldbank.org/RR8FOU4RG0>> (visited 29 January 2008). It must be said, however, that such high level rhetoric is neither repeated, nor borne out at the level of the Bank's practice; see Mac Darrow: 'A Human Rights-based Approach to Development: Theoretical and Operational Issues for the World Bank', in Sage & Woolcock (eds): *The World Bank Legal Review: Law, Equity and Development* (Washington, D.C.: The World Bank; The Hague: Martinus Nijhoff 2006) 385-417.

³ Pascal Lamy, in his report on the Doha Round to the WTO General Council on 27 July 2007, noted that "some good progress has been made across the board over the last few months", but there are "some significant differences which remain to be resolved". See 'Report by the Chairman of the Trade Negotiations Committee', 27 July 2007, at <http://www.wto.org/english/news_e/news07_e/tnc_chair_report_july07_e.htm> (visited 29 January 2008).

⁴ Thus, for example, the Preamble to the Marrakesh Agreement 1994 declares the parties' concern with no less than the following: raising standards of living, ensuring full employment, advancing real income levels, expanding production and trade in goods and services, respecting the precepts of sustainable development and the protection and preservation of the environment, all in a manner consistent with the respect for the different levels of economic development between states. See *Marrakesh Agreement establishing the World Trade Organisation*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995).



What is striking about this potential is the extent to which it relies upon – indeed, to a significant degree, is driven by – private non-state actors, namely corporations. Transnational corporations (TNCs) in particular are the engines of the global economy; they have become the ‘Behemoths’ as Noreena Hertz calls them, whose power has been “propelled by government policies of privatisation, deregulation and trade liberalisation, and the advances of communications technologies of the past twenty years”⁵. Aid agencies, furthermore, no longer shun private enterprise as either merely incidental to, or possibly even antithetical to the goals of poverty reduction, but rather embrace it as a sister in arms in the struggle to help the poor.⁶ With the increasing centrality of the role played by corporations in driving global commerce, trade and development comes increasing levels of corporate power – political and social, as well as economic – that causes a reappraisal of the capacity, let alone suitability, of international law to regulate the use of that power. This article seeks to provide a framework within which to understand the nature of the relations between corporations and the protection of human rights in today’s globalised economy and what role human rights laws can and do play in regulating the relationship.

B. TWO GLOBALIZATIONS ... AND THE RISE OF CORPORATE AUTHORITY

Though international economic relations have a long history stretching back to the earliest times when peoples began to trade and travel between communities or states, the full force of economic globalization has only really been brought to bear over the last half century or so. Over the same period, human rights have also been undergoing a process of globalization or “universalization”. In many respects their paths have been running parallel to each other, but there have been, and there are today, important crossovers.

The growth of both global economic intercourse and universal human rights standards has been aided by certain important phenomena of the late 20th Century and early 21st Century. The first of these is de-colonization, especially during the immediate post-war years up until the mid-1970s. The subsequent attainment of independent statehood by many former colonies provided their peoples with the opportunity not only to realise the key human right of self-determination, but also to engage in international relations in their own right. The second important phenomenon has been the rapid growth of international organizations and international regimes covering a vast array of subject areas. These legal regimes and the international institutions they gave birth to have certainly hastened the spread of global interrelations in all these fields. Conspicuous and variously powerful intergovernmental organizations (IGOs), such as the United Nations, the

⁵ Noreena Hertz: *The Silent Takeover* (London: Heinemann 2001) 8.

⁶ The 2004 report of the UNDP’s Commission on Private Sector Development declared its mission to be “about acknowledging that the private sector is already central to the lives of the poor, and has the power to make those lives better [... and] about using the managerial organization and technological innovation that resides in the private sector to improve the lives of the poor”; UNDP Commission on Private Sector Development: *Unleashing Entrepreneurship: Making Business Work for the Poor* (New York: UNDP 2004) 5.



ILO, the OECD, the IMF, the World Bank and regional development banks, as well as the WTO and regional trading blocs have a pervasive impact – both ways – on the protection and promotion of human rights within the global economy. Third, the enormous advances in speed and capacity in technology, especially as regards travel, telecommunications, and technology transfer over the last twenty years or so, have facilitated ever-expanding means by which we interconnect with each other across countries, continents and cultures.⁷

Finally, and most especially, alongside these developments, and sometimes constitutive of them, has been the escalation of the presence and power of transnational corporations (TNCs).⁸ Today, the economic capacities of some TNCs go beyond the economic capacities of the countries in which they operate, and their corollary political muscle can be greater than the ability of some states to regulate them effectively.⁹ The expansion of the global economy has been accompanied, and at times led, by these ‘super corporations’.¹⁰ The corporate world has demonstrable global reach and capacity and can often make and act on decisions far faster than governments. With this increased power to impact rights comes responsibility. But the nature, scope and source of such responsibility remains a matter of debate.¹¹ The burgeoning corporate responsibility movement aims to put this efficiency to greater use by employing the corporate machinery in the protection of human rights.

In terms of human rights the great expansion of the global economy has brought advantages and disadvantages. On the one hand it is true that greater economic wealth has the potential to provide the basis for many human rights – such as the economic and social rights to work and wages, shelter, food and water, health care, education and raised standards of living generally. Such greater wealth may also assist in the attainment of other

⁷ “Globalization has led to the opening, the vanishing of many barriers and walls, and has the potential for expanding freedom, democracy, innovation, social and cultural exchanges while offering outstanding opportunities for dialogue and understanding”; Pascal Lamy: ‘Humanising Globalization’, 30 January 2006, <http://www.wto.org/english/news_e/sppl_e/sppl16_e.htm> (visited 29 January 2008).

⁸ The term ‘transnational corporation’ refers to an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries – whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively. *Norms 2003* art I, see note 1.

⁹ United Nations Research Institute for Social Development (‘UNRISD’): *Corporate Social Responsibility and Business Regulation*, Research and Policy Brief 1 (2004) <[http://www.unrisd.org/80256B3C005BCCF9/\(httpPublications\)/F862A71428FAC633C1256E9B002F1021?OpenDocument&fromsearch=yes&query=research+and+policy+brief](http://www.unrisd.org/80256B3C005BCCF9/(httpPublications)/F862A71428FAC633C1256E9B002F1021?OpenDocument&fromsearch=yes&query=research+and+policy+brief)> (visited 29 January 2008).

¹⁰ As noted by Andrew Clapham, there is no reason to exclude national companies from the realm of human rights obligations. See text accompanying note 17 below, and Andrew Clapham: *Human Rights Obligations of Non-State Actors* (New York: Oxford University Press 2006) 201.

¹¹ See generally Justine Nolan: ‘With Power Comes Responsibility: Human Rights and Corporate Accountability’ (2005) 28 *University of New South Wales Law Journal* 581.

rights – such as the civil and political rights to freedom of expression, political and religious beliefs, movement and association, participation in government and privacy. But whether that potential is borne out in practice is another matter. For even if the world's wealth, or a country's wealth, is markedly increased that does not necessarily mean that all will benefit equally, or that disadvantaged groups will even benefit at all. Indeed, it is notoriously difficult to say with certainty what is the impact of increased prosperity on human rights enjoyment, beyond mere platitudes (such as, for some people, they are clearly better respected). Thus, for example, in respect of the circumstantial links between increased foreign direct investment (FDI) and human rights protections, one can only make fairly tentative, general conclusions in this regard (that there is some apparent benefit).¹²

The principal conduits of this 'new wealth' are corporations, in particular TNCs, largely through foreign direct investment. Questions regarding the ambit of corporate responsibility and whether there are mechanisms in law (or policy) for enforcing such responsibility has a direct impact on how increased wealth, and the benefits that go with it, are distributed, whether by public (state) or private (corporate) actors. And it is this question of distribution and the gap between theory and practice that really matters for the realization of human rights; whether that be in respect of the distribution *between* rich and poor countries, or between rich and poor communities *within* countries (both in developed and developing states). The issue of "elite capture" – that is, the notion that the elite few, internationally and domestically, take a hugely disproportionate slice of the economic pie, leaving the many with little¹³ – is a concern in all states, though certainly it is a greater concern in some than in others. From the human rights perspective this is particularly significant because often the reasons for the inequality are based on illegitimately discriminating factors such as gender, social class, race, religion, physical and mental disabilities, existing wealth, political beliefs or even geographical location – all of which are human rights infringements.¹⁴ Furthermore, inequitable distribution of wealth often exacerbates existing inequality, places additional power in private hands and deprives the community of their ability to make positive human rights advances.

