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Global Production, CSR and Human Rights:
The Courts of Public Opinion and the Social License to Operate

Prof. Sally Wheeler
s.wheeler@qub.ac.uk

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Abstract:

This paper takes at its starting point the responsibility placed upon corporations by the United Nations' Protect, Respect and Remedy Framework as elaborated upon by the Guiding Principles on Business and Human Rights to respect human rights. The overt pragmatism and knowledge of the complex business relationships that are embedded in global production led John Ruggie, the author of the Framework, to adopt a structure for the relationship between human rights and business that built on the existing practices of Corporate Social Responsibility (CSR). His intention was that these practices should be developed to embrace respect for human rights by exhorting corporations to move from "the era of declaratory CSR"¹ to showing a demonstrable policy commitment to respect for human rights. The prime motivation for corporations to do this was, according to Ruggie, because the responsibility to respect was one that would be guarded and judged by the "courts of public opinion" as part of the social expectations imposed upon corporations or to put it another way as a condition of a corporation's social license to operate.²

This article sets out the background context to the Framework and examines the structures that it puts forward. In its third and final section the article looks at how the Framework requires a corporation's social license to be assembled and how and by whom that social license will be judged. The success or failure of the Framework in persuading corporations to respect human rights is tied to whether "the courts of public opinion" can use their "naming and shaming power" effectively.

1. A Contextual Background to Ruggie's Appointment

Accounts of what appear to be at worst flagrant disregard, and at best disinterest, by corporations of the human rights of individuals reach the mainstream Western media on a regular but atomized basis. Many people in the developed world are aware in very general terms that the production activities of corporations involve power imbalances between the various factors of production and the nation states they are located in. What is much less well known is the complexity of business relationships involved in productive activity. Any attempt to deal with human rights infractions by corporations needs to offer a strategy that addresses this complexity. Examples of recent publicized infractions would be the technology corporation Apple³ and the mineral extractive corporation Rio Tinto⁴ both of which were accused of benefitting from labour practices that abused the human rights of workers in China and Indonesia respectively, with Rio Tinto additionally accused of land grabbing and forced evictions in Madagascar. In both examples neither corporation is in an employee/employee relationship with the workers concerned. In Indonesia Rio Tinto is in an investment role as part of a joint venture at Grasberg mine which is controlled by Freeport (90.6% shareholding) with the remaining shares held by the Indonesian government. In Madagascar the mine in question was part owned by the Madagascar government.

China, Indonesia and Madagascar have very different political and institutional structures from each other and from the US and UK and Australia where these corporations are incorporated and listed. Apple and Rio Tinto fit the classic model of large-scale corporations affecting foreign inward investment into lower cost labour or resource rich economies resulting in export-orientated industrialization in those states.⁵ Apple's production facilities in China are enclosed in a contractual web involving locally based manufacturers who both produce components and obtain them from other manufacturers for further work and onward supply. This illustrates the development of the out sourced production paradigm into global value chains as the inward investment vehicle.⁶ For many industries production is becoming increasingly fragmented into trade in value generating intermediate goods and services with activity located in webs of long term co-production relationships, franchises, affiliated business structures and more traditional arms length supply contracts, hence the name global value chains.⁷ The presence of these chains make the tracking of responsibility for human rights abuses much more difficult. The collapse of the structurally unsound Bangladeshi clothing factory, Rana Plaza, in April 2013 that killed over 1100 workers revealed the tangled web of supply, sub-contracting and labeling relationships that lie behind some consumer products. It is still not clear exactly which fashion chains were sourcing garments or part garments from this factory and on what legal basis they were doing so but they were

numerous.⁸ Some have admitted their involvement while suggesting darkly that others were also involved.⁹ This makes locating an appropriate corporation with sufficient funds to satisfy a tort action in the correct jurisdiction very difficult from a victim perspective.

These issues are not simply about business actors based in Northern and Western states exploiting low cost regulatory regimes in the global South. Capital in the form of FDI no longer flows inexorably from the global North to the global South.¹⁰ The contours of globalization have shifted in recent years to cast new or emerging economies as the host country for corporations which then provide inward investment into other such economies across the global South.¹¹ Nor is it always the case that global value chains are constituted with the largest and so most influential corporation in the chain located in a developed state.¹² Manufacturers in emerging economies are increasingly able to capture more locally driven production and supply more than one customer thus inverting the power base of the chain.¹³ Domestic markets in the global South have expanded enormously with India and China both becoming Asian Driver economies.¹⁴ Global business in terms of FDI flows is much more complex and granular than traditional accounts would suggest that it is. This creates a geopolitical dimension to corporate activity that is subtler in terms of a pattern of winners and losers in relation to human rights abuses and protection than can be addressed by focusing solely on the regulatory relationship between a corporation and its host state.

The example of Apple in China is illustrative of the complex relationship that exists between states and corporations in the control of global production activity. The classic observation is that the growth of corporations in number and economic significance signals a decline in the influence of the nation state and its regulatory power. This is usually supported by the observation that the turnover of the world's largest corporation is greater than the GDP of a large number of states.¹⁵ While technically true this is a rather static description that does not capture the full picture of the interplay between production on a global scale, a global finance system and the desire to industrialize rapidly on the part of many individual states. In fact, the Apple and Rio Tinto examples illustrate the fluidity and complex nature of economic globalization.¹⁶ Industrialization through FDI has changed some parts of some states significantly very quickly and this brings new problems for host nations. The effects of global production produce for some states problems that are not of their making, for example the environmental degradation that results from natural resource extraction. However this activity also allows an economic growth model for that state to be predicated on adding value to natural resources.¹⁷ The proliferation of bilateral investment treaties¹⁸ might restrict the space for host countries to develop their domestic policy in relation to the regulation of corporations but as

these are interstate arrangements in theory they do not directly lead to a leeching of power between state and inward investing corporation.¹⁹

Corporations sometimes act in support of strong governments and sometimes against them. Corporations might, in a weak state, offer a form of stability that the state cannot. On occasions this is done from an altruistic standpoint such as corporate participation in the Global Fund, an international public-private partnership, initiative to fight Aids, TB and Malaria in Somalia.²⁰ In other instances it is done from a more self-interested perspective; for example by providing Aids related health services in parts of S Africa Mercedes Benz is able to secure the supply of a healthier workforce.²¹ States in the neo-liberal era opened up new service markets for corporations by privatizing state monopolies under the blueprint offered by proponents of the new public management school.²² Post the financial crisis of 2008 there has been a further wave of stripping back state functions in favour of private sector provision to serve the interests of austerity. The relationship between state and corporation is one that is constantly evolving with individual citizens more likely to be in direct contact with corporate activity as the role of the state changes in response to a variety of political and economic imperatives that are more nuanced than the naked growth of Western based corporations.

Into this world of complex networked global production came John Ruggie, a Harvard based academic who for some years had worked on globalization and markets and had been Kofi Annan's Assistant Secretary-General for Strategic Planning from 1997-2001. He was appointed as the UN Special Representative for Business and Human Rights in 2005.²³ This was not the first attempt of the UN²⁴ to force an acceptance or even an acknowledgment of responsibility for the effects of business practices into the corporate sector.²⁵ In 2000 the Global Compact²⁶ (of which Ruggie was one of the leading architects) was introduced which encouraged businesses to declare themselves in support of ten core principles around environmental standards, employment practices, human rights and corrupt practices and observe them in their activities.²⁷ Prior to the Compact's promulgation there was the United Nations Draft Code of Conduct for Transnational Corporations set up in 1980. Nor was the United Nations the only supra-national organization suggesting that there should be interventions into the relationship between the corporate sector and the advancement of human rights. The OECD and the ILO both developed positions expressed through codes in 1976 and 1977 respectively.²⁸

What this demonstrates is that the latter years of the twentieth century saw the supporters of an influential international human rights discourse²⁹ increasingly interrogating free market actors about the human rights impact of their activities.³⁰ The public/private divide in the context of corporations has broken down and for

many this is not a desirable state of affairs. In a neoliberal worldview corporations are purely private accumulators of capital and should be required to take little interest in the provision of public benefits.³¹ From a civil society perspective any corporate intervention in the social world is fundamentally anti-democratic; corporations are in terms of structure largely unaccountable in the provision of societal goods unlike a government that has an electoral mandate³² based on the articulation of particular ideological principles. Furthermore corporate executives are likely to be inexperienced in the design and delivery of social interventions.³³

