THE EFFECTS OF CSR FOR THE PROTECTION OF HUMAN RIGHTS

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1. Introduction

I will speak about the relationship between TNCs and human rights in the third world. My focus will be on three aspects: first, the rise of an *informal norm* (the norm of effectiveness) which I perceive as a new and more pragmatic approach to complex human rights issues; second, the possible *systemic effects* of corporate voluntary initiatives; and third, the necessity of a more *holistic view* of the link between TNCs and human rights. The main question behind this whole argument is how some TNCs could advance internationally agreed human rights standards.

My understanding is that corporations violate human rights in developing countries because the legal system malfunctions and poverty is widespread. In other words corporate misbehaviour appears against the background of significant governance gaps. Such gaps allow for human rights violations to also occur *independently* of corporate activities: governments are unaccountable to their populations, often design inappropriate developmental policies, misallocate scarce resources, or sometimes have insufficient resources and then we have an issue of international governance. The relationship between business and human rights then turns to an examination of how a TNC relates to these governance gaps: does it take advantage of the gaps or not, does it attempt to narrow the gaps or not?

Some corporations conduct their operations in a harmful way for their workers or their surrounding communities - such TNCs can be labelled, for lack of a better term, 'abusive' (ATNCs to be

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differentiated from 'responsible' TNCs - RTNCs) because they *abuse* the governance gaps that exist in many host countries. Examples of such TNCs can be found in the clothing industry and in the natural resources industry. ATNCs have been the main object of concern for human rights experts, fuelled boycotts and advocacy, have been drawn in transnational litigation, and are the target of proposals for tort legislation. *Some other* corporations operate in industries where human rights violations are not so pervasive as in the industries just mentioned. Such TNCs do not harm stakeholders, they do not abuse the governance gap, they are just *indifferent* to it. They can therefore be labelled 'indifferent' TNCs (ITNCs to be differentiated from RTNCs). This categorisation of TNCs corresponds to the expectation articulated by the UN Global Compact for TNCs to 'respect' and 'support' human rights, and reflects the various links between TNCs and human rights.

Corporations face a difficult task in deciding how to relate to human rights issues. I think human rights *standards* are relatively simple to understand and to find in treaties and national laws. However their *implementation* (by states or TNCs) raises very complex issues, the further one goes away from the parent, down the supply chain, and into the wider local community. Managers need guidance as to how to approach such complexity and how to reduce it to manageable dimensions in order to fulfil their legal mandate. Various informal norms have been proposed in debates on CSR and herein I will outline the emerging norm of effectiveness and some of its implications.

2. Emerging norm of effectiveness

A norm is a social rule that does not depend on government for either promulgation or enforcement.[1] 'Norm' can be taken to mean what people normally do, as opposed to what deviants do.[2] In dealing with the complexity of the business environment, one option is

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[1] Richard A. Posner, Eric B. Rasmusen, 'Creating and Enforcing Norms, With Special Reference to Sanctions', International Review of Law and Economics, 1999.

[2] Robert D. Cooter, 'Decentralized Law for a Complex Economy: the Structural Approach to Adjudicating the New Law Merchant', Symposium: Law, Economics, & Norms, *University of Pennsylvania Law Review*, May, 1996.

provided by an informal norm that advises managers to rely on the states to set the rules of the game, and on markets to communicate pressing social demands. Its merits notwithstanding, this norm has dissuaded managers from better understanding the social environment of their business (with its threats and opportunities). The experience of Shell and Nike is illustrative of taking too literally the 'business of business is business' norm. Another norm (carried forward by business ethics through stakeholder argumentation) prompts managers to scan the social environment and balance the interests of stakeholders. Unobjectionable as such, this norm is often accompanied by a principled line of argumentation aloof of consequences. This is the antagonism between Milton Friedman and business ethicists. Still, both these norms seem animated by a hope of finding silver-bullets to reduce complexity for both managers and evaluators. Grounded in some theories of justice, these norms perpetuate the illusion that factual complexity can be tackled *mechanistically* by obeying the *dictates* of either law and markets, or of some moral imperatives.