C. HUMAN RIGHTS PERSPECTIVES OF THE GLOBAL ECONOMY

There are three dimensions of the global economy generally, and the role of corporations

¹² See Bjørn Letnes: 'Transnational Corporations and Human Rights: Silencing the Ontological Controversy' (2004) 4 *Public Organization Review* 259, 269–70.

¹³ See Mac Darrow and Amparo Tomas: 'Power, Capture, and Conflict: A Call for Human Rights Accountability in Development Cooperation' (2005) 27 *Human Rights Quarterly* 471, see especially 474–7.

¹⁴ See UNDP: *Human Development Report 2005: International Cooperation at the Crossroads: Aid, Trade and Security in an Unequal World* (New York: United Nations Development Program 2005) 5. It is to address these same disparities in circumstance and opportunity that the *Millennium Development Goals* were established in 2000 – see <www.un.org/millenniumgoals/> for details.



in particular, that have attracted the attention of those concerned with human rights – namely commercial enterprise, trade and investment, and aid-based development.

1. COMMERCIAL ENTERPRISE

The phenomenon of transnational corporations is not new, but the continually increasing levels of power and influence of TNCs within the global economy of today is unprecedented. It has been calculated, for example, that of the top 100 economies in the world today, 51 are corporations and only 49 states.¹⁵ With such massive economic power at their disposal, TNCs therefore have capability to do great harm as well as good for human rights, at both the global and domestic levels. It has been on this basis that calls for corporations to be made responsible for the human rights consequences of their actions have increasingly been made, especially over the past 10 to 15 years.

The role that corporations play in domestic and international economies is fundamental. Their impact on human rights is equally important. Through commercial activity driven by corporations, jobs and wages are made available, goods and services are provided and taxes are paid enabling governments to provide further goods and services. Thereby, directly or indirectly, a vast array of human rights may be supported – from rights to work, welfare, food and shelter, health and education, and freedoms to speech, association, movement. In short, not only are corporations central to the provision of many of the things that make human life more tolerable, enjoyable and fulfilling, the work and wages that corporate enterprise brings to all communities are key elements to the establishment and maintenance of individual human dignity to which end human rights strive to meet.¹⁶

However, the influence of corporations on human rights is not all benign. Corporations, both local and multinational, have been and continue to be minor and major abusers of human rights. Some corporations are guilty of treating workers badly – in terms of pay, conditions and working environments; some do pollute the environment in ways that have dramatic and serious effects far beyond their immediate surroundings; some do discriminate against indigenous peoples, or certain ethnic or religious groups, or against women, or people with disabilities, or on grounds of sexuality; and some do work alongside (or inside) governments that perpetrate gross human rights abuses, such as in Nazi Germany, Apartheid South Africa, and in the many authoritarian and repressive states in the world today.¹⁷

¹⁵ Sarah Anderson and John Cavanagh: *Top 200: The Rise of Global Corporate Power* (Washington, D.C.: Institute of Policy Studies 2000).

¹⁶ In an influential study conducted for the World Bank in 2000 involving data collected from more than 60,000 poor people from countries all over the world, the number one mentioned answer to the question of what they needed to improve their lives was “employment”; see Deepa Narayan, Robert Chambers, Meera Kaul Shah and Patti Petesch: *Voices of the Poor: Crying Out for Change* (New York: Published for the World Bank, Oxford University Press 2000).

¹⁷ See Beth Stephens: ‘The Amoral of Profit: Transnational Corporations and Human Rights’ (2002) 20 *Berkeley Journal of International Law* 45. For a wealth of information on the all aspects of

At the domestic level, both sides of this relationship are relatively well recognised, even if the consequences are not necessarily adequately dealt with. In all Western states and increasingly so in developing nations there are laws that impose obligations on corporations, explicitly or implicitly protecting human rights standards. These include laws covering occupational health and safety at work, employment conditions and wage levels, environmental protection, non-discrimination, employees' rights to privacy, movement and association, and rights to free speech and fair trial.¹⁸

However, at the international level it is another story, for there are presently very few legal obligations that bind corporations operating trans-nationally in terms of human rights. What is more, those few that do exist are very limited in scope and are in fact merely domestic laws that happen to have extra-territorial (that is, international) application.¹⁹ Given the importance of international trade and commerce, this is perhaps somewhat surprising. At the international level, the corporate form is barely recognised, still less directly bound, whether in respect of human rights or any other field. TNCs have been able to operate largely in a legal vacuum because international law including international human rights law imposes no direct legal obligations on corporations. The traditional application of international human rights law is to bind states because states have long been regarded as the most prominent potential violators of human rights. The drafters of the Universal Declaration of Human Rights (UDHR) could not have foreseen in 1948 that select states' powers might one day be dwarfed by corporate power. As such the emphasis in the UDHR, and in international human rights law generally, is on states as the primary bearers of human rights responsibility. However, while international law does not address (or at least rarely addresses)²⁰ corporations *directly*, the state's duty to protect against

corporate interaction on human rights issues, see the "Business and Human Rights" website, at <www.business-humanrights.org/>.

¹⁸ See David Kinley: 'International Human Rights as Legally Binding or Merely Relevant', in Bottomley & Kinley (eds): *Commercial Law and Human Rights* (Aldershot: Ashgate Dartmouth 2002) 25–45.

¹⁹ See Stephen R. Ratner: 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 *Yale Law Journal* 443; and David Kinley & Junko Tadaki: 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law' (2004) 44 *Virginia Journal of International Law* 931, 934–5.

²⁰ While the notion of direct responsibility being placed on corporations appears radical, it is not the first time duties have been placed on them in international law. It has been noted that TNCs also have direct duties under some multilateral conventions. For example, both the *International Convention on Civil Liability for Oil Pollution Damage*, opened for signature 29 November 1969, 973 UNTS 3 (entered into force 19 June 1975) and the *Council of Europe Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment*, opened for signature 21 June 1993, (1993) 32 ILM 1228 (not yet in force) directly impose liability on legal persons including corporations; see Ratner above note 19, 480 *et seq.*, and Kinley & Tadaki, above note 19, 946–7.



non-state human rights abuses within their jurisdiction (which includes abuses by corporations) is firmly enshrined in international law.²¹

However, the vision of human rights protection is not always commensurate with the practice, and it is evident that some states while welcoming the investment offered by TNCs have been unwilling or unable to react to corporate human rights abuses. Compounding the problem is the crucially unresolved legal issue of whether a state's obligations that may flow from international human rights law generally to protect against corporate related human rights abuses extend beyond its jurisdiction (that is, extra territorially or internationally). In a report²² by the Special Representative of the Secretary General (SRSG) submitted to the UN Human Rights Council in 2007, the SRSG suggests that international human rights law is more ambiguous in this regard. The Report suggests that while human rights treaties do not require states to exercise extra territorial jurisdiction over corporate human rights abuses, nor do they prohibit a state from doing so.²³ However, the basis for exercising such jurisdiction and the nature of the subject matter which might justify such action (for example, is protection justified for all corporate human rights abuses) is still a matter of debate. It is this ambiguity which is central to the creation of the permissive international 'human rights free' environment in which some corporations seem to now operate.²⁴

²¹ As typically provided in international human rights instruments (see, for example, Article 2(1) in both the *International Covenant on Civil and Political Rights* 1966 and the *International Covenant on Economic, Social and Cultural Rights* 1966). Also see John Ruggie: 'Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts', UN Doc. A/HRC/4/035, 9 February 2007, at Section I; available at <<http://www.business-humanrights.org/Documents/SRSG-report-Human-Rights-Council-19-Feb-2007.pdf>> (visited 29 January 2008).