However corporations are both political and public actors not least because of the way in which state governments have systematically ceded their functions to the corporate sector.³⁴ Ruggie's appointment can be seen as the UN response to the need to manage the convergence of global production regimes and the supporting neo-liberal discourse of both states³⁵ and corporations with the discourse of human rights recognition and protection.³⁶ The emergence of CSR as a central feature of corporate behavior at the level of individual firm and at industry sector level is the response offered by capital to ameliorate demands from wider society for greater accountability, transparency and ultimately regulation³⁷ of the activities that generate corporate profit.³⁸ The framework eventually produced by Ruggie, echoing views he had expressed prior to his appointment,³⁹ invites links to be drawn between the discourse of human rights and the discourse and practice of CSR as the next section of the paper explains. Concern for human rights has not to date played a significant role in CSR debates or in corporate policies.⁴⁰ Preuss and Brown report that in their study of human rights policies in FTSE 100 listed companies 42.8% of corporations did not address human rights at all despite having at least one CSR tool in place.⁴¹ The desire to behave in a socially responsible manner did not include the observance of human rights, it seems. The commonality between the two discourses that is being advocated, in effect, by the Ruggie Framework forces us to recognize not only that both discourses require proactive action on the part of corporations but also that these discourses have fundamentally different trajectories, as the text below explains. The third and final section of this paper asks whether the norms of behavior adopted by the corporate proponents of CSR can be subjected to the level of scrutiny required for them to be accepted also as the norms of behavior that will deliver respect for human rights.⁴²

The Global Compact was followed in 2003 by the announcement by the United Nations Sub-Commission for the Promotion and Protection of Human Rights of the Draft Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights.⁴³ The Norms pertained to a basket of rights broadly mapped onto the UDHR and subsequent international covenants and customary law, although the inclusion of economic and social rights

as well civil and political rights marked a significant shift away from the anchoring effect of the UDHR⁴⁴ in terms of expressing human rights obligations. The Norms advocated imposing on corporations and other enterprises over which they held influence an obligation to observe human rights rather than a negative demand not to infringe them,⁴⁵ while still casting states as bearing the primary responsibility for protecting human rights. Criticisms of the norms ranged from the substantive with concerns around the interpretation placed on existing treaty arrangements and the breadth of liability ascribed to corporations⁴⁶ and the meaning of previously unused phrases such as “respective spheres of activity and influence” to more, albeit disputed, procedural concerns with perceived lack of consultation of relevant, ultimately opposing, stakeholder groups.⁴⁷ These Norms were expressly not adopted by the Commission on Human Rights in 2004 even though the Sub-Commission on the Promotion and Protection of Human Rights had endorsed them in August 2003.

This is not the place for a detailed discussion of the Norms⁴⁸ but they are worthy of short mention at this point for two reasons. The first part of Ruggie’s mandate in 2005 involved clarifying some of the contentious concepts used by the norms and second the hostile reception that the Norms received from much but not all of the corporate sector⁴⁹ and some states⁵⁰ is unlikely not to have had an influence on how Ruggie undertook his task and what he considered was possible in terms of devising a structure that would achieve broad acceptability.⁵¹ In 2006 Ruggie explained that his operating credo was one of “principled pragmatism”; a commitment to “strengthening the promotion and protection of human rights ...coupled with a pragmatic attachment to what works best in creating change”.⁵² This view when taken with his ex post facto comments about the desire to avoid his mandate being side tracked into lengthy discussions about the status of legal texts and his position being instead that he wanted to get the “parameters and the perimeters of business and human rights locked down in ...policy terms which could be acted upon immediately and on which future progress could be built” would seem to suggest that the Norms and their failure was on his mind throughout his mandate.⁵³ Ruggie ameliorated two of the most contentious parts⁵⁴ of the Norms early in his tenure; he set up multi-stakeholder consultations that canvassed opinion across five continents,⁵⁵ a practice that he continued throughout his mandate⁵⁶ and he abandoned attempts to base corporate liability on direct obligation, focusing instead on obligations flowing through states for violations of international criminal and humanitarian law.⁵⁷ In relation to corporations he sets out responsibilities which while not binding are intended to be a basis for the monitoring and if necessary remediation of corporate conduct.

2 The Ruggie Framework and Guiding Principles

By April 2008 Ruggie had produced a report, supported by extensive consultation, that created a Framework resting on the three pillars of “protect”, “respect” and “remedy”.⁵⁸ In the three years that followed until 2011 he worked on producing implementation guidance for corporations and states and some of this guidance is discussed below. Protection of human rights is the role of the state expressed as a duty; respect for human rights is the second pillar and is the role given to corporations. The difference in liability for states and corporations expressed as “duty” and “respect” reflects the established view that no legal liability attaches to non-state actors in international law.⁵⁹ Remedying the infringement of human rights is something that corporations should do or should co-operate in legitimate processes that are advanced by the state to effect a remedy. One part of the Norms that Ruggie did retain was contained in this third pillar; corporations should have in place mechanisms for those whose rights have been adversely affected to bring grievances to the corporation’s attention and for their swift resolution. The rights which Ruggie wishes corporations to respect are “all internationally recognised rights”⁶⁰ which are defined in the Guiding Principles of 2011⁶¹ as, at a minimum, the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.⁶² Whether this covers all international human rights or not is a matter of debate.⁶³ Ruggie’s position would appear to be that it does.⁶⁴ The Principles that Ruggie set out have been endorsed by the UN Human Rights Council, adopted by the OECD,⁶⁵ encouraged by the EU,⁶⁶ influenced the current design of ISO 26000⁶⁷ and included in the 2012 IFC Environmental and Social Performance Standards.⁶⁸ They are the most recent and most authoritative statement on the relationship between corporations and human rights.

Both Ruggie’s pragmatism and his recognition of the complexity of global production are evidenced in the way that he deals with the issue of a wider responsibility upon corporations beyond clear identifiable acts of theirs that affect particular individuals or groups; this wider responsibility could be expressed as the responsibility to exercise leverage or influence over business associates, states or other actors in respect of adverse impacts on human rights they commit. Relationships such as business networks, brand based supply chains in areas like apparel production and direct sourcing relationships such as those found in agricultural production would be obvious examples where the idea of a wider responsibility beyond direct impact would have considerable utility. Given his role in constructing the Global Compact which advocated corporations applying its principles “within their sphere of influence”,⁶⁹ Ruggie’s attachment to leverage is unsurprising. However “sphere of influence”⁷⁰ was a very contested concept when it was included in the UN Norms

and it is unlikely that inclusion of leverage expressed in those terms would have endeared the Framework of Guiding Principles to the business community.⁷¹ If we track the idea of “influence” through the various stages of evolution of the idea of “responsibility to protect” what we find is a rather malleable, almost slippery approach to the ambit of corporate responsibility.⁷² Responsibility for influence fades in and out of the documentary structure.

At various stages of promulgation of the Framework and Guiding Principles there appear to be clear statements to the effect that the responsibility of respect is confined to impact-based liability only. Corporations presumably drew comfort from the bold assertion early on in the journey to the Guiding Principles that “companies cannot be held responsible for the human rights impacts of every entity over which they may have some influence”.⁷³ This sentiment is buttressed by the commentary to Guiding Principle 17 which refers to the corporation’s “human rights risks” as its “potential adverse rights impacts”. Complex value chains might make it “unreasonably difficult” to conduct due diligence in all areas so a concentration on general areas where significant risk is likely to occur is suggested with the added bonus that acting in this way might assist in ameliorating any potential subsequent reputational damage. Again in Guiding Principle 18 impact based liability is stressed in terms of the need for the corporation “to understand the specific impacts on specific people, given a specific context of operations.” The responsibility to protect then occurs in relation to adverse micro-level impacts on defined individuals or groups of individuals.⁷⁴

Guiding Principle 19 seems, however, to entrench the idea of a wider influenced-based responsibility to the extent that after a corporate actor has ended its own conduct that gave rise to the adverse impact, its responsibility is to use its leverage to end the conduct of others. If it cannot do this due to insufficient influence then it should improve the situation by providing capacity building interventions or even ending the business relationship. HSBC, a bank listed in London and Hong Kong, with global interests, has recently found itself accused of providing loan finance and other banking services to at least seven logging companies operating in Sarawak, Malaysia.⁷⁵ These companies are said to be infringing the rights of indigenous groups through harassment and forced evictions, engaging in the bribery of public officials⁷⁶ and breaking environmental regulations on deforestation. Irrespective of whether these companies are breaking HSBC’s own CSR policies and the external validations that it has signed up to, Guiding Principle 19 suggests HSBC should take put pressure on⁷⁷ these logging companies to change their practices even if Guiding Principles 17 and 18 would appear to point in the opposite direction. The confusion in the Guiding Principles around whether respect extends to influence-based responsibility or is confined to impact-based activities only perhaps indicates the

complexity of global production and how difficult it is to draft to deal with activities that do not centre on a single nodal point but rather exist across a swathe of networks and chains of relationships.