The effectiveness *norm* recognises the constraints under which corporations operate and also prompts managers to scan the environment, but it aims to simplify complexity for decision-makers in a different way. This *approach* gives up the hope of finding silver-bullets. Instead it aims to facilitate attuned balancing acts by focusing on understanding the peculiarities of each context, and on providing tools to measure, report and verify corporate impacts. The focus is not on off-shelf *solutions* or judgements to complex problems, but on off-shelf *tools* for approaching each setting. It emphasises the necessity and inevitability of social *innovation* by all actors instead of simple, *mechanistic* applications of preconceived roles and notions about corporations and human rights. The emerging approach draws on the understanding that the values that people subscribe to, only influence their actual behaviour to a rather limited extent. As some psychologists say, 'To put values into practice, desirable behaviour needs to be reinforced by rewards, education, regulation, social images and desirable identities, and by providing information and appropriate options.'[3] Instead of feeding on *polarisation*,

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[3] Minu Hemmati, Felix Dodds, Jasmin Enayati, Jan McHarry, *Multi-stakeholder Processes for Governance and Sustainability*, 2002, 39.

pragmatic approaches guided by the effectiveness norm attempt to identify areas of conceptual *agreement*: pressing social needs, resource constraints, valuable contributions, necessity of viable tools for assessing impacts. The emerging norm of effectiveness is inseparable from its underlying approach, which proposes that 'there is very little generic development knowledge—that all knowledge has to be gathered and then analysed, modified, disassembled and recombined to fit local needs'.[4]

The new norm of effectiveness is applicable to all actors in the developmental debate: it requires them to look afresh at the *means* they can use in order to achieve their respective *goals* more effectively. It poses that in the current tensional climate of opinion surrounding globalisation, it is the role of managers to scan for CSR threats and opportunities in order to fulfil effectively their legal fiduciary duties. It is the task of human rights experts to examine what opportunities corporations present for strengthening human rights protection. It is the role of law-makers to develop more effective regulation to achieve public goals, and of international development agencies to use aid more effectively to fulfil their developmental mandate. It is the role of recipient states to move towards good governance in order to discharge their human rights obligations by using available resources more effectively, and of NGOs to promote their public-interest objectives through diversified and attuned advocacy. The informal norm of effectiveness furthers a view of human rights not merely in the *ethical* dimension of their value and necessity, but in the *political* and *technical* dimension of their implementation through policies and strategies. CSR thus belongs to a more comprehensive package aimed to stimulate the sustainable development of poor countries; the emphasis on cooperative ways of discharging CSR belongs to a more general trend toward coordination and increased effectiveness of public policies.

For business, the norm of effectiveness implies that, in various contexts and various forms, managers need to be aware, open for partnering, and socially innovative to enhance the beneficial impact of their corporations. This is the *general* standard, which is better

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[4] Sakiko Fukuda-Parr, Carlos Lopes, Khalid Malik, 'Institutional Innovations for Capacity Development', in *Capacity for Development: New Solutions to Old Problems*, Fukuda-Parr, Lopes, Malik (eds.), Earthscan and UNDP, 2002, 17-18.

specified by the emerging good practices of RTNCs, against which corporate efforts and impacts are assessed. What has been customarily seen as not being the concern of business may become the business of business after some leading TNCs recognise the need to deal with some pressing problems perpetuated by governance gaps. RTNCs provide *examples* and *tools* for dealing with governance gaps, which facilitate replication and innovation by reducing costs and providing inspiration for other corporations. This new norm posits that (in as much as it is feasible in the circumstances of the respective case) it might be the business of business to see that the governmental forces provide security without abusing human rights; that it might be the business of business to see that taxes paid are used for development and poverty reduction (as shown by revenue sharing regimes and by corporate initiatives to disclose the taxes paid to host governments)[5]; that it is not enough to create jobs, but it might be the business of business to protect minimum labour standards in the workplace; that it might be the business of business to work with public and private partners to mobilise resources and extend such infrastructure (be it water, energy, or communications) to the poor; that it might be the business of business to promote enterprise development through training, credits, and business contacts. All these are just a few of the ways of discharging CSR.