²² John Ruggie, see note 21.

²³ John Ruggie, above note 21, para. 15. Also see further reports of the SRSG on this issue: John Ruggie and OHCHR: 'State Responsibilities to Regulate and Adjudicate Corporate Activities under the United Nations' core Human Rights Treaties: Individual report on the International Covenant on Economic, Social and Cultural Rights', Report No. 2, May 2007 <<http://www.reports-and-materials.org/Ruggie-report-ICESCR-May-2007.pdf>> (visited 26 August 2007); and John Ruggie and OHCHR: 'State Responsibilities to Regulate and Adjudicate Corporate Activities under the United Nations' core Human Rights Treaties: Individual report on the International Covenant on Civil and Political Rights', Report No. 3, June 2007, <www.reports-and-materials.org/Ruggie-ICCPR-Jun-2007.pdf> (visited 26 August 2007).

²⁴ See Olivier de Schutter: 'Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations', December 2006, <<http://www.reports-and-materials.org/Olivier-de-Schutter-report-for-SRSG-re-extraterritorial-jurisdiction-Dec-2006.pdf>> (visited 29 January 2008), which paper is concerned with filling the gaps in international and domestic laws wherein lies refuge or impunity for corporate abusers of human rights.

The inability of the international legal framework to keep pace with the rise of the corporation as a significant non-state actor has resulted in the emergence of a multiplicity of approaches which aim, in significantly varying degrees, to impose some such level of responsibility on corporations.²⁵ There now exist a great number of voluntary codes of conduct devised or adopted by individual corporations, industry groups or international organizations (such as the UN's *Global Compact*, and the OECD's *Guidelines for Multinational Enterprises*).²⁶ Many of these initiatives have a very broad coverage with only brief references to human rights. Generally, while such 'codes' encourage companies to promote and protect internationally recognised human rights, there are no effective, independent enforcement mechanisms to ensure they do so. Decisions cannot be enforced directly against a company and their power to compel behavioural changes remains subject to the political will and ability of national governments.²⁷ On a more intimate level, some corporations are now express in their claims as regards human rights. For example, a 2006 survey of Global Fortune 500 firms conducted by the UN's Special Representative on business and human rights, found that a high percentage of respondents report having an explicit set of human rights principles or management practices in place, although the particular human rights highlighted varied between respondents.²⁸

Another, much smaller and distinct category of initiatives, are those that purport to place legal (i.e., *non-voluntary*) obligations on corporate behaviour overseas. TNCs are subject not only to the laws existing in the states in which they operate ('host' states), but also in their 'home' states (that is, where their headquarters are). An example of the latter, so-called 'extra-territorial' laws, is the United States *Alien Torts Claims Act* (1789) (ATCA) which has now been used against many United States-based corporations for alleged breaches of certain international human rights standards.²⁹

In terms of legally binding obligations on TNCs, what is apparent from the preceding discussion is the glaring lack of provisions at international law – that is, despite the fact that by definition such corporations are operating internationally. The UN's Human

²⁵ For an overview of all the various forms, see the UN Office of the High Commissioner for Human Rights (OHCHR): *Report on the responsibilities of transnational corporations and related business enterprises with regard to human rights*, UN Doc. E/CN.4/2005/91, (15 February 2005) paras 7–22, available at <http://www2.ohchr.org/english/issues/globalization/business/reports.htm>.

²⁶ See Deborah Leipziger: *The Corporate Responsibility Code Book* (Sheffield: Greenleaf 2003) for a compilation of the principal such codes and initiatives.

²⁷ Nolan, see note 11,587.

John Ruggie: 'Human Rights Policies And Management Practices Of Fortune Global 500 Firms: Results Of A Survey', *Corporate Social Responsibility Initiative, Working Paper No. 28* (Cambridge, MA: John F. Kennedy School of Government, Harvard University 2006), 4. A total of 102 companies completed the questionnaire, and of those, nine out of ten reported having an explicit set of human rights principles or management practices in place.

²⁸ For an overview, see OHCHR Report, above note 25, paras. 23–55.

²⁹ *Norms 2003*, above note 1.



Rights Norms for Corporations³⁰ were in part intended to fill this gap, and the arrival of the Norms on the international scene in 2003 provided some ground for believing that this status quo might be challenged. However, the Norms – which comprise a set of human rights obligations directed at companies, but which would be imposed upon them by way of the usual means of international law, namely, the domestic laws of individual states – met considerable resistance from the corporate community.³¹ In his Interim Report of 2006, the SRSG argued that that the manner in which the Norms are framed must be abandoned, but that their substance may be resurrected in a new and less controversial format.³² The future of the Norms remains clouded but they have been a beneficial and fruitful initiative, reinvigorating debate on the issue of business and human rights, raising new and important concepts regarding regulation of TNCs and enforcement of human rights obligations, and articulating a core set of standards for going forward.³³ Voluntary efforts by companies to improve their adherence to human rights are welcomed but alone are insufficient to prevent human rights abuses.

The goals of corporate enterprise and those of human rights are not the same – that much cannot be denied. Human rights protection is not a key factor in the calculations that TNCs typically make. Such protection for human rights that corporations do provide is incidental to their principal goals of growth and profit maximization, and such violations of human rights made by corporations often flow directly from too slavish a devotion to these twin objectives. It would be unrealistic, and indeed undesirable, to insist that corporations should drop their profit motive and substitute it with the object of protecting and promoting human rights, for that would of course be to make corporations something which they are not and never could be. But we are surely in a situation today where the prevalence and power of corporations is such that it must attract suitable levels of regulation and accountability in terms of the impact that they have on human rights, not only at the domestic level, but also in international relations.

2. INTERNATIONAL TRADE AND INVESTMENT

International trade is fundamentally a concern of corporate commercial enterprise. States may indeed make the rules – by way of multi-lateral or bi-lateral treaties or the

³⁰ For discussion of the various responses to the Norms, see David Kinley, Justine Nolan and Natalie Zerial: 'The Politics of Corporate Social Responsibility: Reflections on the United Nations Human Rights Norms for Corporations' (2007) 25 *Company and Securities Law Journal* 30.

³¹ John Ruggie: *Interim Report of the Secretary-General's Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc. E/CN.4/2006/97 (22 February 2006), para. 69, available at <http://www2.ohchr.org/english/issues/trans_corporations/reports.htm> (visited 29 January 2008).

³² Kinley, Nolan and Zerial, above note 31.

³³ "[TNCs] are the driving force behind globalisation. Through their production, trade and investment activities, they are integrating countries into a global market." Oxfam: *Rigged Rules and Double Standards: Trade, Globalisation, and the Fight Against Poverty* (Oxford: Oxfam 2002) 175.

establishment of trading blocs (e.g., the EU or NAFTA) or trading governing bodies (e.g., the WTO) – but it is corporations, and mainly private corporations, that actually do the trading and thus have a powerful effect on the protection, or not, of human rights.³⁴ In fact, Braithwaite & Drahos contend that the reality behind even the first leg of the above sentence is questionable, as in their monumental study of global business regulation, they found that business leaders are more likely to dictate the terms argued by their state's trade representatives, rather than the other way around.³⁵

It is argued that increased economic development and wealth will flow from the expansion of global trade, and global trade will expand by way of the dismantling or domestic trade barriers. Certainly, greater global wealth is demonstrably apparent,³⁶ and indeed so it is with most countries on an individual level (with a number of sub-Saharan African states constituting the startling exceptions that prove this rule).³⁷ Certainly too, many are convinced that this growth is the direct result of massively increased international trade over the past 15–20 years borne on the back of aggressive (if not altogether consistent) policies of trade liberalisation. Not unsurprisingly, perhaps, trade experts and advocates or leaders of trade organisations tend to be among those true believers.³⁸

However, the concerns of many human rights advocates are focussed first on whether the reliance on the operation of the notion of comparative advantage in the open market to yield such advances in economic development always (or even often) delivers on its promise; and second, even when it does, on whether that necessarily translates into the equitable and widespread improvement of social circumstances generally, and human rights in particular. At the national level, the standard answers to these twin questions are that the market, given time, will deliver on the first, and that the market as appropriately

³⁴ John Braithwaite & Peter Drahos: *Global Business Regulation* (Cambridge: Cambridge University Press 2000) especially 200–01 for their observations on this phenomenon in the US.