The focus of this paper is on the second pillar of the Framework accepting that the pillars stand together; the state's duty to protect and the need for both actors to find victims of adverse human rights impacts access to remedies may place increased legal obligations upon corporations as a matter of national law. The responsibility of respect placed upon corporations is housed within a methodology of due diligence. Corporations should have in place a mechanism of due diligence that will allow them to become aware of the impact of their activities on human rights and then act to prevent and/or address adverse impacts.⁷⁸ Due diligence within the Framework has four elements.⁷⁹ Corporations first need to put in place a human rights policy.⁸⁰ The remaining three elements coalesce around the ideas of transparency, external participation and independent verification. The second stage is to learn the effect that business activity has upon human rights by conducting assessments of the impact of corporate activities on human rights.⁸¹ Ruggie's concern was that if respect for human rights was not integrated into business practice but instead grafted on as an additional but separate activity it would be cosmetic at best in approach and coverage.⁸² Consequently he advocated the idea that a corporation's human right policy should be "owned" by the whole firm and integrated throughout its activities. Corporate leaders should ensure that respect for human rights is allowed to trickle down through business structure. Employees should be trained, if necessary, to avoid infringing human rights while carrying out their job.⁸³ The use of monitoring and auditing processes to track corporate progress is advocated.⁸⁴

Due diligence is performing two functions within the Framework. It develops what Ruggie terms "a connectivity" between respect for human rights and the corporate sector on two levels; linguistic and practical.⁸⁵ At the linguistic level Ruggie is presumably trying to create a common language of understanding between the two discourses. Due diligence has a particular meaning within the human rights obligations of states; for example the UN Declaration on Elimination of Violence Against Women requires states to use *due diligence* to prevent, investigate and punish, in accordance with their own national legal systems, acts of violence against women perpetrated by the state or third parties. This includes creating, if necessary, the appropriate structures of sanction. By using this concept Ruggie is conveying to corporations the idea that despite the non-obligatory nature of "respect" under the Framework the level of attention in terms of resource intensive fact-finding, policy making and training that is expected of them is akin to what states are legally obliged to do under the human rights obligations they have accepted. The difference between duty and respect at the level of obligation is what makes this a linguistic

communality only. Due diligence also has traction within the corporate sector as a practical concept. It is used in corporate management and corporate governance to identify and measure risk in relation to a wide range of business transactions from merger and acquisition to supply chain management. This is tantamount to suggesting that respect for human rights is a business risk rather than a good in its own right.

There are diverse views about the merits of this approach in philosophical terms, and while that is an interesting debate,⁸⁶ of more significance for this paper is the link that this idea of human rights as a business risk makes to CSR as a practice. In 2005, before his tenure at the UN began, Ruggie set out the idea that CSR was a risk management strategy for business and offered some suggestions on how CSR might be used in this way. The elements of due diligence bear considerable resemblance to these suggestions⁸⁷ which include stakeholder consultation, a system for identifying risks and dealing with them and reporting protocols. When this is added to the grounding of the responsibility in a socio-ethical structure,⁸⁸ namely unexplained⁸⁹ “social expectations”⁹⁰ and “prevailing social norms”⁹¹ which are said to underpin the corporate “social license to operate” what appears to have happened is that the responsibility to respect has been fused into the rationale for CSR - a management tool for the avoidance of damage to business reputation.

The adoption of particular CSR policies is a choice made by corporate management to present a corporation to the external world in a particular way. CSR policies are not designed by corporations to be assessed by third parties as a reflection of corporate operations even in part, let alone in their entirety. There is insufficient information available in the public domain for accurate independent evaluation to take place. Corporations may encourage, through the giving out of information and financial support, validation of their policies by external bodies they have selected or, more likely, they take part in.⁹² There are a variety of different institutional environments for this type of CSR certification from NGO and corporate co-governance of organisations (for example the Forest Stewardship Council) to NGOs themselves and to industry coalitions (for example Responsible Care)⁹³ and literally hundreds of different kinds of certification for products and whole industries.⁹⁴ The rationale for corporations participating in these validation exercises is that these exercises trigger a reaction in public opinion and the financial markets that is at least equivocal and at best positive about the societal impacts that particular policies have achieved.⁹⁵ CSR discourse identifies its goal as business orientated social investment with vulnerable groups, (defined as those outside the supplier-employee paradigm) seen as stakeholders in the business not as independent bearers of human rights.⁹⁶

Respect for human rights by the corporate sector is about observing at least

minimum standards for human existence through recognizing liberty rights, political rights, and economic and social rights. This is a very different requirement and policy focus from voluntarily adopting CSR policies for strategic reasons.⁹⁷ Corporate managers use CSR as a form of chiaroscuro;⁹⁸ certain activities are pushed forward for scrutiny, awards even, while others remain firmly in the shade.⁹⁹ This might be seen within the corporate sector as efficient and effective management of risk. Zadek has identified a three-stage development model for CSR which he maps against the changing landscape of societal expectations of corporations. His linear three generations move from CSR as corporate philanthropy that is unconnected with business operations, to CSR that is integrated into a longer term business strategy recognizing that promotion of ideas like cause related marketing and socially responsible investment will lead to “win-win” scenarios and finally to a form of CSR that tries to interrogate the largest global challenges around environmental degradation, poverty and social and economic exclusion.¹⁰⁰ Other commentators employ similar developmental models for CSR¹⁰¹ and at heart all these models are describing how corporations make strategic business decisions to achieve particular market reputations in the context of changing social pressures.¹⁰² Ruggie is pushing the CSR model much further than this by suggesting that what will hold the balance between respect for human rights and corporate indifference is a social license granted or revoked by the courts of public opinion in line with social expectations and norms. The final section of the paper looks at the concept of a social license to operate in more detail, at what these courts of public opinion might be and how they will be able to obtain the evidence for their judgment on the maintenance or not of a social license.

3: The Social License

3.1 Defining the Social License

Social license as the term suggests is about business practice and regulation outside the realm of the legal. It draws on CSR principles¹⁰³ and is central to Zadek’s third stage of CSR development. Its appearance in the Framework is no surprise because it is what is left in the absence of a structure of legal enforcement. It enjoys no particular recognized definition but the most influential analysis of it by Gunningham and his colleagues¹⁰⁴ describes it as “the demands on and expectations for a business enterprise that emerge from neighbourhoods, environmental groups, community members and other elements of the surrounding civil society”.¹⁰⁵ The focus of Gunningham’s work was on environmental standards in the pulp and paper manufacturing industry and this explains the prominence of environmental interests in the description given. As he acknowledges, within the corporate sector generally there is no agreement about the demands made by those to whom the social license

is presented or how and when their demands should be responded to. This acknowledgment comes against the background of environmental regulation which, while it has its own problems of rigour and enforcement, is more tightly legally defined than the protection required for human rights by the corporate sector. In Gunnigham's work the idea of a social license was evidenced in a corporate actor choosing to embark upon a course of behavior that went beyond what was required for legal compliance. In Ruggie's Framework the social license stands on its own without a close supporting network of legal regulation addressing the immediate problem. The level at which the license kicks in is the level of protection supplied by existing but diffuse national and international regulation. This puts the importance of the debate referred to in the preceding section about which rights are included in the Framework and which are not in context.

The research carried out by Gunnigham et al identified four related reasons for positive corporate responses to social license pressure; damage to corporate reputation, fear of increased regulatory enforcement, fear of the imposition of new regulations and fear of the damage of market based boycotts. At worst this relegates social license to the realms of "a calculation of what is required to minimize business risk [and] win ...community support to avoid ...disruption to ..operations". At best a positive response that supports human rights might result from some of these triggers through pressure from the "courts of public opinion." The potential for this is examined below. However it is important before looking at that potential to consider some of the inherent, rather than context specific, limits to social license enforcement and how the concept of social license sits internally within the corporation. Not all corporate actors will react in the same way to pressure on their social license. Reaction depends on how much pressure and by whom the pressure is exerted against any one of the factors identified by Gunningham's research. It is also the case that the internal dynamics of a corporation play a part. Issues such as managerial incentives, the operating culture of a particular corporation, the internal perception of organizational identity and image and the personal attitudes of executives and managers to different issues are all important factors in how the social license is viewed within the corporation.¹⁰⁶ Corporate reputation is a good example of this. Reputation has a different value to different corporations. What decides its value is not the presence of external pressure factors necessarily but how the corporation's internal operational culture values reputation.¹⁰⁷

In Schön's idea of "problem setting" individuals operating in a particular context select the boundaries of a situation and impose upon it a sense of order and coherence by determining what needs attention and in what direction events or policies need to be driven.¹⁰⁸ This is what corporate managers and executives do when they make policy and operational decisions. The idea of mainstreaming human

rights respect into corporate conscience through the operation of the due diligence structure that Ruggie advocates plays into the paradigm of problem setting. If the due diligence structure is adopted by corporations it sets the problem of how respect for human rights is upheld within corporate activities and pushes respect for human rights into the consciousness of decision makers within the corporation. These decision makers should then ask questions of themselves about how they need to change their operations and possibly their business relationships with other corporations to give effect to respect. The internal factors specified above would determine exactly what action is taken. However the problem is also circular in nature because in the absence of any external pressure it is unlikely that an issue will be translated into a problem that is addressed internally by corporate executives. To return to the example of corporate reputation in the previous paragraph something has to alert corporation executives to the idea that corporate reputation is under attack before a corporation can take a decision to respond in a particular way.