As examples of such corporate stories, both successful and failed, accumulate, a *simplistic* application of the 'business of business is business' norm holds a diminished usefulness as a guiding, simplifying tool to approach growing complexity. It was the Association of British Insurers that noted the complexity of the business environment with its threats and opportunities, and that best captured features of CSR risks.[6] It is only recently that there is huge willingness to engage corporations coming from highest level

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[5] Kathryn Gordon, *Multinational Enterprises in Situations of Violent Conflict and Widespread Human Rights Abuses*, Working papers on international investment, Number 2002/1, OECD, 20-1, http://www.oecd.org/pdf/M00030000/M00030496.pdf; Juliette Bennett, *Revenue Sharing Regimes*, paper prepared for the UN Global Compact, 2002, 22, http://65.214.34.30/un/gc/unweb.nsf/550d4b46b29f68a 852568660081f938/85256aef00564bcb85256ac00065f845/$FILE/ RevenueSharingRegimes.pdf

[6] *Investing in Social Responsibility - Risks and Opportunities*, Association of British Insurers, 2001, http://www.abi.org.uk/Display/File/85/CSR_FullReport.pdf

in the UN, from states and from some important NGOs. Also it is only recently that there are sustained efforts by leading TNCs and other actors to systematically develop and disseminate good and viable practices. At the same time, the public awareness of corporate impacts in poor countries has grown exponentially, and so did expectations as well. Corporate ignorance and inaction are the proof of irresponsibility that is growing politically harder to refute in this changing context.

When I was writing this paper about the norm of effectiveness and pragmatic approaches to CSR, I received a small story through email that struck me as quite relevant to our theme. You might have received it as well, the story of an ethical dilemma that was once actually used as part of a job application. It goes like this. You are driving along in your car on a wild, stormy night. You pass by a bus stop, and you see three people waiting for the bus:

a. An old lady who looks as if she is about to die.
b. An old friend who once saved your life.
c. The perfect man (or) woman you have been dreaming about.

Which one would you choose to offer a ride to, knowing that there could only be one passenger in your car? You could pick up the old lady, because she is going to die, and thus you should save her first; or you could take the old friend because he once saved your life, and this would be the perfect chance to pay him back. However, you may never be able to find your perfect dream lover again. Allegedly, the candidate who was hired (out of 200 applicants) answered: 'I would give the car keys to my old friend, and let him take the lady to the hospital. I would stay behind and wait for the bus with the woman of my dreams.'

But to come back to business, how does the norm of effectiveness affect *self-proclaimed* RTNCs and those TNCs that *refuse to engage* (ATNCs and ITNCs)? I will take these two aspects in turn.

3. How effectiveness controls supposedly RTNCs

In the eyes of critics, voluntarism fails to ensure the accountability of the TNCs which have chosen to engage. If the effectiveness norm holds ground, this criticism may be too harsh as there are various ways of obtaining accountability at various levels. The UN Draft Guidelines on a Human Rights Approach to Poverty Reduction

Strategies note that rights and obligations demand accountability and there can be judicial and non-judicial mechanisms of accountability. Further: 'While duty-holders must determine for themselves which mechanisms of accountability are most appropriate in their particular case, all mechanisms must be *accessible, transparent* and *effective*.'[7] It is likely that a corporate strategy adopted by a supposedly RTNC that resumes itself to stating intentions and making unverifiable claims will currently backfire. Half-measures are not rational solutions as the evaluators of corporate performance are dead set to assess *concrete* results. If TNCs that engage voluntarily are indeed guided by the effectiveness norm, then the whole credibility of their involvement depends on their ability to document their performance in a credible fashion, with some kind of independent confirmation. Thus, significant levels of *accountability* may be obtained from the rational pursuit of self-interest complemented by the *effectiveness* norm and by viable assessment tools.

RTNCs discharge their CSR and thus achieve *operational* improvements for the targeted beneficiaries. Important as they are, these operational effects of CSR are complemented by important *systemic effects* of CSR which expand the range of beneficiaries. Such systemic effects result from the dissemination of corporate impacts through formal and informal channels that shape perceptions and strategies both within the business system and throughout its external environment. However, communication is a verified accountability mechanism as documented by disclosure regulations in many fields of law. The engagement of RTNCs is a voluntary one and corporate disclosures have sometimes backfired on well-intended corporations due to a polarised climate of opinion. These realities pose a trade-off at this incipient moment, in having communication delivering either *accountability* or further corporate *participation* in developing social involvement and assessment tools. Therefore, if one is after the innovation and participation gains, a balancing act is unavoidable and its outcome is decisive for the creation of an enabling or hostile social environment for voluntary initiatives to deliver.