³⁵ For global trends in economic growth, see International Monetary Fund: *World Economic Outlook: Spillovers and Cycles in the Global Economy: April 2007* (Washington D.C.: IMF 2007) Chapter 1, available at <<http://www.imf.org/Pubs/FT/weo/2007/01/pdf/c1.pdf>> (visited 29 January 2008).

³⁶ On progress towards the halving of global poverty by 2015 (with the exception of Sub-Saharan Africa), see World Bank, *Global Monitoring Report 2007: Confronting the Challenges of Gender Equality and Fragile States*, (Washington D.C.: World Bank 2007) Chapter 1, available at <http://siteresources.worldbank.org/INTGLOMONREP2007/Resources/3413191-1179404785559/Chp1-GMR07_webPDF-corrected-may-14-2007-4.pdf> (visited 29 January 2008).

³⁷ See for example, Pascal Lamy, WTO Director-General: 'Trade is a 'Fundamental Tool' in the Fight against Poverty', speech delivered to the United Nations Conference on Trade and Development (UNCTAD) in Geneva, 6 October 2005, available at <http://www.wto.org/English/news_e/spp1_e/spp105_e.htm> (visited 29 January 2008).

³⁸ Because, it is argued, the main "civilising" influence on the otherwise crude capitalist quest for profit is the market itself, which turns capitalism into "an engine of social progress"; see Simon Cox (ed.): *Economics: Making Sense of the Modern Economy*, (2nd ed., London: The Economist, Profile Books 2006) 6.



tempered (usually meaning lightly so)³⁹ by state regulation and intervention, will yield the second, or at least as best as is possible.⁴⁰

The variety of ways in which states formulate and pursue their market interventions is as great as are their relative successes. What we are concerned with here is both the international and corporate dimensions of the balance – that is, to what extent do the institutions and mechanisms of international trade promote or retard human rights, and whatever the extent and direction, what role is played by corporations?

The broad historical context in which the brave new world of global trade exists today is as important to answering these questions as are the specifics of certain initiatives, approaches and proposals that might bring human rights and trade rules together. For what can be said with certainty about the mixing of trade and human rights is that the single most important bone of contention between the ‘old’ free trading countries of the West and the ‘new’ free trading countries in the developing world, is that the former were able to build their economies on the back of very strong protectionist policies, which policies are now being largely denied to developing countries, just at the time when they are seeking to expand their economies. And what is more, some of those old barriers still exist in the West, especially in the areas of agriculture.⁴¹

Specifically, within the WTO regime, there are few clear avenues by which corporations, let alone human rights concerns, can gain entry, and even less scope to take centre stage. To a very substantial degree this is due, in respect of corporations, to the fact that it is a state-membership organization, and in respect of human rights, to the mandate of the WTO and the main trade instruments over which it presides. Although the Marrakesh Agreement that established the WTO⁴² expressly alludes to concerns for the broader socio-economic and environmental consequences of trade liberalization, especially in relation to developing economies, such references are nonetheless viewed in practice to be desirable outcomes – rather than binding legal obligations⁴³ – of the main business of state parties “contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade rela-

³⁹ See Floris van Hees, ‘Protection v Protectionism: The Use of Human Rights Arguments in the Debate For and Against the Liberalisation of Trade’ (2004), <<http://www.abo.fi/instut/imr/norfa/floris.pdf>> (visited 29 January 2008).

⁴⁰ See the UN Conference on Trade and Development (UNCTAD): ‘Trade Liberalisation and Poverty Reduction in LDCs’ (Chapter 5), in *Least Developed Countries Report 2004: Linking International Trade with Poverty Reduction* (Geneva: UNCTAD 2004), available at <http://www.unctad.org/en/docs/ldc2004p2ch5_en.pdf> (visited 29 January 2008).

⁴¹ See Marrakesh Agreement, above note 4.

⁴² See Jagdish Bhagwati’s dismissive comment in this regard in ‘Afterword: The Question of Linkage’, Symposium: The Boundaries of the WTO (2002) 96 *American Journal of International Law* 126 at 133: “Many of us nonlegal intellectuals and experts think that the preamble is like the overture at the opera: the audience is free to rustle through the libretto and even whisper to friends until the real opera begins!”

⁴³ Preamble to the Marrakesh Agreement, above note 4, Third paragraph.

tions".⁴⁴ The emphasis on developing states has nonetheless created the foundation upon which certain specific initiatives have been built that have – directly or indirectly – promoted human rights ends.

All that said, to the extent that there are features of the WTO regime that address human rights concerns (or might be read to do so) they operate at the state-to-state level, with or without the intermediary of the WTO. Thus, the WTO's so-called 'enabling clause'⁴⁵ that permits contracting parties to "accord differential and more favourable treatment to developing countries", has been the cornerstone of a Generalized System of Preferences (GSP) that the USA and European Union in particular have couched in terms that expressly tie adherence to (or at least recognition of, in the form of treaty ratifications) international human rights standards.⁴⁶ And there are various other key trade laws that also allow exceptions to the obligation to remove or not to erect trade barriers when there are demonstrable human health and environmental concerns,⁴⁷ where goods are the product of prison labour⁴⁸ and where national security,⁴⁹ public order,⁵⁰ or public morals⁵¹ would otherwise be compromised – all of which can be presented as the raising of barriers on grounds related to, if not directly expressive of, international human rights standards.⁵² Additionally, it has also been argued that such attempts at the textual incor-

⁴⁴ A product of the Tokyo Round of Trade Negotiations, which though not constituting a part of the GATT, nonetheless has legal force by virtue of it having been agreed to by all GATT signatories; see GATT, *Basic Instruments and Selected Documents*, 26th Supplement (1980), 203–5; also reproduced at <http://www.wto.org/english/docs_e/legal_e/enabling1979_e.htm> (visited 29 January 2008).

⁴⁵ See Emilie Hafner-Burton: 'Trading Human Rights: How Preferential Trade Agreements Influence Government Oppression' (2005) 59 *International Organization* 593; and Lorand Bartels: 'The Appellate Body Report in *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries* and its Implications for Conditionality in GSP Programmes', in Thomas Cottier, Joost Pauwelyn and Elisabeth Bürgi Bonanomi (eds): *Human Rights and International Trade* (Oxford: Oxford University Press 2005) 463–487.

⁴⁶ See General Agreement on Tariffs and Trade (GATT), opened for signature 30 October 1947, 55 UNTS 187 (provisionally entered into force 1 January 1948) Art XX(b); on the relevant jurisprudence of which article, see Office of the United Nations High Commissioner for Human Rights: *Human Rights and World Trade Agreements: Using General Exceptions Clauses to Protect Human Rights* (New York and Geneva: OHCHR 2005), available at <<http://www.ohchr.org/Documents/Publications/WTOen.pdf>> (visited 29 January 2008); and Gabrielle Marceau: 'WTO Dispute Settlement and Human Rights' (2002) 13 *European Journal of International Law* 753.

⁴⁷ See GATT, above note 47, Art XX(e).

⁴⁸ See GATT, above note 47, Art XXI.

⁴⁹ See the General Agreement on Trade in Services, opened for signature 15 April 1994, 1869 UNTS 183 (entered into force 1 January 1995), Art XIV(a).

⁵⁰ See GATT, above note 47, Art XX(a).

⁵¹ Office of the United Nations High Commissioner for Human Rights, above note 47 at 6.