Adoption of the social license as a description of practice has achieved most popularity in the extractive sector. There it is used by the International Council on Mining Minerals¹⁰⁹ other industry representative groups such as the Australian Coal Association,¹¹⁰ the Minerals Council of Australia¹¹¹ and many of their corporate members¹¹² in their publically available policy statements on sustainability and operational standards.¹¹³ It has come to be used to indicate that a particular extraction project has the consent of the local community in which it is situated.¹¹⁴ Thus it signifies a negotiation process, often through intermediaries, in which local communities receive and accept assurances that the social, economic and environmental benefits of what is proposed outweigh the potential impact.¹¹⁵ As an equation this reveals some of the inherent limitations in the idea of a social license for corporate operations.¹¹⁶ It assumes that information is a neutral factor as between the parties. In a situation where there is likely to be a significant power imbalance between corporate actor and community it means that the local community have received accurate information not tainted by deceit, corruption or lack of corporate technical knowledge about the long term effects of a project in a form and timescale which allows them to give free, prior and informed consent.¹¹⁷ There may be issues here about who is entitled to speak for different groups¹¹⁸ and whether those who might oppose a social license have the organizational capacity to prevent consent being simply assumed by a more powerful actor.¹¹⁹ Extractive projects have an immediate geographical impact and the position of wider society and the local community on the desirability of extraction development may not be the same. This is particularly true in instances where host states do not recognize indigenous land rights or land claims and prefer the possibilities for development offered by inward investment.¹²⁰ The traction that the concept of social license has in the extraction industry is perhaps unfortunate for the future prospects of human

rights respect given that this industry was the one that Ruggie described in 2006 as “dominat[ing] this sample of reported abuses” and as “account[ing] for most allegations of the worst abuses”.¹²¹

3.2 Constructing the Social License Within the Ruggie Framework

The social license that pertains to the Ruggie Framework will presumably be shaped through the adoption of the due diligence mechanism, outlined in section 2 above. The *Guiding Principles*¹²² set out a screening process to be undertaken to identify the areas where human rights are at greatest risk, evidence is to be gathered, possibly with the assistance of actors external to the corporation, the evidence is to be examined against the applicable human rights standards and actions to deal with infringements or potential infringements of rights are to be taken. Following this the effectiveness of these actions are to be evaluated and then reported to interested external parties. This process will form the internal part of the license. This internal stage suggests, although the Framework does not describe it in this way, an approach to respect for human rights that looks like a Human Rights Impact Assessment more frequently seen in the policy design activities of governments and public sector bodies. It is an evidenced approach to building human rights awareness into business operations. Of course, as noted above, when a Human Rights Impact Assessment is carried out by these public bodies it is, in most cases, being used to look at the effect of proposed actions on their rights based legal obligations. In the context of corporations these assessments, as a social license, will have eventual traction only through public opinion. Corporations are used to considering the impact upon their business of extraneous risk factors. Most corporate actors are unused to calculating the impact of their entire business operation on categories of rights holders outside perhaps investors, consumers and directly salaried employees.¹²³ For other corporations whose activities required them to engage in Social Impact Assessments the methodology of assessing the impact on human rights is very different.¹²⁴ Social impact assessments encourage selected stakeholders to take part in a process that nominate key issues for attention.¹²⁵ The assessment of human rights, using the lens of human rights, unsurprisingly starts from the point of all recognized rights (hence the importance of knowing exactly which rights are included within the Framework) and then moves to a position of dialogue participation.¹²⁶

The Framework suggests, but does not require, that, what it describes as “meaningful” consultation, take place with those likely to be affected by business operations.¹²⁷ In that this consultation should also be prior to the business operations in question taking place, the model resembles the free, prior and informed consent model that the extractive industries use referred to above. It is

also likely to be beset by the same difficulties in that there is no right of consultation; whether it occurs and how it occurs is a matter for an individual corporation. There is also an issue of cultural norms and expectations in the context of rights. In the absence of a stronger steer from the Framework there is every incentive for a corporation to shelter behind a consultation with the local community, the result of which is further entrenchment of the norm of gender discrimination, which is embedded in the community. On the one hand a corporation that takes the results of consultation seriously might feel obliged to accept this not least on the grounds that it should not be imposing different cultural values on a community. On the other hand a rights impact assessment creates an opportunity to examine the rights of the entire effected community and consistent with respect is the requirement not to worsen the position of any one group. A corporation is not really in a position to assert that societal re-engineering of this sort belongs solely to the province of the state when it is charged with respecting the same rights that states are legally obliged to uphold. Failure to respect all rights equally irrespective of consultation results leads to those rights and their repeated infringement being hidden until such time as those particular human rights values become part of the community's consciousness.¹²⁸

The due diligence framework is advocating that corporations do what many of them already do; release information about their corporate operations to an external audience. This occurs in the context of complying with the requirements of the plethora of certification mechanisms that already exist within CSR. The different institutional settings for these mechanisms, referred to above, see them fall into six distinct groups ranging from internationally promulgated and independent codes to codes created by individual corporations. There are model business codes of general application supported by inter-governmental bodies such as the UN backed Global Compact that corporations can sign up to; there are general codes of business operation agreed between governments such as the OECD Guidelines for Multinational Enterprise; multi-stakeholder codes drafted as a result of agreements between corporations, NGOs and governments such as the Ethical Trading Initiative; industry wide codes such as the Sustainable Development Framework of the International Council on Mining and Metals; individual company codes which contain operating principles in relation to everything from bribery to environmental management to supply chain assurance;¹²⁹ and independent reporting standards such as the ISO 14001 standard for environmental management.¹³⁰ These reporting initiatives all have the same outcome; they facilitate corporations benchmarking their performance against common standards and against each other. The choice of policy area and business segment that is certified belongs to the corporation. That choice might be made for a variety of strategic reasons; to focus audience awareness on positive actions in a particular arena or to distract attention from a particular

event for example.¹³¹ The potentially misleading nature of selective certification by corporations is something that has consistently undermined the credibility of CSR.¹³²

What is very different in the context of the Ruggie Framework is the absence of a reporting structure or template and hence the absence of any lower (or upper) limit to policy ambition. There is no minimum floor requirement that must be passed. For CSR certification the emphasis for a corporation is on achieving a limit to policy while still attracting certification, in the context of human rights the goal should be limitless and for some corporations, given the nature of their business, recognized as unachievable.¹³³ Choice for the corporation is not part of the due diligence framework. Both the corporation's human rights policy and its calculation of the impact of its business upon human rights should be all encompassing of its business operations. However as Harrison points out the danger of corporations conducting their own assessments of their own risks albeit with some external consultation and participation is that what occurs is a validation of their assessment and policy response rather than an enhancement of respect for human rights.¹³⁴ A corporation's credibility may be lost in the eyes of an expert¹³⁵ if it proceeds in this way but, as the text that follows explains, judgment on the adequacy of the impact assessment is unlikely to be solely in the hands of an expert audience.

Notwithstanding Ruggie's stated preference¹³⁶ for corporations to publicize the methodology they have used to undertake due diligence the absence of any template or indicative methodology in the Framework for constructing the social license makes cross-corporation comparison very difficult for an outsider.¹³⁷ However such comparison is an essential tool, surely, if the courts of public opinion are to decide whether a corporation's social license is acceptable and will be maintained. Any opportunity for corporations to learn and share best practice with each other is lost in the absence of a published methodology. The element of competition between corporations is then also lost. While the idea of corporations competing around respect for human rights might be unpalatable it is more likely to drive up the quality of assessment processes and outcomes than the probable absence of inter-firm competition.¹³⁸

3.3 Assessing the Social License

The assessment of a corporation's social license depends upon the view taken of it by the "courts of public opinion" which will exercise "naming and shaming" prowess over any license that does not confirm to social expectations. The Framework is silent on whose social expectations will be used as the measure but it does indicate particular sites of judgment – investors, employees, communities, consumers, civil society.¹³⁹ Whether these actors come to the issue of assessment with the same

goals in mind is a moot point. Institutional investors, for example, break into two groups in broad terms; investors who pursue socially responsible investing, sometimes as part of business coalitions to mitigate risk to their business model¹⁴⁰ and ethical investors¹⁴¹ and then the much larger group of conventional investors. Nevertheless whatever the rationale for assessment is, assessors will have access to the same information.