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[7] *Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies*, Office of the High Commissioner for Human Rights, 10 September 2002, par. 8, http://193.194.138.190/development/povertyfinal.html#*

4. How the systemic effects of CSR affect ATNCs and ITNCs

As critics of the Global Compact remind us, voluntarism may fail to force ATNCs into compliance.[8] The GC is an instrument for *engaging* corporations who voluntarily seek modalities to manage and improve their social impact. Designing *viable tools* for measuring and reporting the performance of TNCs which have voluntarily engaged, is the task of the Global Reporting Initiative. To ensure *credible verification* of corporations that report their performance according to GRI criteria is a job assumed by social accounting bodies using formats such as the AA1000. It appears that voluntary initiatives of RTNCs help create *a ladder* for voluntary engagement by offering managerial tools, inspirations and willingness in states and NGOs to engage. Furthermore, the voluntary involvement of hundreds of organisations (be they employers or trade organisations, developmental NGOs, governmental agencies) into flexible networks disseminate to much larger audiences the challenges, processes and outcomes of the GC and GRI.

It is for corporations themselves to make choices as to how far to advance up the ladder. However, it also leaves TNCs with the burden, indeed the responsibility, to explain by themselves their choices. Such explanations will have to be offered in the light of consequences of corporate inaction, against the performance of other corporations in comparable settings, and in a context favouring increasing transparency. Indeed, as experience generated by RTNCs' practices accumulates and assessments become more attuned to the business context, the main demand on which various sectors converge is for TNCs to state and explain their CSR policy and performance. Businesses at the 2002 World Economic Forum observed that 'One of the most consistent demands that companies are facing from different stakeholders, ranging from institutional investors to social and environmental activists, is to be more transparent about their wider economic, social and environmental performance.'[9]

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[8] Peter Utting, 'The Global Compact and Civil Society: Averting a Collision Course', *Development in Practice*, Volume 12, Number 5, November 2002, http://www.unrisd.org/80256B3C005BE6B5/search/E58C1A77E37FA9F0C1256C7E00490304?OpenDocument&cntxt=19A11&cookielang=en#top

[9] *Global Corporate Citizenship: The Leadership Challenge for CEOs and Boards*, World Economic Forum, 2002, 9, http://www.iblf.org/csr/CSRWebAssist.nsf/707de05d244f223378525695b001612d5/80256adc002b820480256b570061dbd7/$FILE/ATTDQCYO/Final_Statement.pdf

This *bottom-up process* of standard-setting and awareness-raising has powerful implications for social change and carries a great potential to advance the realisation of human rights. The standards and good practices ensuing from this participative process can be put to use voluntarily by TNCs, find their way into contracts, be promoted through advocacy or even be consecrated into legislation. *Other market actors* have their own perception of the public expectation, and of the risks and opportunities that it entails. Such actors (for example, insurers, institutional investors, stock exchanges, consultancies, trade associations, public purchasers, development banks, market regulators etc), in the pursuit of their purely economic mandate, follow the efforts of RTNCs to attune their self-interest to evolving realities and do judge corporations against their more responsible peers. Such market actors may *demand information* from reluctant corporations and could *issue guidelines* for managing threats and opportunities as inspired by RTNC practices. For example, the Association of British Insurers issued guidelines that take the form of disclosures expected to be included in the annual report of listed companies.[10]

Pressure for increasing communication comes also from states. The EU Parliament recently stated that 'providing and using information on the social, environmental and economic impacts of companies in a format that is authoritative, accessible and transparent, and as far as possible in a manner that facilitates inter-company comparisons of effectiveness, would be an effective foundation to promote corporate social responsibility throughout the European Union.'[11] There are already social disclosure laws in France, Belgium, Germany, Australia, but the most high profile is the 2000 UK Occupational Pension Schemes Regulations which obliges pension funds to report the extent, if at all, to which they take into account social, environmental and ethical considerations in their investment decisions.[12]

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[10] supra 6.