⁵² Lucas Bastin: 'A New Argument for the Textual Incorporation of Human Rights into WTO



poration of human rights might be more effectively pursued if the jurisprudential tools more familiar to trade law, and especially to trade lawyers, were employed by human rights advocates. For example, the long-established notion of ‘legitimate expectations’ and well recognised defence of ‘necessity’ within DSM Panel decisions might both be amenable to the inclusion of human rights reasons why a state might wish to restrict trade of a particular product or with a particular country.⁵³

In all of these respects the medium is, formally, the state, not corporations. However, in practice, corporate interests are often closely aligned within the broad regulatory framework devised by Braithwaite and Drahos above. For example, corporations are as self-interestedly concerned with promoting the stabilising features of the rule of law and good governance in countries that they invest in or trade with, and these features are contingent on securing many of the civil and political rights and labour standards espoused by the EU and US GSP schemes. The allowable general exceptions clauses such as Article XX of GATT might be – indeed are – invoked or rejected by states at the clear behest of domestic corporate interests. Thus, for example, the US fishing industry’s interests in the having the US pursue the Tuna/Dolphin and Shrimp/Turtle cases,⁵⁴ the competing pressures placed on the EU and the US administrations by their respective agribusinesses to fight out the beef hormones and GMO cases;⁵⁵ the pressures placed on the US gov-

Law: Legitimate Expectations and the Defence of Necessity’, University of Sydney student thesis, 2007, on file with authors.

⁵³ *United States – Restrictions on Imports of Tuna*, Report of the Panel, (GATT DS21/R) 3 September 1991 (‘Tuna/Dolphin I’) and *United States – Restrictions on Imports of Tuna*, Report of the Panel, (GATT DS29/R) 16 June 1994 (‘Tuna/Dolphin II’). *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body (WT/DS58/AB/R), 12 October 1998. On the role of private industry in lobbying the US Trade Representative (USTR) to initiate GATT/WTO cases, see generally, Gregory Shaffer: *Defending Interests: Public-Private Partnerships in WTO Litigation* (Washington D.C.: Brookings Institution Press, and Bristol: University Presses Marketing 2003) at 23–27 and 46–50.

⁵⁴ *EC – Measures Concerning Meat and Meat Products (Hormones)*, Report of the Appellate Body (WT/DS26/AB/R; WT/DS48/AB/R), 16 January 1998; and *EC – Measures Affecting the Approval and Marketing of Biotech Products* (WT/DS291/R; WT/DS292/R; WT/DS293/R), 29 September 2006. The US beef industry’s trade organisations put pressure on the USTR to take their case to the WTO in the *EC – Meat Hormones* case; see Shaffer, above note 54, at 39. On the role of lobby groups in the *EC – Biotech/GMO* case, see Friends of the Earth International & Corporate Europe Observatory: *Business Rules: Who Pays the Price? How Corporate Influence in the WTO Impacts People and the Environment* (Mexico and Uruguay: FOEI and CEO 2003), at 8-9, <www.foei.org/en/publications/pdfs/businessrules.pdf> (visited 29 January 2008).

⁵⁵ *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, Report of the Panel (GATT BISD 37S/200), 7 November 1990. On the ability of the tobacco industry to enlist the support of the US government in overcoming trade barriers in developing states, including in the case of Thailand, see Allyn Taylor: ‘An International Regulatory Strategy for Global Tobacco Control’ (1996) 21 *Yale Journal of International Law* 257, 262-264.

ernment by the tobacco lobby to mount the Thai cigarettes case,⁵⁶ and the barely disguised Kodak/Fuji dispute that was formally pursued through the surrogacy of the US and Japanese governments respectively.⁵⁷ This is not to say that this is necessarily illegitimate, it just exposes what is the reality of the economic and political leverage that the corporate lobby exercises in all nearly all states – whether developed or developing – in respect of a whole array of government policies; international trade is no exception.

The situation is somewhat similar even in respect of the more ambitious proposals to explicitly align trade and human rights concerns, including and especially regarding calls for the incorporation of a so-called “social clause” into the WTO framework agreements. The establishment of a more comprehensive set of permissible human rights barriers to free trade incorporated in such a device would institute a much wider range of social issues (including human rights concerns, especially relating to minimum labour standards) that might be used as reasons for one country to erect trading barriers in respect of the importation of certain goods from another country.⁵⁸ The explicit mixing of human rights and trade goals in this way is strongly resisted in many quarters, including by corporations, and supported in some others.⁵⁹

The area in which the most direct results have been achieved in respect of trade mechanisms that protect human rights has been where the strategies have been targeted directly at corporations (selective public procurement – SPP) or as a direct consequence of inter-governmental agreement (Doha Declaration on TRIPs and Public Health in 2001).⁶⁰ As with the various text-based exceptions discussed above, both types of measures here represent permissible limitations to otherwise core obligations placed on states to free up trade relations between each other. The essential difference to the mix is the added ingredient of corporations. Under SPP measures states make threshold demands as regards human rights protections of corporations that wish to bid for public sector contracts. They

⁵⁶ *Japan – Measures Affecting Consumer Photographic Film and Paper*, Report of the Panel, (WT/DS44/R) 31 March 1998. Though not an Art XX case, we include it here on account of the unambiguously corporate-led actions. The case was openly referred to as having been brought by the US against Japan, “at the behest of Kodak”; see South-North Development Monitor: ‘Kodak-Fuji War before the WTO’, 3 October 1996, <<http://www.sunsonline.org/trade/process/followup/1996/10040096.htm>> (visited 29 January 2008).

⁵⁷ See Virginia Leary: ‘The WTO and the Social Clause: Post-Singapore’ (1997) 8 *European Journal of International Law* 118.

⁵⁸ Robert Joss and Anita Chan outline the diverse views of developing country trade unions on the desirability of the ‘social clause’, see Joss and Chan: ‘From North-South to South-South: The True Face of Global Competition’ (2002) 81 *Foreign Affairs* 8, 9.

⁵⁹ WTO Ministerial Conference, *Declaration on the TRIPS Agreement and Public Health*, adopted on 14 November 2001, WT/MIN(01)/DEC/2, at: <http://www.wto.org/English/thewto_e/minist_e/min01_e/mindecl_trips_e.htm> (visited 29 January 2008).

⁶⁰ Katherine Zeisel: ‘The Promotion of Human Rights by Selective Public Procurement Under International Trade Law’ in Olivier de Schutter (ed.): *Transnational Corporations and Human Rights* (Oxford, UK; Portland, US: Hart Publishing 2006) 361–391.



are intended directly, “to create incentives for companies and their host states to improve human rights conditions”⁶¹. Government procurement is not an insignificant portion of the economies of almost all states, varying, it is estimated, between 10% and 30% of the GNP of states.⁶² They are malleable instruments in that they can be designed to address the abusive activities of either foreign or domestic corporations, or both, and they can be just as effective whether the government is national or sub-national, as demonstrated by (the now disbanded) Massachusetts’ SPP, which excluded corporations that did business in Burma from bidding for state government contracts.⁶³ Both the US and the EU have established permissive stances towards members states’ use of the device, despite the concerns held by some that such state intervention on non-trade grounds will interfere with the commercial objects of trade and further, that it might be abused such as to disguise essentially protectionist measures. And while in respect to the later concern, the WTO is very much alive, it has, since 1994, specifically exempted SPP from the scope of the GATT. Evidence upon which to make meaningful judgements about the efficacy of SPP measures in promoting human rights observance is simply not available at present, but the increasing interest in corporate accountability mechanisms in the other parts of the global economy covered in this essay points to a likely increase in their use by governments.

The Doha Declaration on TRIPs and Public Health in 2001 is an inter-governmental agreement that institutes a regime under which developing countries such as India, Brazil, Malaysia and Thailand are able to manufacture cheap, generic copies of otherwise patent-protected drugs which are the property of pharmaceutical corporations.⁶⁴ What is unusual about this international arrangement is that, in practice, it is not an inter-national process at all, but rather a negotiation between states and corporations. The Declaration provides the framework in which individually or collectively, states and corporations

⁶¹ Katherine Zeisel, above note 61, 362.