Assessment by any of these groups, even before the issue of how they might conduct assessment, requires transparency of reporting and this takes us back to the point made by Harrison;¹⁴² the nature and extent of the internal process that creates the social license feeds into the evaluation that can be made of it. Possible impacts and actual infringements that are not reported upon cannot be judged. Rio Tinto once again provides a useful illustrative example. Rio Tinto tells the world that it spends US\$ 331m on socio-economic projects spread across the 40 countries in which it operates.¹⁴³ It provides information on 12 case studies that illustrates its commitment to human rights. However these case studies nearly all feature corporate business activities that commenced before 2007. There is no indication of whether any assessment was done of the possible impact on human rights when commercial activity began or since and if an assessment was carried out what it revealed. What is presented is a story of Rio Tinto's social engagement activities not a story of what might have needed to be done or should have been done to protect human rights.¹⁴⁴

For Ruggie's suggested group of assessors to be able to evaluate a corporation's social license then they need to access it and understand what it means. This means taking not only corporate reports that directly reference impacts upon human rights but looking at the entire social license that a corporation constructs for itself using the third party certification mechanisms and its own internal codes that are referred to above. There is a problem of asymmetrical information for assessors. Their judgment can be made in one of two ways. One is by relying on certification and corporate reports and the other is by relying on the translation services of an NGO which, while enjoying the status of assessor itself, breaks down information into an comprehensible format and offers a commentary, additional information and comparisons where possible in the format of report cards, alternative certification and narrative accounts.¹⁴⁵ The reality might be a combination of reliance on both.

Both these assessment avenues raise questions of credibility, product and industrial practice coverage and market place traction. In terms of third party certification not only are there the doubts about the absolute reliability of these mechanisms that are set out above but it is also the case that we know very little about the extent to which they are trusted by, or have traction with, consumers. It might be that those

that are associated with an NGO are considered more reliable or alternatively these NGO might be viewed as captured by corporations so giving their shared certificate less value.¹⁴⁶ Product labels might be more influential on consumers than text. In this case interest in human rights is reduced to the aesthetics of presentation. Starobin and Weinthal, using the example of kosher food certification, produce a model for assessing consumer traction of third party certification that centres on the display by certifiers of demonstrable and transparent expertise that taps into a group of consumers with strong social capital bonds.¹⁴⁷ This will be a difficult model to replicate in relation to more complex products and practices and in situations where consumers do not share a particular organizing identity.

NGOs can engage other assessors of corporate social licenses and encourage them to pass negative judgment by targeting the practices of particular corporations or particular products or both. NGOs are not neutral actors; they have values and agendas. They can be in competition with each other to attract and retain significant donors and skilled staff, to affect high profile results and thus to garner respect and influence in the field.¹⁴⁸ This has an impact on their choice of social license to challenge. Some NGOs are seen as more credible than by wider society and thus their campaigns against social licenses will be more successful irrespective of the relative merits of the claims made. High credibility is achieved by NGOs that can demonstrate that their claims are supported by a high degree of costly and observable effort that is externally verifiable and that they will suffer significant reputational damage from making false claims.¹⁴⁹

Even for NGOs with high credibility, target choice and campaign methodology is key to gaining traction for social license opposition. Awareness of human rights non-observance is dependent on NGOs achieving populist support. Campaign methods might range from raising funds for litigation or share purchase, organizing consumer boycotts to direct lobbying for regulatory change or regulatory enforcement. There are a variety of factors that make some firms and some products more attractive as targets than other. Significant factors are the nature of the product. Anti-social products such as weapons and cigarettes are typical targets as are brands that have a high awareness value within the consumer market place; niche clothing and food brands are two obvious examples. Products or practices with clear externalities like oil drilling or chemical production have high traction. Firms that are representative of particular cultures or lifestyles like McDonalds or firms which are perceived as securing large amounts of surplus value from the supply chain like Apple would be considered to have traction.¹⁵⁰ Global production is a complex activity spanning many business relationships and jurisdiction. A particular type of consumer is required to respond to many of these campaigns. Expanding consumer markets in new and developing economies may produce consumers with different cultural

expectations and preferences. Only those activities that can be simply explained or identified with are suitable for a license removal campaign. How iPads are soldered together has more traction than how the ruthenium component of their chips is produced.

4. Conclusion

Through the adoption of pragmatism and the pursuit of compromise John Ruggie has produced a Framework that recognizes the complex reality of global business production. It acknowledges the importance but also the difficulty of achieving influenced based corporate responsibility and of persuading corporations to use their leverage over others as a way of bringing about change. However in suggesting that the Framework will force corporations to move from declaratory CSR to demonstrable CSR a yawning gap is opened up. Drawing on CSR concepts might offer comfort to corporations but it will also ensure that CSR methods are used to respond to the Framework. These methods are likely to be of limited utility limited in relation to effective protection of human rights. Ruggie is placing a reliance on a broad swathe of different and largely unconnected groups to act as a chain of interrogators and judges. This requires a large degree of happenstance to be even moderately successful. In the absence of a methodology for the production of accurate, relevant and verifiable information and with no clear idea of how it will get to the social and political market place much is left to a combination of chance, the offices of NGOs and the sentiments of consumers. Human rights observance by business it seems is being returned to the market place of consumption for adjudication by a range of actors with very different agendas.

¹ See the comments made by Ruggie to the UN General Assembly on October 26th 2010, <http://www.ohchr.org/documents/issues/business/2010GA65remarks.pdf> (accessed 7th Feb 2014)

² Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development – 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. UN Doc. A/HRC/8/5 at para 54

³ US based NGO China Labor Watch have produced two consecutive reports in 2013 and 2014 on Apple's subcontracted production facilities in China which show human rights abuses and environmental standards to be compromised and unimproved in the intervening 12 months. http://www.chinalaborwatch.org/upfile/Jabil_Green_Point.final.pdf
http://www.chinalaborwatch.org/upfile/2014_09_25/2014.09.25%20iExploitation%20at%20Jabil%20Wuxi%20EN.pdf

⁴ R Neate "Rio Tinto blamed by protesters over 41 mine worker deaths" *The Guardian* April 5th 2014. See also <http://londonminingnetwork.org/2010/04/rio-tinto-a-shameful-history-of-human-and-labour-rights-abuses-and-environmental-degradation-around-the-globe/> It should be noted that Rio Tinto has compiled a publically available and very extensive guide to how it integrates human rights into its operations see

http://www.riotinto.com/documents/ReportsPublications/Rio_Tinto_human_rights_guide_-_English_version.pdf (accessed March 28th).

⁵ M Hart-Landsberg *Capitalist Globalization* (2013) The Monthly Review Press New York at p13-55 provides an account of the growth of large corporations. See also for some additional statistical depth UNCTAD *World Investment Report 2011: Non-Equity Modes of International Production and Development* UN New York.

⁶ G Gereffi (1994) "The Organization of Buyer-Driven Global Commodity Chains: How US Retailers Shape Overseas Production networks" in G Gereffi and M Korzeniewicz (eds) *Commodity Chains and Global Capitalism* Praeger Westport Connecticut 95.

⁷ The *World Investment Report 2013* (pp122-140) suggests that more than 60% of global trade by value takes place within global value chains, http://unctad.org/en/PublicationsLibrary/wir2013_en.pdf (accessed Feb 1st 2014)

⁸ Some accounts assert that the number of clothing brands sourcing products from Rana Plaza was as high as 27. For a discussion of this and other factory disasters see <https://www.cleanclothes.org/news/2013/05/24/background-rana-plaza-tazreen> and D Robinson "Primark increases compensation to Rana Plaza factory victims in Bangladesh" *Financial Times* October 24th 2013.

⁹ Press Association "Primark Offers Long-Term Compensation to Rana Plaza Factory Collapse Victims" *The Guardian* October 24th 2013.

¹⁰ A Rugman (2008) "How Global are TNCs from Emerging Markets" in K Sauvant (ed) *The Rise of Transnational Corporations from Emerging Markets* Edward Elgar Cheltenham 86.

¹¹ R Applebaum "Giant Transnational Contractors in East Asia: Emergent Trends in Global Supply Chains" (2008) 12 *Competition and Change* 69.

¹² D Hoang and B Jones "Why do Corporate Codes of Conduct Fail? Women Workers and Clothing Supply Chains in Vietnam" (2012) 12 *Global Social Policy* 67.

¹³ G Gereffi "Global Value Chains in a post-Washington Consensus World" (2014) 21 *Review of International Political Economy* 9.

¹⁴ R Kaplinsky and M Farooki "Global Value Chains, the Crisis, and the Shift of Markets from North to South" in O Cattaneo, G Gereffi and C Staritz (eds) *Global Value Chains in a Postcrisis World* (2010) The World Bank Washington 125.

¹⁵ For a discussion of alternative methodologies that are comprehensible to non-economists see D Kinley *Civilising Globalisation* (2009) CUP Cambridge at p 163-165.

¹⁶ A Scherer and G Palazzo (2011) "The New Political Role of Business in a Globalized World: A Review of a New Perspective on CSR and its Implications for the Firm, Governance, and Democracy" 48 *J Man Stud* 899.