[11] EU Parliament - REPORT on the Commission Green Paper on Promoting a European Framework for Corporate Social Responsibility, 30 April 2002.

[12] Art 11A of The Occupational Pension Schemes (Investment, and Assignment, Forfeiture, Bankruptcy etc.) Amendment Regulations, 1999.

Involvement of TNCs with human rights issues in the absence of legal liability, public policy incentives, or obvious self-interest has been and remains a stumbling block in CSR thinking. The *business case* can be best comprehended and developed by businesses themselves, especially when enough technical and non-technical capacity has been built, but there is a difference in what motivates different corporations to pursue CSR strategies. On one hand, *market leaders* in their respective industries have stronger incentives to experiment with CSR in order to enhance and preserve their competitive advantage. On another hand, it is the emerging business norm of effectiveness that motivates *other corporations* to follow (and join) leaders in CSR matters because of the risks of being placed at a competitive disadvantage in various contexts, if they are seen as disregarding the effectiveness norm. Such contexts could be auctions for governmental concessions and contracts (both in the host and home states), relationships with concerned TNCs, the demands for information placed by institutional investors or listing requirements on stock exchanges, relationships with a potentially hostile and disruptive local community, personal embarrassment against peers in collegial settings, poor image with atomised actors such as individual consumers and talented employees and so on.

Thus, the availability of engagement forums, viable tools, and the existence of definable options allow accountability to be negotiated in a myriad of specific contexts. As such, the systemic effects of voluntary initiatives do not provide a centralised forum where clear outcomes can be counted on in advance and where corporate liability can be easily claimed and obtained. It is mistaken to think of CSR (codes of conduct and partnerships) as a conceptual alternative to law. Law and CSR interact, and the practices of RTNCs facilitate states discharging their human rights responsibilities. Furthermore, the issues raised by CSR are not simply what can law do to enhance corporate performance, but also how good practices of corporations help define relevant standards and facilitate their adoption into law, and how CSR supports and enhance the capacity of host states to raise to their human rights responsibilities. Therefore, one can look at the effects of voluntary engagement on good governance in the host state.

5. Effects of RTNCs on good governance

For a corporation, the success and credibility of its human rights policies depends on partners such as national and local authorities, NGOs and community bodies, international development agencies and international governmental organisations. The other side of the coin is equally important: successful cooperation with RTNCs demands capacities, effectiveness and accountability from each partner. As various studies of partnerships suggest, effective partnerships are far from diminishing or making redundant the role of government. Interactions with RTNCs may positively influence public authorities in the direction of good governance. Habitually the key question is what incentives can the state adopt to further stimulate CSR practices by making them economically attractive? But given the weakness of many *host governments* and the understanding that CSR is indeed intrinsically linked to governance gaps, the question can be put the other way around: how can CSR stimulate the host state to perform its responsibilities?

In regard to non-state actors such as NGOs, which also strive to improve governance, partnerships with business offer to NGOs a new avenue where to employ their comparative advantage, and thus to fulfil their mandate more effectively. The idea behind trisector partnerships involving TNCs, civil society and government is that each party should bring in its *core complementary competencies* – as argued by Business Partners for Development,[13] the program started by the World Bank. Corporations need partners, and best practice in partnering reveals sometimes corporations making efforts to build community capacity in order to enable meaningful participation and negotiation.

6. Broader concept of CSR

As I argued before, it is important to grasp that the effects of CSR are far from being confined between the RTNC and its targeted beneficiaries. Besides these *operational* and localised effects, certain