⁶² For a discussion of the political and legal context of the Massachusetts Burma law, see Peter Fitzgerald: ‘Massachusetts, Burma and the World Trade Organization: A Commentary on Blacklisting, Federalism, and Internet Advocacy in the Global Trading Era’ (2001) 34 *Cornell International Law Journal* 1, especially at 4–10 and 36–44. In June and July 1997, the EC and Japan each issued a complaint against the US in the WTO, alleging that the Burma law violated the Agreement on Government Procurement. On 21 October 1998, the WTO’s Dispute Settlement Body established a Panel, but the Panel agreed to suspend the proceedings, at the request of the parties, on 10 February 1999, due to ongoing constitutional challenges to the Burma law in the US courts. The US Supreme Court ultimately held that the Massachusetts Burma law was unconstitutional (see *Crosby v National Foreign Trade Council*, 530 U.S. 363 (2000)). The WTO proceedings lapsed on 11 February 2000.

⁶³ See the *Declaration on the TRIPs Agreement and Public Health*, above note 60.

⁶⁴ See Davina Ovetz’s account of such voluntary licensing negotiations between Brazil and a group of US pharmaceutical manufactures of antiretroviral medicines, in ‘Making Trade Policies more Accountable and Human Rights-Consistent: An NGO Perspective of Using Human Rights Instruments in the Case of Access to Medicine’, in Wolfgang Benedek, Koen de Feyter & Fabrizio Marrella (eds): *Economic Globalisation and Human Rights* (Cambridge: Cambridge University Press 2007) 170–209, 177.



can hammer out what are in effect concessionary commercial agreements – namely ‘voluntary licensing’,⁶⁵ or, where such agreement is not forthcoming (which so far has been the norm), it re-endorses the right of developing countries to issue compulsory licences for the manufacture of certain health related products in situations of “national emergency or other circumstances of extreme urgency”.⁶⁶

On the face of it therefore, the right to health is given priority over the corporation’s right to the exploitation of its intellectual property, although it should always be borne in mind that the whole TRIPs regime is itself an enormous exception to the free-market ideology of the WTO that expressly serves the interests of corporate holders of IP rights. This fact often seems lost on pharmaceutical companies who thus far have shown an extreme reluctance to negotiate with poorer countries over patent rights, preferring to litigate or threaten litigation instead.⁶⁷

Fundamentally, corporations and trade are symbiotically linked, and as we have seen in this section human rights concerns can, albeit minimally, be inserted into trade relations by way of obligations or inducements directed towards the corporate vehicles of trade. And if such a corporate route is not the only way in which to civilise trade, it is nonetheless a viable and proper one. The corporate lobby at level of national government is, or can be, extremely influential, and as the WTO – as trade lawyers are so keen to remind us – is little more than a construct of its member states, corporations thereby have great influence over the objects, means and methods of global trade.

Whatever the precise role of corporations in the slow and stilted convergence of human rights and trade goals, it is one that will grow rather than diminish. They will be crucial players in the process of advancing trade specialists’ understanding of the concerns of human rights advocates and vice versa, and especially as regards the obligations imposed on states by international human rights law and international trade law respectively.⁶⁸ The question of how to balance economic efficiency through trade, and social justice through human rights protection, remains the key task at hand,⁶⁹ and in that balancing, the choices made by corporations as to where and in what they invest are vital. Foreign direct investment is, as Janet Dine puts it:

a mechanism with great potential benefits, including the provision of stable capital, the importation of skills and technology and access to the largest markets of them all:

⁶⁵ *Declaration on the TRIPs Agreement and Public Health*, above note 60, Art. 5(c).

⁶⁶ See Angela Saini, ‘Making Poor Nations Pay for Drugs’, *NewScientist.com*, 31 March 2007, at <<http://www.newscientist.com/channel/health/mg19325972.800-making-poor-nations-pay-for-drugs.html>> (visited 29 January 2008), who concludes that if pharmaceutical companies are keen to encourage R&D in poorer countries, as they claim to be, then “they should start by setting a better example: litigate less, innovate more”.

⁶⁷ See Floris van Hees’s excellent canvassing of both sides of the debate, above note 40, at 24–32.

⁶⁸ See Miguel Gonzalez: ‘Trade and Morality: Preserving ‘Public Morals’ without Sacrificing the Global Economy’ (2006) 39 *Vanderbilt Journal of Transnational Law* 939, 967–972.

⁶⁹ Janet Dine: *Companies, International Trade and Human Rights* (Cambridge: Cambridge University Press 2005) 22.



‘[e]xchanges *within* TNCs which now account for around two-thirds of world trade flows, reflecting the growth of intra-product trade.’⁷⁰

The fact, however, that so little of it goes to the very poorest countries – sub-Saharan Africa receives about 1% of FDI, whereas, the vast bulk goes into those booming developing economies such as China, India, Brazil, Mexico, Malaysia, Indonesia, Thailand and Vietnam⁷¹ – demonstrates how merciless the market can be for the poorest of the poor. It may be said that it is at this point that international aid steps in, but that, as we shall see in the following section, is itself an ever-more challenging task, as aid budgets pale not only against the demands that are made of them, but also against the enormous increase in the amounts of FDI.⁷²

3. AID-BASED DEVELOPMENT

Of the three pillars that constitute the global economy, the relationship between international aid and human rights has, on the face of it, the least room for corporate enterprise. After all, the post World War II origins of development aid were steeped in the philosophy of the command economy with a focus on public sector economic management rather than encouragement of private sector enterprise.⁷³ However, much has changed over the past 15 years, such that now aid agencies actively court private sector involvement in development projects, not least in an deliberate effort to co-opt the enormous (and growing) economic potential, noted above, that lies in the private sector’s command of FDI.⁷⁴

⁷⁰ Janet Dine, see note 70.

⁷¹ In 2004, FDI inflows into the group of 50 least developed countries (LDCs) reached \$11 billion, the highest level ever. However, this represents no more than 2% of world FDI inflows, demonstrating that FDI flows to LDCs remain low overall. While many LDCs relied on official development assistance (ODA) as their major source of finance in the 1995–2000 period, average annual FDI flows exceeded bilateral ODA for twelve LDCs. Nearly half (24) of the LDCs registered a positive growth rate in FDI flows, and a negative one in ODA flows, for the period 1990–2003. See United Nations Conference on Trade and Development: *FDI in Least Developed Countries at a Glance: 2005/2006* (New York and Geneva: UNCTAD 2006) 1–2, available at <http://www.unctad.org/en/docs/iteiia20057_en.pdf> (visited 29 January 2008).

⁷² For an excellent overview of the issues that lie at the heart of the debate over the links between human rights and development, see UNDP: *Human Development Report 2000: Human Rights and Human Development*, (New York; Oxford: Oxford University Press 2000), chapters 1 and 6.

⁷³ See ‘A Voice for the Poor’, in Cox, above note 39, at 285-7, drawing extensively on the work of Peter Bauer.

⁷⁴ See *Unleashing Entrepreneurship*, above note 6 at 29–37, <http://www.undp.org/cpsd/documents/report/english/chapter4.pdf> (visited 29 January 2008). On the changing face of development, an example is The Global Fund which was established in 2002. It is a Public Private Partnership (PPP) tasked with administering and allocating funds provided by both governments and private sector donors to countries to combat HIV/AIDS, malaria and tuberculosis.

With the increasing involvement of corporations in aid based development comes a correspondingly urgent need to regulate TNC's adherence to international human rights norms so as to reduce the scope for negative human rights impact.