¹⁷ The extent to which this growth model becomes a reality depends on a number of variables including the terms of investment treaties, the strength of governance in the host country and the quality of infrastructure available to distribute the benefits, see S Lauwo and O Otusanya "Corporate Accountability and Human Rights Disclosures: A Study of Barrick Gold Mine in Tanzania" (2013) *Accounting Forum* (in Press, available in online early view).

¹⁸ See note 2 at para 12.

¹⁹ M Sheffer (2011) "Bilateral Investment Treaties: A Friend or Foe to Human Rights" 39 *Denver J Int Law and Policy* 483.

²⁰ M Schäferhoff "External Actors and the Provision of Public Health Services in Somalia: Public Health Services in Somalia" (2014) 27 *Governance* 675

²¹ J Hönke and C Thauer "Multinational Corporations and Service Provision in Sub-Saharan Africa: Legitimacy and Institutionalization Matter: Multinational Corporations in Sub-Saharan Africa" (2014) 27 *Governance* 697

²² A Crane, D Matten and J Moon (2008) *Corporations and Citizenship* CUP Cambridge at p64f.

²³ United Nations Commission on Human Rights, Human Rights Resolution 2005/69.

²⁴ See T Sagafi-Nejad *The UN and Transnational Corporations* (2008) Indiana Univ Press Bloomington.

²⁵ Seppala, while concentrating on the continuance of state centrality to the human rights and business activity debate, presents some very interesting commentary about the cumulative processes around these interventions, see N Seppala "Business and the International Human Rights Regime: A Comparison of UN Initiatives" (2009) 87 *J of Bus Eth* 401-417.

²⁶ <http://www.unglobalcompact.org/>

²⁷ <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html>

²⁸ See S Asante "The Concept of the Good Corporate Citizen in International Business" (1989) 4 *Foreign Investment Law Journal* 1.

²⁹ For an account of how this has become both one of the central discourses of our times but has also lost its way in a sea of anti-democratic political activity see S Hopgood *The Endtimes of Human Rights* (2013) Cornell University Press, Ithica in particular at pp119-141.

³⁰ Baxi framed the juncture between these two discourses in terms of a question, "which are the right language and rhetoric to be used—those furnished by the grammar of human rights or the wider languages of 'social responsibility'? U Baxi "Market Fundamentalisms: Business Ethics at the Altar of Human Rights" (2005) 5 *Human Rights Law Review* 1 at p24.

³¹ B Husted and J Salazer "Taking Friedman Seriously: Maximizing Profits and Social Performance" (2006) 43 *J Man Stud* 75

³² For a framing of this debate see J Dillard and A Murray "Deciphering the Domain of Corporate Social Responsibility" in K Haynes, A Murray and J Dillard (eds) *Corporate Social Responsibility* (2013) Routledge Abingdon 10 and from a more critical perspective S Banerjee "Corporate Social Responsibility: the Good, the Bad and the Ugly" (2008) 34 *Critical Sociology* 51.

³³ Wilks has a concise but powerful articulation of the critique of corporations taking on the role of governments in the delivery of social programmes, see S Wilks *The Political Power of the Business Corporation* (2013) Edward Elgar Cheltenham UK at p207.

³⁴ A Scherer, G Palazzo and D Matten "The Business Firm as a Political Actor: A New Theory of the Firm for a Globalized World" (2014) 53 *Business and Society* 143.

³⁵ S Aaronson "Seeping in Slowly: How Human Rights Concerns are Penetrating the WTO" (2007) 6 *World Trade Review* 1.

³⁶ D Rabet "Human Rights and Globalization: The Myth of Corporate Social Responsibility?" (2009) 1 *Journal of Alternative Perspectives in the Social Sciences* 463.

³⁷ P Newell "CSR and the Limits of Capital" (2008) 39 *Development and Change* 1063.

³⁸ T Porter (2005) "The Private Production of Public Goods: Private and Public Norms in Global Governance" in E Grande and L Pauly *Complex Sovereignty: Reconstituting Political Authority in the Twenty-First Century* University of Toronto Press, Toronto 217.

³⁹ J Ruggie "Taking Embedded Liberalism Global: the Corporate Connection" in D Held and M Koenig-Archibugi (eds) *Taming Globalization* (2003) Polity Cambridge 93 at p108 and 116-117.

⁴⁰ T Campbell "A Human Rights Approach to Developing Voluntary Codes of Conduct for Multinational Corporations" (2006) 16 *Bus Eth Quart* 255. For a discussion of the surprisingly small overlap that has occurred in CSR and human rights debates see F Wettstein "CSR and the Debate on Business and Human Rights: Bridging the Great Divide" (2012) 22 *Bus Eth Quart* 739 at p746-748.

⁴¹ L Preuss and D Brown "Business Policies on Human Rights: An Analysis of Their Content" (2012) 109 *JBE* 289. Their findings were based on corporate policies from the reporting year 2009.

⁴² Human rights and CSR have both emerged as norms of behavior for different groups in the recent past following the norm life cycle explained in M Finnemore and K Sikkink "International Norm Dynamics and Political Change" (1998) 52 *International Organization* 887. For an illustration of this structure of norm emergence in the context of corporate activity and affected communities and stakeholders see H Dashwood "Sustainable Development Norms and CSR in the Global Mining Sector" in J Sagebien and N Lindsay (eds) *Governance Ecosystems* (2011) Palgrave Macmillan Basingstoke 31.

⁴³ Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, 26 August 2003, E/CN.4/Sub.2/2003/12/Rev.2

⁴⁴ K de Feyter (2005) *Human Rights* Zed London.

⁴⁵ Delimiting corporate responsibility in this way was seen as extending it considerably from previous iterations of the relationship between corporate behaviour and human rights recognition and protection, see W Meyer *Human Rights and International Political Economy in Third World Nations: Multinational Corporations, Foreign Aid and Repression* (1998) Praeger Westport Connecticut and A Voiculescu "Human Rights and the Normative Ordering of Global Capitalism" in (eds) A Voiculescu and H Yanacopulos *The Business of Human Rights* (2011) Zed London 10 at p12-16.

⁴⁶ Compare the positions taken by D Weissbrodt and M Kruger "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights"

(2003) 97 *Am J of Int Law* 901 and J Knox "The Ruggie Rules: Applying Human Rights Law to Corporations" in R Mares (ed) *The UN Guiding Principles on Business and Human Rights* (2012) Martinus Nijhoff Leiden Netherlands 51.

⁴⁷ D Kinley et al "The Norms are dead! Long live the Norms! The Politics behind the UN Human Rights Norms for corporations" in D McBarnet, A Voiculescu and T Campbell (eds) *The New Corporate Accountability* 2007 CUP Cambridge 459.

⁴⁸ For detailed accounts of the Norms see D Kinley and R Chambers "The UN Human Rights Norms for Corporations: The Private Implications of Public International Law" (2006) 6 *Human Rights L Rev* 447, and D Arnold "Transnational Corporations and the Duty to Respect Basic Human Rights" (2010) 20 *Bus Eth Quart* 371-399.

⁴⁹ Some corporations members volunteered to trial the monitoring of activities suggested by the Norms, see <http://www.realizingrights.org/pdf/BLIHR3Report.pdf>

⁵⁰ States such as Pakistan and Malaysia with economic models predicated on supply chain participation took the view that they might make them an uncompetitive location for inward corporate business and/or stifle their own domestic economic development, see S Jerbi "Business and Human Rights at the UN: What Might Happen Next?" (2009) 31 *Human Rights Quarterly* 299. For similar concerns around the GRI and ISO 14000 see K Dingwerth "Private Transnational Governance and the Developing World: A Comparative Perspective" (2008) 52 *International Studies Quarterly* 607 at p 617.

⁵¹ Ruggie's own analysis of the issues that had to be addressed in a post-Norms era can be found at J Ruggie "Business and Human Rights: The Evolving International Agenda" (2007) 101 *Am J Int L* 819.

⁵² Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN E/CN.4/2006/97

⁵³ J Ruggie *Just Business* (2013) Norton & Co New York at p xlv.

⁵⁴ Ruggie described the Norms as a "train wreck" full of exaggerated legal claims and conceptual and procedural ambiguities, see *Promotion and Protection of Human Rights*, Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, U.N. ESCOR, Commission on Human Rights, 62d Sess, Provisional Agenda Item 17, U.N. Doc. /CN.4/2006/97 (2006).

⁵⁵ See note 2 at para 4 and J Ruggie (2007b) *Prepared Remarks at Clifford Chance*, London (Feb.19 2007). Available at <http://www.reportsand-materials.org/Ruggie-remarks-Clifford-Chance-19-Feb-2007.pdf>

⁵⁶ S Aaronsen and I Higham "'Re-Righting Business': John Ruggie and the Struggle to Develop International Human Rights Standards for Transnational Firms" (2013) 35 *Human Rights Quart* 333.

⁵⁷ See n 46 above and S Ratner "Corporations and Human Rights: A Theory of Legal Responsibility" (2001) 111 *Yale L J* 443.

⁵⁸ See note 2 above.