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[13] *Putting Partnering to Work, Tri-sector Partnership Results and Recommendations*, Business Partners for Development, 1998–2001, http://www.bpdweb.org/docs/main1or5.pdf

systemic effects appear because of the effectiveness norm being widely disseminated through formal and informal channels. A focus on values, principles and corporate responsibilities draws attention to the *ethical* aspects of CSR; an emphasis on manageability and effectiveness is compatible with ethical reasoning, but it also reveals the *technical* and *political* nature of CSR. The emerging norm of effectiveness does not prompt for clearer definitions of corporate *responsibility* (given the infinite and diverse corporate impacts on host states). It does prompt for discovering corporate *irresponsibility* revealed by violations and by a lack of effort to increase awareness, to engage with stakeholders and to replicate good practices established in the industry. It is an illusion to strive for a CSR abstractly defined and ready for implementation if only political or managerial will can be summoned. Thirty years of efforts to more clearly define the concept of CSR have hopelessly failed: there is no one single and accepted formula or stable boundaries, but pressing human rights issues, infinite contexts, great complexity, evolving realities, and consequences. But CSR practices need to be manageable and effective in order not to appear as window dressing or simply inadequate for the magnitude of the human rights problems.

This way of approaching CSR proposes that the relationship TNCs-human rights is not simply one involving a corporation and its workers, local communities, or the environment. It is not merely a relationship of *infringement*, but also one of *support* through contributions to sustainable development and poverty alleviation. Voluntary corporate initiatives are not limited to codes of conduct that aim to prevent corporate violations, but contain also partnerships for development aimed at realising human rights through joint efforts with other social actors. Poverty is multidimensional and development agencies accept now a broader understanding of poverty than simply a lack of income.[14] This opens wide spaces for human rights reasoning in the developmental context and in how developmental policies are constructed. Therefore, evaluations of TNCs need to account for the multifaceted corporate contributions to the host state; similarly, evaluations of voluntary initiatives need

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[14] *Guidelines on Poverty Reduction*, Executive Summary, Development Assistance Committee, OECD, 2001, http://www1.oecd.org/dac/htm/g-pov.htm

to account for both their operational and systemic effects. Such investigation should not be a revisionist attempt guided by ideological leanings, but a sensible attempt to understand a variety of contexts where business rationality manifests itself in various ways, and to better grasp the complex process of social change that law aims to facilitate.

There is no reason why an analysis from a 'human rights perspective' should account only for torts. It might backfire if one sees human rights simply as principles and values that are infringed, and not as standards that serve as focal points for policies articulated, often in a concerted fashion, by various actors. Corporate violations are indeed the most pressing; but narrowing the relationship in this way, while needed and legitimate for certain purposes, might lead to *over reliance on state action* and on the deterrent function of law. In addition, it might artificially and detrimentally narrow understanding of the *broader context* in which voluntary initiatives create positive pressures and incrementally change the rules of the game. Some TNCs could or indeed do act as agents who advance human rights in areas where international human rights law (IHRL) and grass roots local NGOs fall short. Because voluntary initiatives can reinforce the role of states and NGOs, it is the *interaction* among various actors that may make a great difference for those in need of protection. Indeed, evidence gathers that more corporations make efforts to improve their social impact and learn at a fast pace. Even more, as governments and corporations pursue their developmental strategies in the same space, they forge new and innovative connections and their interaction increases steeply.

Therefore, I propose that it is important to have an *encompassing concept of CSR* dealing with *all kinds* of TNCs. Some of its unifying elements would be: first, the *informal norm of effectiveness*. It covers both respect and support for human rights, and it accounts for the systemic effects of CSR. Second, alleviation of *poverty* in its many manifestations is pursued thorough various types of voluntary initiatives – be they codes of conduct, partnerships for development or other modalities. Third, CSR aims to address certain governance gaps and is thus linked to *good governance* in host countries, a point on which IHRL, international developmental strategies, and grass-root activism converge in seeing as essential for human rights and development. Fourth, *laws and policies* are needed to encourage

reflection[15] and innovation within the business system, such as sensible disclosure regulation, especially at home country level.

To conclude, the understanding of the interplay between voluntary corporate initiatives and law/policy is essential in making sense of the link TNCs-human rights from a legal perspective. I propose that this is a way of approaching TNC-human rights issues in the tradition of human rights, as they are institutionalised in international law, while remaining in touch with the political, social and economic realities of the time.

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[15] G. Teubner, 'Corporate Fiduciary Duties and Their Beneficiaries, A Functional Approach to the Legal Institutionalization of Corporate Responsibility', in K. Hopt, G. Teubner (eds), *Corporate governance and directors' liabilities*, Berlin, 1985, 149-177.