The provision of development aid, whether by multilateral organizations such as the World Bank,⁷⁵ the regional development banks or the European Union, or bilaterally through individual state aid agencies,⁷⁶ is essentially concerned with the alleviation of poverty and improvement of peoples' living standards through the process of economic development.⁷⁷ As such, the aid and development enterprise is, by design or effect, one essentially concerned with the fulfilment of many key human rights. We must, therefore, as Thomas Pogge urges us to, "focus on the human rights of the global poor because the great human rights deficits persisting today are heavily concentrated among them."⁷⁸ In fact, the UN, in its *Vienna Declaration and Program of Action 1993*, states that:

the existence of widespread extreme poverty inhibits the full and effective enjoyment of human rights; its immediate alleviation and eventual elimination must remain a high priority for the international community.⁷⁹

Corporations are now billed by some as the solution to some of deficiencies in current

The Global Fund brings private sector disciplines to the disbursement and evaluation of programs, and operates with much lower overheads than traditional agencies.

⁷⁵ See, e.g., the Articles of Agreement of the International Bank for Reconstruction and Development (IBRD) (part of the World Bank Group), which state that among its purposes are "the development of productive facilities and resources in less developed countries", and "raising [...] standard[s] of living and conditions of labour" (arts 1(i) and (iii), respectively), <<http://go.worldbank.org/7H3J47PV51>> (visited 29 January 2008).

⁷⁶ See, e.g., AusAID's proclamation that the "overseas aid program aims to assist developing countries reduce poverty and achieve sustainable development, in line with Australia's national interest", <<http://www.ausaid.gov.au/makediff/default.cfm>> (visited 26 August 2007); and the United Kingdom Department for International Development's somewhat less cryptic declaration in its Mission Statement, that it is "leading the British government's fight against world poverty", available at <<http://www.dfid.gov.uk/aboutdfid/missionstatement.asp>> (visited 26 August 2007).

⁷⁷ Thus the 2000 Millennium Development Goals – to which 189 states have formally lent their support – have as their first 'goal' to "eradicate extreme poverty and hunger", by halving both the number of people living on less than a USD\$1 a day and those suffering from hunger by 2015, see <www.un.org/millenniumgoals/> (visited 28 January 2008).

⁷⁸ Thomas Pogge: 'Recognized and Violated by International Law: The Human Rights of the Global Poor' (2005) 18 *Leiden Journal of International Law* 717, 718.

⁷⁹ Paragraph 14 of the *Vienna Declaration and Programme of Action*, adopted 25 June 1993, UN Doc. A/CONF.157/23, <<http://www2.ohchr.org/english/law/vienna.htm>> (visited 28 January 2008). The *Vienna Declaration* was the product of the United Nation's World Conference on Human Rights in 1993.



development dilemmas⁸⁰ but their place within the development paradigm is complex and largely unregulated. Regulation specifically focused on the impact of business on development is a relatively new arena and while many examples of business incursions into the development sphere are ‘regulated’ largely on the domestic front,⁸¹ the human rights accountability gap arises when such states are unable or unwilling to regulate corporate activity in a manner that is consistent with providing human rights protections. Largely in response to civil society agitation, international guidance that forces the merger of human rights and business has begun to emerge in select sectors on the international development front, particularly with respect to the finance industry. The outcry for change is partly a result of the policies of the 1980s when international finance institutions such as the World Bank and the International Monetary Fund actively encouraged developing countries to pursue export led growth, liberalise their trade and investment regimes and privatise state enterprises. During, and following on from this period, the role and impact of TNCs in developing countries expanded, some argue for the better (providing investment, employment, taxation and so on) and some for the worse (because the TNCs were implicated in promoting a particular style of development that prioritised economic development over the people and the environment).

In accordance with the pursuit of such policies, international financial institutions are often perceived to be acting outside any global governance regime for the protection of rights or those affected by their policies. However now, in some cases, there is evidence of reformed attitudes that acknowledge, at least in theory, the growing influence (positive and negative) of corporations in the development sphere and the need for guidance (if not regulation) in the protection of human rights. In 2002, with the backing of the World Bank Group’s International Finance Corporation (IFC), a number of banks working in the project finance sector met to develop a common set of environmental and social policies and guidelines that could be applied globally and across all industry sectors. This led to the drafting of the first set of Equator Principles launched in 2003.⁸² This notion of extending both culpability and responsibility to the traditional ‘silent investment partners’ in order to promote, respect and protect human rights, illustrates the ever-increasing relevance and acceptance of human rights responsibilities to business. The adoption of the Equator Principles reflects the increasing scrutiny that project sponsors and lenders face in dealing with environmental and social issues which surround projects in emerging markets, and can be seen as a direct response, by the adopting banks (and the international financial institutions which encouraged such adoption), to criticism from NGOs and others relating to their past lending practices. Corporations and their financial backers are urged to consider the full impact of their practices on development and adopt a pre-

⁸⁰ Business Today.Com: ‘Encouraging Development’, February 2007, <www.businesstodayegypt.com/article.aspx?ArticleID=7148> (visited 29 January 2008).

⁸¹ For example under local corporations’ law, environmental laws, labour law etc. See text accompanying note 18, above.

⁸² A revised set of principles were released in July 2006, available at <<http://www.equator-principles.com/principles.shtml>> (visited 29 January 2008).

ventative approach to investment. The IFC has also instituted performance standards that companies are required to meet in return for IFC investment funds which include several human rights elements including labour rights, the rights of indigenous people and the surrounding community and the protection of cultural heritage.⁸³ Despite being criticised by some, as not going far enough, the standards are yet another step in the right direction of solidifying the connection between human rights and corporations and the intrinsic role each play in the development sphere.⁸⁴ The World Bank's Corporate Social Responsibility Practice set up to advise developing country governments on public policy roles and instruments they can use to encourage corporate social responsibility is another reminder that when dealing with human rights and development, business should not be left out of the equation. The work of the practice group acknowledges that some of the most significant and systematic contact that most people in low-income countries have with the rule of law is in the workplace and the Bank, along with states and corporations, all have significant roles to play in ensuring that an effective compliance regime is in place to protect individual rights.⁸⁵

Similarly, concern about the impact of corporations on human rights has led to an increased focus on the transparency (or lack thereof) of country's export credit agencies (ECA). Export credit agencies use public funds or a combination of public and private funds to provide loans, guarantees, and insurance in support of overseas investment and exports by domestic corporations and may sometimes fund controversial projects.⁸⁶ The capital that industrial country's ECAs provide to exporters and investors eclipses the contribution of overseas development agencies, other bilateral agencies and multilateral organisations.⁸⁷ Significantly, the 2006 Interim Report of the SRSB singled out "home countries providing investment guarantees and export credits" for frequently not taking "adequate regard for the human rights practices of the companies receiving the bene-

⁸³ See <<http://www.ifc.org/ifcext/enviro.nsf/Content/EnvSocStandards>> (visited 29 January 2008).

⁸⁴ *Report of the Special Representative of the Secretary-General*, above note 21, at para. 51.

⁸⁵ See for example some of the research produced by the World Bank's Corporate Social Responsibility Practice: Gare Smith and Dan Feldman: *Company Codes Of Conduct And International Standards: An Analytical Comparison*, Part I, (Washington D.C.: World Bank/IFC 2003) at 2, available at <http://siteresources.worldbank.org/INTPSD/Resources/CSR/Company_Codes_of_Conduct.pdf> (visited 29 January 2008).

⁸⁶ See for example, the arguments of a non-government organisation, ESCR Net, which argues that the Export Development Canada (EDC) provides considerable support to Canada's mining companies with significant impact on human rights and the environment, and the UK Export Credit Guarantee Department (ECGD) is heavily invested in arms exports: ESCR Net: 'Information on Export Credit Agencies and Human Rights', 2007, <http://www.escr-net.org/resources/resources_show.htm?doc_id=427881> (visited 29 January 2008).

⁸⁷ D. E. Gianturco: *Export Credit Agencies: The Unsung Giants of International Trade and Finance*, (Westport, Conn.: Quorum Books 2001) 69.



fits”.⁸⁸ NGO activism on this issue has helped focus attention on the need to institute safeguards into export credit agencies’ programs, to promote greater transparency and curb corporate led abuse of human rights and the environment. The obligation on national governments to protect human rights includes within it a duty to regulate private actor conduct. As discussed above,⁸⁹ this creates a duty for home states to regulate private financial institutions including those providing export credits and investment guarantees as well as TNC conduct generally, and a recently announced collaborative study between the IFC and the SRSG aims to further examine the relationship between foreign direct investment and human rights.⁹⁰ The startling reality is that the theory of state protection of human rights is not always applied in practice and corporations, wittingly or unwittingly, are often able to operate in a largely ‘human rights free zone’.