⁵⁹ A Clapham (ed) *Human Rights and Non-State Actors* (2013) Edward Elgar Cheltenham

⁶⁰ See note 2 above at para 52.

⁶¹ "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework," (GP) http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf (accessed 6 Feb 2014).

⁶² See GP 12.

⁶³ Muchlinski asserts that several important human rights instruments in the context of business operations, eg CEDAW, are not caught by the Framework, P Muchlinski "Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance and Regulation" (2012) 22 *Business Ethics Quart* 145 at p148.

⁶⁴ See Ruggie n53 above at pp 20-23, 96.

⁶⁵ <http://www.oecd.org/newsroom/newoecdguidelinstoprotecthumanrightsandsocialdevelopment.htm>

⁶⁶ <http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/human-rights/>

⁶⁷ S Adler "The Impact of the United Nations Secretary-General's Special Representative and the UN Framework on the Development of the Human Rights Components of ISO 26000" *Corporate Social Responsibility Initiative Working Paper* No. 64, (2011) John F. Kennedy School of Government, Harvard University Cambridge MA.

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- ⁶⁸ See IFC Performance Standards on Environmental and Social Sustainability Jan 2012 http://www.ifc.org/wps/wcm/connect/115482804a0255db96fbfd1a5d13d27/PS_English_2012_Full-Documents.pdf?MOD=AJPERES (accessed Sept 30th 2014).
- ⁶⁹ A Rasche "A Necessary Supplement": What the United Nations Global Compact is and is not" (2009) 48 *Business and Society* 511.
- ⁷⁰ Macdonald recasts sphere of influence into "sphere of responsibility" built around an idea of agent centered responsibility for harm mediated through others. This has the potential to encourage the changing of harmful business practices and the adoption of improved business practices as distinct actions in their own right where the corporation was not the primary actor, see K Macdonald "Re-thinking "Spheres of Responsibility": Business Responsibility for Indirect Harm" (2011) 99 *JBE* 549.
- ⁷¹ D Kinley, J Nolan and N Zerjal "The Politics of Corporate Social Responsibility: Reflections on the United Nations Human Rights Norms for Corporations" (2007) *Company and Securities LJ* 30 at p37.
- ⁷² The possibilities for a leveraged based responsibility is offered in S Wood "The Case for Leverage-Based Corporate Human Rights Responsibility" (2012) 22 *Business Ethics Quarterly* 63. An equally rigorous case for a narrower view of the ambit of responsibility can be found in J Douglas-Bishop "The Limits of Corporate Human Rights Obligations and the Rights of For-Profit Corporations" in W Cragg (ed) *Business and Human Rights* (2012) Edward Elgar Cheltenham UK 74.
- ⁷³ See note 2 above at paras 68-69.
- ⁷⁴ A real commitment to leverage would see the Ruggie architecture suggest that the largest or most financially powerful corporate actors should have a wider purview of human rights responsibility that causes them to think in a global sense what the effect of particular business activities might be, see M Dowell-Jones and D Kinley "Minding the Gap: Global Finance and Human Rights" (2011) 25 *Ethics and Int Affairs* 183.
- ⁷⁵ See <http://www.globalwitness.org/hsbc>
- ⁷⁶ See <http://www.globalwitness.org/library/open-letter-sarawak-chief-minister-taib-mahmud-accepting-offer-debate-land-and-forest-use>
- ⁷⁷ The challenge of engaging the finance industry in what respect for human rights means is set out by Dowell-Jones in "Financial Institutions and Human Rights" (2013) 13 *Human Rights L R* 423.
- ⁷⁸ See note 2 above at para 56.
- ⁷⁹ Report of the special representative of the UN secretary-general on the issue of human rights, and transnational corporations and other business enterprises. Business and human rights: Further steps towards the operationalization of the "protect, respect and remedy" framework. 9 April. UN Doc. A/HRC/14/27 at para 80. para 83.
- ⁸⁰ See note 2 above at para 60.
- ⁸¹ See note 2 above at para 61.
- ⁸² J Ruggie "The construction of the UN "protect, respect and remedy" framework for business and human rights: the true confessions of a principled pragmatist" (2011) *EHRLR* at p131.
- ⁸³ See note 2 above at para 62.
- ⁸⁴ See note 2 above at para 63.
- ⁸⁵ J Ames "Taking Responsibility" (2011) *European Lawyer* 15.
- ⁸⁶ For a review of possible positions on this point see D Arnold "Transnational Corporations and the Duty to Respect Basic Human Rights" (2010) 20 *Bus Eth Quart* 371 and W Cragg "Ethics, Enlightened Self-Interest, and the Corporate Responsibility to Respect Human Rights: A Critical Look at the Justificatory Foundations of the UN Framework" (2012) 22 *Bus Eth Quart* 9.
- ⁸⁷ B Kytte and J Ruggie "Corporate Social Responsibility as Risk Management: A Model for Multinationals" *Corporate Social Responsibility Initiative Working Paper* no10 (2005) John F Kennedy School of Government, Harvard University Cambridge MA.
- ⁸⁸ B Horrigan *Corporate Social Responsibility in the 21st Century* (2010) Edward Elgar Cheltenham at pp323-325.
- ⁸⁹ For a discussion of this point see C Lopez "The 'Ruggie process': from legal obligations to corporate social responsibility?" in S Deva and D Bilchitz (eds) *Human Rights Obligations of Business* (2013) CUP Cambridge 58.
- ⁹⁰ See note 2 at paras 54-61.

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- ⁹¹ Business and Human Rights: Towards Operationalising the “protect, respect and remedy” framework. UN Doc A/HRC/11/13 at paras 46-49.
- ⁹² T Bütte and W Mattli “International Standards and Standard-Setting Bodies” in D Coen, W Grant and G Wilson (eds) *The Oxford Handbook of Business and Government* (2010) OUP Oxford 440 at p455f.
- ⁹³ S Bernstein and B Cashore “Can Non-State Global Governance be Legitimate? An Analytical Framework” (2007) 1 *Regulation and Governance* 347.
- ⁹⁴ D Vogel “Taming Globalization” in D Coen, W Grant and G Wilson (eds) *The Oxford Handbook of Business and Government* (2010) OUP Oxford 472.
- ⁹⁵ There is an extensive debate as to whether a positive CSR profile improves corporate financial performance. There are numerous studies on this some looking at particular CSR activities such as corporate charitable giving and others looking at a corporation’s total CSR portfolio. It seems that CSR does not have a negative impact on financial performance and in some cases can be shown to have a positive one, see P van Buerden and T Gössling “The Worth of Values – A Literature Review on the Relation between Corporate Social and Financial Performance” (2008) 82 *JBE* 407 and A Carroll and K Shabana “The Business Case for Corporate Social Responsibility: a Review of Concepts, Research and Practice” (2010) 12 *Int J of Man Reviews* 85. More worrying is the finding contained in S Scalet and T Kelly “CSR Rating Agencies: What is their Global Impact” (2010) 94 *JBE* 69 that being omitted from a particular rating index or certificate programme because of poor performance does not lead to an improved corporate performance in the future but to a greater emphasis on other more positive CSR stories.
- ⁹⁶ R Mayes, B Pini and P McDonald “Corporate Social Responsibility and the parameters of dialogue with vulnerable others” (2013) 20 *Organization* 840
- ⁹⁷ R McCorquodale “Corporate Social Responsibility and International Human Rights Law” (2009) 87 *J Bus Eth* 391.
- ⁹⁸ N Jackson and P Carter “Organizational Chiaroscuro: Throwing Light on the Concept of Corporate Governance” (1995) 48 *Human Relations* 875.
- ⁹⁹ J Conley and C Williams “Engage, Embed and Embellish: Theory versus Practice in the Corporate Social Responsibility Movement” (2005-6) 31 *J Corp Law* 1.
- ¹⁰⁰ S Zadek *The Civil Corporation* (2001) Earthscan London and “The Path to Corporate Responsibility” (2004) *Harv Business Review* (December).
- ¹⁰¹ Stage models of CSR development pre-date Zadek, see P Sethi “Dimensions of Corporate Social Performance: An Analytical Framework” (1975) 75 *Calif Man Rev* 58. For a more modern example see A Warhurst “Past, Present and Future Corporate Responsibility: Achievements and Aspirations” in C Crouch and C Maclean (eds) *The Responsible Corporation in Global Economy* (2011) OUP Oxford.
- ¹⁰² B Holzer *Moralizing the Corporation* (2010) Edward Elgar Cheltenham UK at pp94-96.
- ¹⁰³ J Owen and D Kemp “Social licence and mining: A critical perspective” (2013) 38 *Resources Policy* 29 at p 33.
- ¹⁰⁴ N Gunningham, R Kagan and D Thornton “Social License and Environmental Protection: Why Businesses Go Beyond Compliance” (2004) 29 *Law and Social Inquiry* 307.
- ¹⁰⁵ *Supra* at p308.
- ¹⁰⁶ J Howard-Grenville, J Nash and C Coglianese “Constructing the License to Operate: Internal Factors and Their Influence on Corporate Environmental Decisions” (2008) 30 *Law and Policy* 73 provide a fantastic account of intra firm factors that influence the fate of the social license. Their account deserves much more attention than it is possible to give it here. A summary of the factors that they identify with the supporting evidence for them can be found at p80.
- ¹⁰⁷ Of course there maybe other external factors at play in valuing reputation such as the position taken on it by debt and equity finance but importance of this position has to be calculated by corporate executives based upon their own internal view of things. What shapes their view is the culture they operate in, see J Howard-Grenville “Inside the ‘Black Box’: How Organizational Culture and Subcultures Inform Interpretations and Actions on Environmental Issues” (2006) 19 *Organization & Environment* 46.
- ¹⁰⁸ D Schön *The Reflexive Practitioner* (1983) Basic Books, New York at p40.
- ¹⁰⁹ <http://www.icmm.com/document/3716> (accessed February 2nd 2014)
- ¹¹⁰ <http://www.australiancoal.com.au/social-licence-to-operate.html> (accessed on February 2nd 2014)

http://www.minerals.org.au/file_upload/files/resources/enduring_value/EV_GuidanceForImplementation_July2005.pdf (accessed February 2nd 2014)