In practice, the delivery of development aid whether by corporations or other agencies has many dimensions. Some of those can be viewed as directly contributing to human rights goals, like the provision of food, clean water, shelter, health care, education and the protection and welfare of children; others more indirectly so, through the provision of power and telecommunication services, and the building of transport infrastructure. Furthermore, in this latter respect, aid is increasingly concerned with the promotion of institutional capacity and individual skills in such areas as the judiciary, government officials, police forces and civil society organisations. Here, aid seeks to support such rights as the right to a fair trial, freedom of expression and association, non-discrimination (on grounds of gender, race, disability, sexuality etc), and political participation.

In analysing the extent to which corporations can and will play a role in modern development thinking and practice and the ensuing intrinsic connection business has with human rights, it is important to recognize that there are certain controversial features of the relationship between human rights and aid. In fact, when discussion is focussed specifically on what role human rights does and ought to play within aid, much discontent is apparent. The concern comes largely from two sources. The first source is represented by many of the multilateral and Western aid agencies themselves, who resist calls for them to adopt a so-called ‘human rights approach’ to aid and development,⁹¹ as, they argue, this would deflect them from their primary economic concerns and thrust them into political issues. This is despite the fact – as demonstrated above – that the development programs of such agencies are already deeply involved with human rights matters.⁹²

⁸⁸ *Interim Report of the Special Representative of the Secretary-General*, above note 32, at 20, para. 79. The Report notes that “the repertoire of policy instruments available to States to improve the human rights performance of firms is far greater than most States currently employ.”

⁸⁹ See text accompanying note 21 above.

⁹⁰ See ‘IFC and UN Cooperate on Study of Investment Contracts and Human Rights’, 7 August 2007, <<http://www.ifc.org/ifcext/media.nsf/content/SelectedPressRelease?OpenDocument&UNID=21BE753E0EEED227852573300058F692>> (visited 29 January 2008).

⁹¹ See, e.g., Mac Darrow and Amparo Tomas, see note 13.

⁹² So much so indeed, that the Human Rights Council of Australia claims in its influential work on the subject, that “development should in fact be properly seen as a subset of human rights”; *The*



The second source of discontent gives rise to the neo-colonial concerns held by the developing countries who are the recipients of Western and multilateral aid. The argument here is that the nature of many of the past and present aid programs is such that they are exporting particular political agendas. Specifically, by making aid conditional (whether explicitly or implicitly) on the recipient states' adherence to certain human rights standards, the donor states are forcing their (typically) liberal, capitalist democratic philosophies onto developing countries.⁹³

Fundamentally, debates over questions of conditionality in terms of human rights – whether heavy or light-handed – centre on the notion of the universality of human rights. For if rights are accepted as universal, and therefore not representative of any one particular political, philosophical or cultural ideology, they then should apply to all states equally. Thus, neither the excuses made by Western states not to promote human rights compliance in others, nor the excuses made by developing states not to abide by human rights standards, are legitimate.

Whatever the political and philosophical disputes, at the practical level, the two notions of human development and human rights have to be seen as interrelated and interdependent, even if it is accepted that they are not coterminous. They are, as Philip Alston puts it, “close enough in motivation and concern to be compatible and congruous, and they are different enough in strategy and design to supplement each other fruitfully.”⁹⁴ An approach that acknowledges, accepts and when necessary is willing to regulate the role played by corporations in the development arena “can thus bring significant rewards, and facilitate in practical ways the shared attempts to advance the dignity, well-being and freedom of individuals in general.”⁹⁵

D. CONCLUSION

Evidently, the impact of the global economy on human rights is extremely significant, even if, as yet, the same cannot be said in respect of the human rights impact on the glob-

Rights Way to Development: A Human Rights Approach to Development Assistance (Marrickville, NSW: Human Rights Council of Australia 1995) 26.

⁹³ An especially unambiguous example of this approach is the Bush Administration's establishment in 2004 of the Millennium Challenge Account – administered by the Millennium Challenge Corporation. To date the appropriation figures are: \$1 billion for 2004; \$1.5 billion for 2005 and \$1.75 billion for 2006; Doug Johnston & Tristan Zajonc: ‘Can Foreign Aid Create an Incentive for Good Governance?’

Evidence from the Millennium Challenge Corporation’, 11 April 2006, at 7; available at <<http://ssrn.com/abstract=896293>> (visited 29 January 2008).

⁹⁴ Philip Alston, ‘A Human Rights Perspective on the Millennium Development Goals’, (2005) <<http://www2.ohchr.org/english/issues/millennium-development/docs/alston.doc>> (visited 29 January 2008), para. 8.

⁹⁵ Alston, see note 95.



al economy. The rise and rise of the transnational corporation as a powerful non-state actor has largely left behind human rights and international law in its wake without proposing any real sustainable mechanisms for holding business accountable for human rights abuses. And yet we agree that it can be said of TNCs that they “play a significant role in generating the gains from trade for both their home and their host countries, since they reallocate resources internationally to maximise efficiency and profits ...”.⁹⁶ But with the important proviso that, for example, the author of these words crucially omits – namely, that this is a role that corporations *can* play. It is neither their destiny always to do so, nor indeed always to do so without also inflicting injustice and harm, including, sometimes, great human rights harm. An important message of our present piece is that the costs (in all respects) of such a footprint cannot and must not be ignored or externalised by the corporate generals and foot soldiers of the global economy. To be sure, they can, and do, do good, and that much we must be very careful to harness, but the bad must be acknowledged and attended to as well. And that challenge is one that falls to human rights advocates as well as the corporate sector to meet.

The part that human rights plays in the corporate world must be strengthened if we are to ensure the wider distribution, and the deeper penetration of increasing wealth and protection of the disadvantaged from the worst excesses of economic globalisation; a quest to “humanise globalization,” as Pascal Lamy rather grandly puts it.⁹⁷ The voluntary adoption of sector specific human rights standards by corporations whether relevant to commercial enterprise, trade and investment or development is but a temporary brace that supports but will not alone sustain long term human rights protections. With power comes responsibility and not only corporations, but also many states and intergovernmental institutions now recognise the need to more formally protect human rights within the juggernaut of the global economy.

The task is not only one that cries out for strengthening the ties of international cooperation, but is also a task that has important implications for the ways in which countries treat their own citizens. This is as true for the developed economies of the Western countries as it is for countries whose economies and structure of governance are still developing. The former cannot afford to be complacent by relying on the fact that capitalism and democracy have brought relative economic comfort to many of its peoples. For there still exist too many who are disadvantaged and deprived, and whose powerlessness and minority status are too often allowed to blind the majority to their fate.⁹⁸ But equally, where developing countries relegate respect for human rights to second place behind the pursuit of economic growth through autocratic governance, and as pushed by both domestic and foreign corporate interests, they do so at the peril of their people’s welfare

⁹⁶ Kent Jones: ‘The WTO and the Interests of Developing Countries’ in *Who’s Afraid of the WTO?* (Oxford and New York: Oxford University Press 2004), at 171.

⁹⁷ Pascal Lamy, above note 7.

⁹⁸ See David Beetham: *Democracy and Human Rights* (Cambridge, UK and Malden, US: Polity Press 1999) at 106–7, where he discusses JK Galbraith’s critique of democracy’s (especially American democracy’s) reprehensible treatment of the poor, the weak and the deprived.

and their government's legitimacy. Rights and liberties are, as Amartya Sen argues, instrumental and integral to the attainment of development, not merely add-ons to be pursued at some later date.⁹⁹

⁹⁹ Amartya Sen: *Development as Freedom* (New York and Oxford: Oxford University Press 1999) at 36-40.