¹¹² For example Anglo American PLC <http://www.angloamerican.com/~media/Files/A/Anglo-American-Plc/reports/annual-report-2013/AA-SDR-2803.pdf> (accessed Jan 31st 2014) and Lonmin PLC <http://sd-report.lonmin.com/2013/home> (accessed Jan 31st 2014)

¹¹³ S Bice “What Gives You a Social Licence? An Exploration of the Social Licence to Operate in the Australian Mining Industry” (2014) *Resources* 62.

¹¹⁴ E Salim *Striking a Better Balance: Extractive Industries Review: The World Bank Group and Extractive Industries (Volume 1)* (2003) World Bank: Washington, DC, USA.

¹¹⁵ J Prno and D Slocombe “Exploring the Origins of ‘Social Licence to Operate’ in the mining sector: Perspectives from Governance and Sustainability Theories” (2012) 37 *Resources Policy* 346.

¹¹⁶ Supra n104 at p332-336.

¹¹⁷ O Ololade and H Annegarn “Contrasting Community and Corporate Perceptions of Sustainability: A case study within the platinum mining region of South Africa” (2013) 38 *Resources Policy* 568.

¹¹⁸ R Howitt and R Lawrence “Indigenous Peoples, Corporate Social Responsibility and the Fragility of the Interpersonal Domain” in C O’Faircheallaigh and S Ali (eds) *Earth Matters* (2008) Greenleaf Publishing Sheffield 83.

¹¹⁹ R Hamann “Is Corporate Citizenship Making a Difference?” (2007) 4 *Journal of Corporate Citizenship* 15.

¹²⁰ The UN Declaration on the Rights of Indigenous Peoples, article 32 of which enshrines free, prior and informed consent as the standard to be applied to protect the land rights of indigenous communities, is endorsed by 148 states but without host state recognition of actual land rights and claims competing claims to preservation and wider development are likely to conflict, see B Haalboom “The intersection of corporate social responsibility guidelines and indigenous rights: Examining neoliberal governance of a proposed mining project in Suriname” (2012) 43 *Geoforum* 969.

¹²¹ In 2006 early in his mandate Ruggie presented an interim report which focused on 65 cases of corporate abuses of human rights drawn from 27 countries, see *Promotion and Protection of Human Rights* Interim Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, 22 February 2006, E/CN.4/2006/97

¹²² See n61, GPs 17-21.

¹²³ For an account of some HRIAs that have been conducted by corporate actors in relation to very specific activities see J Harrison “Measuring Human Rights: Reflections on the Practice of Human Rights Impact Assessment and Lessons for the Future” November 2010 *Warwick School of Law Research Paper No. 2010/26*. Available at SSRN <http://ssrn.com/abstract=1706742>

¹²⁴ T Maassarani, M Tatgenhorst Drakos and J Pajkowska “Extracting Corporate Responsibility: Towards a Human Rights Impact Assessment” (2007) 40 *Cornell Int Law J* 135 at pp144-150.

¹²⁵ A M Esteves, D Franks and F Vanclay “Social Impact Assessment: the State of the Art” (2012) 30 *Impact Assessment and Project Appraisal* 34.

¹²⁶ D Kemp and F Vanclay “Human Rights and Impact Assessment: clarifying the connections in practice” (2013) 31 *Impact Assessment and Project Appraisal* 86.

¹²⁷ See n61, the supporting commentary to GP 18.

¹²⁸ Supra n86 (Cragg) at p14.

¹²⁹ S Barrientos and S Smith “Do Workers Benefit from Ethical Trade? Assessing codes of labour practice in global production systems” (2007) 28 *Third World Quarterly* 713

¹³⁰ O Borial “Corporate Greening Through ISO 14001: A Rational Myth?” 18 *Organization Science* 127

¹³¹ N Andrew, M Wickham, W O’Donohue and F Danzinger “Presenting a Core-Periphery Model of Voluntary CSR Disclosure in Australian Annual Report” (2012) 9 *Corporate Ownership and Control* 438

¹³² See M Delmas and V Burbano “The Drivers of Greenwashing” (2011) 54 *Calif Man Rev* 64 and I Alves (2009) “Green Spin Everywhere: How Greenwashing Reveals the Limits of the CSR Paradigm” (2009) 2 *J of Global Change and Governance* 1

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- ¹³³ K Salcito, J Utzinger, M Weiss et al “Assessing Human Rights Impacts in Corporate Development Projects” (2013) 42 *Env Impact Ass Rev* 39.
- ¹³⁴ J Harrison “Human Rights Measurement: Reflections on the Current Practice and Future Potential of Human Rights Impact Assessment” (2011) 3 *J Hum Rights Practice* 162 at p172.
- ¹³⁵ For concerns see about the accuracy and quality of what is released in existing governance environments see A Fonesca “How Credible are Mining Corporations’ Sustainability Reports? A Critical Analysis of External Assurance under the Requirements of the International Council on Mining and Metals” (2010) 17 *Corporate Social Responsibility and Environmental Management* 355
- ¹³⁶ Supra n53 at p68-77.
- ¹³⁷ J Harrison “Establishing a meaningful human rights due diligence process for corporations: learning from experience of human rights impact assessment” (2013) 31 *Impact Assessment and Project Appraisal* 107 at p114.
- ¹³⁸ L Fransen “Why do Private Governance Organizations not Converge? A Political-Institutional Analysis of Transnational Labor Standards Regulation” (2011) 24 *Governance* 359
- ¹³⁹ Supra n2
- ¹⁴⁰ See for example <http://www.unpri.org>, www.ceres.org, www.incr.com, www.iigcc.org. While this is not a point to be taken here there is a distinction drawn in investment practice between responsible ownership and socially responsible investment, now rather better known as ethical investing.
- ¹⁴¹ S Viviers, “Is Responsible Investing Ethical?” (2008) 39 *South Africa J of Business Management* 15. Co-operative Financial Service figures for 2009 (constructed using information from the Investment Management Association and the British Bankers Association) place the amount of money held in ethical financial instruments at £19.2 billion up from £5.2 billion in 1999. Although showing strong growth, this figure represents only 1.8% of amounts held in UK based financial instruments.
- ¹⁴² Supra n137 at p113
- ¹⁴³ http://www.riotinto.com/annualreport2013/_pdfs/rio-tinto-2013-strategic-report.pdf (accessed March 28th 2014)
- ¹⁴⁴ Supra n4.
- ¹⁴⁵ T Melish and E Meidinger “Protect, Respect, Remedy and Participate: ‘New Governance’ Lessons for the Ruggie Framework” in R Mares (ed) *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (2011) Brill, The Netherlands 303.
- ¹⁴⁶ I Nooruddin and S Wilson Sokhey “Credible Certification of Child Labor Free Production” in P Gourevitch, D Lake and J Gross Stein (eds) *The Credibility of Transnational NGOs* (2012) CUP Cambridge 62.
- ¹⁴⁷ S Starobin and E Weinthal “The Search for Credible Information in Social and Environmental Global Governance” (2010) 12 *Business and Politics* 1.
- ¹⁴⁸ J Hendry “Taking Aim at Business: What Factors Lead Environmental Non-Governmental Organizations to Target Particular Firms?” (2006) 45 *Business and Society* 45.
- ¹⁴⁹ P Gourevitch and D Lake “Beyond virtue: evaluating and enhancing the credibility of non-governmental organizations” in P Gourevitch, D Lake and J Gross Stein (eds) supra n146 at p3f.
- ¹⁵⁰ M Yaziji and J Doh *NGOs and Corporations* (2009) CUP Cambridge at pp57-73.